Opinions of the Supreme Court of Texas

Fiscal Year 2011

(September 1, 2010 – August 31, 2011)

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FISCAL YEAR 2011 OPINIONS

(SEPTEMBER 1, 2010 – AUGUST 31, 2011)

IN THE SUPREME COURT OF TEXAS

NO. 05-0729

EXXON CORPORATION AND EXXON TEXAS, INC., PETITIONERS,

v.

EMERALD OIL & GAS COMPANY, L.C., RESPONDENT

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

Argued February 13, 2007

Rehearing Granted November 20, 2009

JUSTICE WAINWRIGHT delivered the opinion of the Court.

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

After issuing our opinion, we granted respondent's motion for rehearing on November 20, 2009 and obtained further briefing from the parties. Without further oral argument, we withdraw our opinion of March 27, 2009 and substitute the following opinion. Our judgment remains unchanged.[1]

[1] The Texas Comptroller of Public Accounts; Jerry Patterson, Commissioner of the Texas General Land Office and Chairman of the School Land Board; and Texas Oil & Gas Association filed amicus briefs on rehearing in this case.

In this oil and gas dispute, we determine whether section 85.321 of the Texas Natural Resources Code allows a subsequent mineral lessee to maintain a cause of action against a prior lessee for damages to the mineral interest that occurred prior to the time the subsequent lessee obtained its interest. We hold that section 85.321 creates a private cause of action that does not extend to subsequent lessees. Because the plaintiff in this case owned no interest in the mineral leases when the prior lessee allegedly damaged the interest, the plaintiff lacks standing to assert a cause of action under section 85.321.[2] Accordingly, we reverse the court of appeals' judgment. Today, we also issue our opinion in the rehearing of *Exxon Corp. v. Miesch*, the companion to this case. ___ S.W.3d ___ (Tex. 2010) (reh'g op.).

I. FACTUAL AND PROCEDURAL BACKGROUND

In the 1950s, Humble Oil & Refining Company (Humble) held mineral leases with Mary Ellen and Thomas James O'Connor on several thousand acres in Refugio County, Texas (O'Connor Field or Field). Exxon Texas, Inc. succeeded Humble's interest in the leases. Under the leases, Exxon paid a fifty percent royalty, which was higher than the royalty Exxon paid on an adjoining tract. In the 1970s and 1980s, Exxon unsuccessfully sought to renegotiate the royalty percentage with the royalty owners. Deciding that it was no longer sufficiently profitable to continue operating the O'Connor Field, Exxon systematically plugged and abandoned the wells, completing its abandonment of the Field in 1991.

[2] The original lessee did not assign its claim for damages to the property to the subsequent lessee.

In 1993, Emerald Oil & Gas Company, L.C. (Emerald) obtained leases for a portion of the O'Connor Field and attempted to re-enter the wells. Emerald encountered unexpected difficulties when it tried to re-enter the wells. Emerald alleges that Exxon caused these difficulties by improperly plugging and intentionally sabotaging the wells by putting considerable quantities of metal, unidentifiable refuse, and environmental contaminants into the wells, placing nondrillable material in the wells, and leaving cut casing in the plugged wells. In 1996, Emerald, on behalf of its working-interest owner, Saglio Partnership Ltd., sued Exxon on six claims: (1) breach of a statutory duty to properly plug a well, (2) breach of a statutory duty not to commit waste, (3) negligence per se, (4) tortious interference with economic opportunity, (5) fraud, and (6) negligent misrepresentation. The royalty owners[3] intervened, alleging similar claims.

Exxon moved for partial summary judgment against Emerald and the royalty owners on grounds that: (1) Exxon has no obligation to potential future lessees; (2) there is no private cause of action for breach of a statutory duty to plug a well in a particular way; (3) there is no private cause of action for breach of any statutory duty not to commit waste; and (4) the facts alleged do not give rise to a claim for tortious interference with economic opportunity; but (5) in the alternative, if the royalty owners have a claim against Exxon for failure to plug the wells properly, it sounds in contract only, not in tort.

[3] The current royalty owners who are petitioners in this case are: Morgan Dunn O'Connor, T. Michael O'Connor, Brien O'Connor, Kelly Patricia Dunn Schaar, Nancy O'Connor, Bridey Dunn Greeson, individually and on behalf of the Dunn-O'Connor Family Trust, Laurie T. Miesch, Jack Miesch, Michael L. Miesch, Molly Miesch Allen, and Janie Miesch Robertson.

The trial court granted portions of Exxon's motion for partial summary judgment, concluding that under sections 85.045, 85.046, 85.321, and 89.011 of the Texas Natural Resources Code and Title 16 section 3.14(c)(1) of the Texas Administrative Code, Exxon owed no statutory duty to potential future lessees, including Emerald. Accordingly, the trial court granted partial summary judgment in Exxon's favor on Emerald's three statutory claims of (1) negligence per se, (2) breach of a statutory duty to plug a well properly, and (3) breach of a statutory duty not to commit waste. The trial court then severed those claims and proceeded to trial on Emerald's three remaining claims against Exxon: fraud, negligent misrepresentation, and tortious interference. The court also denied Exxon's motion for summary judgment on the royalty owners' claims and tried those claims. This appeal arises from Emerald's challenge to the trial court's summary judgment on the statutory claims.

The court of appeals reversed and remanded Emerald's three statutory claims to the trial court, holding that section 85.321 imposes a duty on current lessees to future lessees and thus provides a basis for a cause of action against Exxon. Exxon petitioned this Court for review. We now review the trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Our opinion on rehearing in *Exxon v. Miesch*, also issued today, decides the appeal of claims that were tried. ___ S.W.3d ___ (Tex. 2010) (reh'g op.).

II. DISCUSSION

A. Private Cause of Action

Two of Emerald's claims against Exxon invoke statutory duties—breach of statutory duty to plug a well properly and breach of statutory duty not to commit waste. Emerald's pleadings cite

section 85.321 of the Texas Natural Resources Code as the basis for its standing to bring the first claim and refers to other related provisions of the Code in support of standing to bring the second claim. Section 85.321, titled "Suit for Damages," reads:

> A party who owns an interest in property or production that may be damaged by another party violating the provisions of this chapter that were formerly a part of Chapter 26, Acts of the 42nd Legislature, 1st Called Session, 1931, as amended, or another law of this state prohibiting waste or a valid rule or order of the commission may sue for and recover damages and have any other relief to which he may be entitled at law or in equity. Provided, however, that in any action brought under this section or otherwise, alleging waste to have been caused by an act or omission of a lease owner or operator, it shall be a defense that the lease owner or operator was acting as a reasonably prudent operator would act under the same or similar facts and circumstances.

TEX. NAT. RES. CODE § 85.321. The court of appeals held that section 85.321 creates a private cause of action for damages resulting from statutory violations. We agree.

In construing statutes, this Court starts with the plain language of the statute. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). The language of section 85.321 clearly creates a private cause of action. A party whose interest in property is damaged by another party violating provisions of a conservation law of this state or a Texas Railroad Commission rule or order "may sue for and recover damages" and other relief to which the party may be entitled. TEX. NAT. RES. CODE § 85.321. Section 85.321 also expressly provides a defense to civil actions for lease owners and operators acting as a reasonably prudent operator would act under the same or similar circumstances, adding more credence to the conclusion that section 85.321 creates a private cause of action. *Id.*

This Court previously reached the same conclusion. In *HECI Exploration Co. v. Neel*, royalty owners sued their lessee for failing to notify them that the lessee sued the operator on an

adjoining tract whose overproduction of oil, in violation of Railroad Commission rules, damaged the common reservoir. 982 S.W.2d 881, 884 (Tex. 1998). The court of appeals held that the lessee violated an implied covenant to notify the royalty owners of an intent to sue the offending operator. *Id.* at 884–85. This Court held no such implied covenant exists because the lessee's suit against the adjoining operator does not collaterally estop the royalty owners from suing separately under section 85.321. *Id.* at 890–91. "When a mineral or royalty interest owner is damaged by a violation of the conservation law of this state or a Railroad Commission rule or order, section 85.321 of the Texas Natural Resources Code also expressly provides for a damage suit against the offending operator." *Id.*

Relying on *Magnolia Petroleum Co. v. Blankenship*, 85 F.2d 553, 556 (5th Cir. 1936) as persuasive authority, Exxon urges the Court to disregard *HECI Exploration* and hold that section 85.321's predecessor, article 6049c, did not create a private cause of action. *Magnolia* involved a dispute between two lessees producing from a common reservoir. *Id.* at 554. Magnolia produced oil from several wells on a tract of eighty-one acres while Blankenship had one well on half an acre. Blankenship had sunk his well without a permit. The Railroad Commission sued him, seeking a $1,000 penalty. Blankenship countered for a certificate authorizing him to operate the well. The trial court authorized the penalty and also ordered the certificate of operation. Magnolia appealed the decision, contending that the trial court did not have authority to order the certificate of operation and moved for an injunction against Blankenship under section 13 of article 6049c. *Id.* at 554, 556. Interpreting the statute, the Fifth Circuit held that while the first sentence of section 13 "purports to give no new cause of action," the second sentence gives a producer the right to sue for damages and

appropriate equitable remedies, including an injunction. *Id.* at 556. However, the court determined that an injunction would have been inequitable in that case because Blankenship's single well did not produce as much oil as Magnolia's many wells. *Id.* at 554. Instead, Magnolia should have requested that the Railroad Commission regulate the distribution of oil to each operator. *Id.* at 556. Exxon argues that *Magnolia* stands for the proposition that the Railroad Commission has primary jurisdiction to regulate the allocation of oil between producers from a common reservoir and prohibits a private cause of action under what is now section 85.321. We agree *Magnolia* explains that, at the time, statutes gave the Railroad Commission primary jurisdiction to adjust correlative rights of oil and gas owners in a common reservoir, but we disagree on the latter assertion. Exxon's reading overstates *Magnolia*'s holding. *Magnolia* reasons that, compared to the Commission's proration of production, allowing such allocation to be performed by the random institution and adjudication of private lawsuits would be problematic. Surely that is correct. But *Magnolia* does not hold that section 85.321's predecessor bars private lawsuits for a mineral owner's recovery of damages. *Magnolia* does not answer that question except to say that if section 85.321's predecessor created such a private cause of action, it did not provide a right to an injunction when the evidence fails to establish an equitable basis for doing so. *Id.* at 556.

Furthermore, the Fifth Circuit has held on more than one occasion, not inconsistent with *Magnolia*, that the language in section 85.321's predecessor (section 13 of article 6049c) does, in fact, create a private cause of action. *Turnbow v. Lamb*, 95 F.2d 29, 31 (5th Cir. 1938) ("Article 6049c, section 13, Vernon's Civil Stat. Texas, expressly recognizes and preserves to an injured party his cause of action for damages 'or other relief' against a violator of the oil production laws."); *see*

Sun Oil Co. v. Martin, 330 F.2d 5, 5 (5th Cir. 1964) (adopting the lower court's reasoning in *Sun Oil Co. v. Martin*, 218 F. Supp. 618, 621–22 (S.D. Tex. 1963) (explaining that a violation under section 13 of article 6049c "may give rise to an action for damages")); *see also Ivey v. Phillips Petroleum Co.*, 36 F. Supp. 811, 816 (S.D. Tex. 1941) (holding, in accord with Fifth Circuit law, that a plaintiff does not have standing to sue pursuant to section 13 of article 6049c if no Railroad Commission regulation or state law violation occurred). Although section 85.321 and section 13 of article 6049c are not identical, the pertinent parts of the two laws are the same. Act effective August 12, 1931, 42nd Leg., 1st C.S., ch. 26, § 13, 1931 Tex. Gen. Laws 46, 53, *repealed by* Act effective September 1, 1977, 65th Leg., R.S., ch. 871, § 1, 1977 Tex. Gen. Laws 2345, 2527. Thus, we do not agree that *Magnolia* interprets section 13 of article 6049c to prohibit a private cause of action.

B. Standing of Subsequent Lessees

Having concluded that section 85.321 creates a private cause of action, we examine whether Emerald's status as a subsequent lessee impacts its standing to bring a cause of action under section 85.321. The Legislature gave the right to a private cause of action to a person who "owns an interest . . . that may be damaged by another party violating the provisions of this chapter . . . ." TEX. NAT. RES. CODE § 85.321. Exxon argues that "violating" is a present tense term that indicates an injury concurrent with ownership, whereas Emerald maintains that "violating" would include any party that had violated the statute at some point in time. The plain language is unclear as to whether concurrent ownership is required or whether subsequent interest owners could also maintain a cause of action. The participle phrase "violating the provisions of this chapter" could indicate a continuous action—a party who has violated, continues to violate, or is violating the provision, which would

open the cause of action to a wider range of interest owners. *Id.* The statute could also be interpreted as another party *who is* violating the provisions of this chapter, which suggests a temporal limitation on the private cause of action. Because the text itself is unclear, we look to section 85.321's statutory predecessor and the surrounding context for guidance. *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006).

Section 85.321's statutory predecessor, section 13 of article 6049c, preserved common law standards:

> Nothing herein contained or authorized and no suit by or against the [Railroad] Commission shall impair or abridge or delay any cause of action for damages, or other relief, any owner of any land or any producer of crude petroleum oil or natural gas, or any other party at interest, may have . . . .

Act effective August 12, 1931, 42nd Leg., 1st C.S., ch. 26, § 13, 1931 Tex. Gen. Laws 46, 53, *repealed by* Act effective September 1, 1977, 65th Leg., R.S., ch. 871, § 1, 1977 Tex. Gen. Laws 2345, 2527. Thus, part of the stated purpose of Chapter 26 was to prevent the Railroad Commission from infringing on existing causes of action under the common law. The language in sections 85.321 and 85.322 comes directly from section 13 of article 6049c.

For more than 100 years, this Court has recognized that a cause of action for injury to real property accrues when the injury is committed. *See Houston Water-Works Co. v. Kennedy*, 8 S.W. 36, 37 (Tex. 1888). The right to sue is a personal right that belongs to the person who owns the property at the time of the injury, and the right to sue does not pass to a subsequent purchaser of the property unless there is an express assignment of the cause of action. *Abbott v. City of Princeton*, 721 S.W.2d 872, 875 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). "Accordingly, a mere subsequent purchaser [of the property] cannot recover for an injury committed before his purchase." *Lay v.*

Aetna Ins. Co., 599 S.W.2d 684, 686 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); *see also Vann v. Bowie Sewerage Co.*, 90 S.W.2d 561, 562–63 (Tex. 1936) (holding that a cause of action for damages to property resulting from a permanent nuisance accrues to the owner of the land at the time the injury begins to affect the land, and mere transfer of the land by deed does not transfer the claim for damages). Therefore, under Texas common law, absent a conveyance of the cause of action, a subsequent owner cannot sue a prior owner for injury to realty before the subsequent owner acquired his interest. *See Vann*, 90 S.W.2d at 562–63; *see also Haire v. Nathan Watson Co.*, 221 S.W.3d 293, 298 (Tex. App.—Fort Worth 2007, no pet.); *Cook v. Exxon Corp.*, 145 S.W.3d 776, 781 (Tex. App.—Texarkana 2004, no pet.); *Exxon Corp. v. Pluff*, 94 S.W.3d 22, 27 (Tex. App.—Tyler 2002, pet. denied); *Senn v. Texaco, Inc.*, 55 S.W.3d 222, 225 (Tex. App.—Eastland 2001, pet. denied). Similarly, a subsequent lessee, like Emerald, can stand in no better shoes than a subsequent owner. If the Legislature intended to change this common law principle, it could have done so in the statute.

Were we to interpret section 85.321 to allow Emerald to sue Exxon as a prior lessee, we would expand the class of potential claimants beyond that allowed by common law and subsumed in the statute. Without explicit direction from the Legislature, we hesitate to adopt an interpretation of section 85.321 that would make any party who holds a mineral interest indefinitely liable to all subsequent interest holders for prior alleged damage to the land. The consequences of such an interpretation run contrary to the legislative intent to protect and encourage the development of Texas natural resources. *See* TEX. CONST. art. XVI, § 59. We are mindful of the consequences of a particular construction. *See* TEX. GOV'T CODE § 311.023(5); *McIntyre*, 109 S.W.3d at 745. Absent a legislative enactment clearly abrogating the common law, we conclude that Emerald does

not have standing as a subsequent lessee to pursue a claim under section 85.321 for Exxon's alleged wrongful actions as a prior lessee.[4] *See, e.g.*, *Tooke v. City of Mexia*, 197 S.W.3d 325, 342–43 (Tex. 2006) (holding that TEX. LOC. GOV'T CODE § 51.075 abrogated *City of Texarkana v. City of New Boston*, 141 S.W.3d 778 (Tex. 2004)).

C. Negligence Per Se

Because our holding that a subsequent lessee has no standing to bring a claim under section 85.321 stems from common law principles, Emerald lacks standing to bring a negligence per se claim for the same reasons.

III. CONCLUSION

Accordingly, we reverse the court of appeals' judgment and render judgment that Emerald take nothing.

_____
Dale Wainwright
Justice

OPINION DELIVERED: December 17, 2010

[4] Emerald and the Commissioner of the Texas General Land Office contend on rehearing that the opinion "effectively says that Exxon is the only party that can sue Exxon for damage resulting from violations of the Natural Resource Code and Railroad Commission regulations." On the contrary, the opinion and the opinion on rehearing explain that persons who had an interest in the realty at the time of the damage to the interest have standing to sue under section 85.321 for the violations listed. Thus, the royalty owners in this case have standing to sue, and they did sue, but too late for at least some of the causes of action. *See Exxon v. Miesch*, __ S.W.3d ___ (Tex. 2010) (reh'g op.). Also, an assignee of the realty interest (at the time of the alleged damages) would have standing to sue.

IN THE SUPREME COURT OF TEXAS

NO. 05-1076

EXXON CORPORATION AND EXXON TEXAS, INC., PETITIONERS,

v.

EMERALD OIL & GAS COMPANY, L.C. AND LAURIE T. MIESCH, ET AL., RESPONDENTS

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

Argued February 13, 2007

Rehearing Granted November 20, 2009

JUSTICE WAINWRIGHT delivered the opinion of the Court.

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

After issuing our opinion, we granted the parties' motions for rehearing on November 20, 2009 and obtained further briefing from the parties. On December 17, 2010, we issued an opinion on rehearing and modified our judgment. Thereafter, the parties filed second motions for rehearing. Today, we deny the parties' motions, but withdraw our opinion of December 17, 2010 and substitute the following opinion. Our judgment remains unchanged from the one issued December 17, 2010.

In this oil and gas dispute, royalty owners and an oil and gas lessee allege that the previous lessee failed to fully develop oil and gas tracts near Refugio, Texas and sabotaged the wells before

abandoning the lease. The lessee's claims at issue in this appeal are for negligent misrepresentation, fraud, and tortious interference with business opportunity. The royalty owners' claims are for statutory and common law waste, breach of alleged regulatory duty to plug wells properly, negligence, negligence per se, negligent misrepresentation, tortious interference with economic opportunity, breach of lease, and fraud. The trial court granted summary judgment on lessee's claims not subject to this appeal and directed a verdict against the lessee on its remaining claims and against the royalty owners on their claims for statutory waste, negligence, negligence per se, tortious interference, fraud, and negligent misrepresentation. The remaining royalty owner claims for statutory and common law waste and breach of contract went to verdict. The jury found in favor of the royalty owners. The court of appeals reversed the directed verdict and affirmed the jury verdict. 180 S.W.3d 299. We reverse and remand to the court of appeals. On December 17, 2010, we also issued our opinion on rehearing in the companion case of *Exxon Corp. v. Emerald Oil & Gas Co.*, ___ S.W.3d ___ (Tex. 2010) (reh'g op.).[1]

[1] We received amicus briefs from Texas Oil & Gas Association, the Texas Alliance of Energy Producers, the Texas Land and Mineral Owners' Association, Texas and Southwestern Cattle Raisers Association, and Jerry Patterson, Commissioner of the Texas General Land Office and Chairman of the School Land Board. On first rehearing, we received amicus briefs from Susan Combs, Texas Comptroller of Public Accounts, Jerry Patterson, Commissioner of the Texas General Land Office and Chairman of the School Land Board, Texas Oil & Gas Association, and Jacqueline L. Weaver, A.A. White Professor, University of Houston Law Center.

I. FACTUAL AND PROCEDURAL BACKGROUND

The royalty owners consist of three families—the Miesches, the O'Connors, and the Dunns (collectively the Miesches).[2] They owned mineral interests on several thousand acres of land (the O'Connor Field or Field) in Refugio, Texas. In the 1950s, Humble Oil and Refining Company, a predecessor of Exxon Corporation and Exxon Texas, Inc. (collectively Exxon), began acquiring mineral leases from the royalty owners. Exxon derived its interests from four separate but similar mineral leases with the Miesches. The leases (collectively the Lease or the O'Connor Lease) included an atypical fifty percent royalty obligation and a stringent disclosure clause. During the term of the Lease, Exxon drilled 121 wells and produced at least 15 million barrels of oil and more than 65 billion cubic feet of gas, resulting in the payment of more than $43 million in royalties to the Miesches. In the early 1970s and later in the next decade, Exxon attempted to renegotiate a lower royalty because profitability of the operations was declining. As early as 1987, the royalty owners requested that Exxon provide them information and documentation to support Exxon's position that the field was being depleted and was no longer profitable at the fifty percent royalty. By 1989, Exxon had begun plugging some of the thirty-four wells remaining in operation. The Miesches sent a letter, dated August 30, 1990, advising Exxon "that in the event you [Exxon] plug and abandon any wells [in the O'Connor Field] which are producing or capable of producing

[2] The current royalty owners who are petitioners in this case are: Morgan Dunn O'Connor, T. Michael O'Connor, Brien O'Connor, Kelly Patricia Dunn Schaar, Nancy O'Connor, Bridey Dunn Greeson, individually and on behalf of the Dunn-O'Connor Family Trust, Laurie T. Miesch, Jack Miesch, Michael L. Miesch, Molly Miesch Allen, and Janie Miesch Robertson.

minerals in paying quantities to [the royalty owners], Exxon will be sued under the terms of the lease and the common law, both for present breach of contract and anticipatory damages . . . ."

Walker and McBroom, Inc., a potential operator for the Miesches whom they engaged to evaluate the amount of reserves remaining in the O'Connor Field, advised them by letter of September 4, 1990, that "Exxon has exhausted any value of the field to them, and created substantial environmental hazards" and suggested that the royalty owners pursue Exxon's geologic information of the Field to aid in its future development, "particularly if oil and gas prices substantially rise in the future."

On September 12, 1990, the royalty owners demanded by letter that Exxon deliver all data and documents pertaining to the subject wells, "includ[ing] drilling, production, completion and re[-]completion data, well bore production or completion schematics or diagrams and flow line maps and surface facility diagrams or schematics." In the same letter, the royalty owners warned that "plugging and abandonment of the [six] referenced wells would commit waste and would be contrary to public policy and laws" and that the letter "shall also be considered as formal demand not to plug the above referenced six wells, as such would cause us irreparable harm and commit waste." The royalty owners further informed Exxon that they had "located a group of oil and gas companies that are willing to accept the plugging obligation" and assignment of the O'Connor Lease.

Initially, the royalty owners asserted that Exxon refused to provide any information, claiming that the information was proprietary. Later, Exxon claimed the information was too difficult to locate and retrieve. Then, Exxon agreed to provide the royalty owners a data room containing the requested information subject to a confidentiality agreement. The data room included a large

quantity of information, but apparently did not contain the well logs for the plugged wells and did not contain Exxon's opinions and analysis interpreting the data.

Exxon ultimately concluded that it could no longer profitably afford the O'Connor Lease unless the royalty owners agreed to reduce the royalty obligation or assign the leases to third parties. When negotiations to lower the royalty obligation failed, Exxon continued plugging and abandoning the wells. As required by law, after Exxon plugged each of the wells, it filed a plugging report with the Texas Railroad Commission, the department that regulates oil and gas production. 16 TEX. ADMIN. CODE § 3.14(b)(1) (R.R. Comm'n of Tex., Plugging).[3] By letter dated August 16, 1991, Exxon notified the royalty owners that it had completed its plugging operations.

In 1993, after the Lease terminated, the royalty owners entered into a lease agreement with Pace West Production, Ltd. (Pace or Pace West), later known as Emerald Oil & Gas Company, L.C. (Emerald)[4], for approximately one-third of the acreage in the O'Connor Lease. In deciding whether to lease the land, Emerald reviewed Exxon's public filings for the Field, including the oil well plugging reports (W-3 forms) that Exxon filed with the Texas Railroad Commission. The W-3 filings seemed to indicate that Exxon properly plugged the wells. However, Emerald encountered problems from the beginning of its attempts to re-enter the plugged wells, including wellbores

[3] Title 16 section 3.14 of the Texas Administrative Code requires well operators to file plugging reports, or W-3 forms, with the Railroad Commission within thirty days after each well is plugged. 16 TEX. ADMIN. CODE § 3.14 (R.R. Comm'n of Tex., Plugging). Section 3.14 mandates that an operator disclose the specific methods used to plug the wells and sign an oath verifying that the statements in the report are true. *Id.*

[4] Exxon argues that because Pace West was not formed until 1993, Emerald's fraud claim is foreclosed. The evidence of the identity of Emerald Oil's predecessor raises a fact question on the issue and is discussed further in II.C., *infra*.

plugged with improperly cut casing[5] and other "junk" in the wells, and plugs in locations other than those listed on the reports. The term "junk" is a term of art used in the oil and gas industry to refer to non-drillable material such as steel or iron in a wellbore. *Tarrant County Control & Imp. Dist. No. One v. Fullwood*, 963 S.W.2d 60, 66 (Tex. 1998) (per curiam); *see* 16 TEX. ADMIN. CODE § 3.14(d)(10) (R.R. Comm'n of Tex., Plugging) (prohibiting, with exceptions, the placement of non-drillable material or junk in the wellbore during plugging operations). Rock Thomas, principal in Re-Entry People, the company hired by Emerald Oil & Gas to re-enter some of the plugged wells on the Lease, explained that "junk" is "something in [the wellbore] that you don't know what it is." Testimony at trial indicated that nuts, bolts, fiberglass pipe, tubing, packers, environmental contaminants and other items were placed in plugged wells in the O'Connor Field.

Emerald sent the royalty owners a written status report on June 8, 1994, explaining that it "encountered junk in [the] hole" in one well, that Exxon had cut the casing in several wells, and that cut and shifted casing had halted re-entry in at least one well. Royalty owners alleged the cut casing in wells in the O'Connor Field caused problems, including increasing costs to re-enter wells, making it impossible to re-enter some wells, and substantially damaging their interests. In January 1995, Emerald obtained Exxon's internal well records on the O'Connor Lease from Quintana, Exxon's partner on the adjoining tract, also leased by Exxon. Exxon's internal records allegedly differed substantially from the Railroad Commission filings regarding its plugging of the wells in the O'Connor Lease. On January 24, 1995, Emerald met with the royalty owners and explained the

[5] Exxon does not dispute that it plugged at least some of the wells using non-standard plugging procedures and acknowledges that it cut the casing and cemented it in some of the wellbores.

extent of the alleged Field-wide damage to the wells due to Exxon's plugging techniques.

Concluding that Exxon intentionally sabotaged the field, Emerald sued Exxon in July 1996, and amended the pleading in 1998, claiming breach of regulatory duty to plug wells properly, breach of duty to avoid committing waste of natural resources, negligence per se in violating several sections of the Natural Resources Code and Railroad Commission Regulations, tortious interference with economic opportunity, negligent misrepresentation, and fraud. The fraud claim was predicated on false representations in public filings with the Railroad Commission that the wells were properly plugged.

The royalty owners intervened in the lawsuit in two separate groups in August and September of 1996, and alleged statutory and common law waste, tortious interference with economic opportunity, breach of regulatory duty to plug wells properly, fraud, and environmental claims, and sought various measures of actual damages, exemplary damages, and attorney's fees. In October 1999, the royalty owners amended their petitions, adding claims for breach of contract for Exxon's alleged failure to develop the leasehold, negligence, negligence per se, and negligent misrepresentation.

Reasoning that Exxon owed no duty to future lessees such as Emerald, the trial court granted in part Exxon's motion for summary judgment on Emerald's claims for breach of regulatory duty to plug wells properly, breach of common law and regulatory duties to avoid committing waste, and negligence per se. The court severed the partial summary judgment, and Emerald appealed. The court of appeals reversed and remanded the claims to the trial court. *See Emerald Oil & Gas, L.C. v. Exxon Corp.*, 228 S.W.3d 166 (Tex. App.—Corpus Christi-Edinburg 2005, pet. granted). Exxon

appealed that judgment to this Court in cause number 05-0729, and we issued the opinion on rehearing in the companion case on December 17, 2010. *Exxon Corp. v. Emerald Oil & Gas Co.*, ___ S.W.3d ___ (Tex. 2010) (reh'g op.).

The case proceeded to jury trial on Emerald's three common law claims (fraud, negligent misrepresentation and tortious interference with economic opportunity) and on all of the Miesches' claims, but the royalty owners abandoned their environmental claims before verdict. The trial court granted a directed verdict in Exxon's favor on Emerald's three remaining claims and on all of the royalty owners' claims except common law and statutory waste and breach of lease. The jury found in favor of the royalty owners on the claims against Exxon for waste and breach of lease, awarding $5 million in actual damages for waste, $10 million in punitive damages for acting with malice in conduct causing injury to the royalty owners, and $3.6 million in damages for breach of lease. The trial court rendered judgment in accordance with the verdict. All parties appealed. The court of appeals affirmed the judgment in favor of the royalty owners and did not address the Miesches' claims that were dismissed on directed verdict. 180 S.W.3d at 335, 339. It also reversed the directed verdict against Emerald on its claims against Exxon for fraud, negligent misrepresentation, and tortious interference, ruled against Exxon on its affirmative defense of limitations and remanded the claims for a new trial. *Id.* at 339. We granted Exxon's petition for review and issued our opinion. The parties sought rehearing, which we granted, modifying our original judgment and clarifying our opinion.

II. LAW AND ANALYSIS

A. Statute of Limitations: The Royalty Owners' Claims for Statutory and Common Law Waste, and Emerald's Claims for Negligent Misrepresentation and Tortious Interference

The royalty owners' claims against Exxon decided in this appeal are statutory and common law waste, breach of lease, and fraud.[6] Emerald's claims against Exxon in this appeal are for fraud, negligent misrepresentation, and tortious interference. Exxon asserts that the claims are barred by limitations.[7] The parties do not dispute that a two-year statute of limitations applies to the waste, negligent misrepresentation, and tortious interference claims against Exxon. TEX. CIV. PRAC. & REM. CODE § 16.003(a). Emerald's claim for fraud and the Miesches's claim for breach of lease are subject to four-year limitations periods and are addressed later in the opinion. *See id.* §§ 16.004, .051.

Causes of action accrue and statutes of limitations begin to run when facts come into existence that authorize a claimant to seek a judicial remedy. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003); *Johnson & Higgins of Tex. v. Kenneco Energy, Inc.,* 962

[6] Emerald's claims for statutory and common law waste, breach of regulatory duty to plug wells properly, and negligence per se were dismissed by the trial court in a partial summary judgment ruling, were severed at the trial court, and are the subject of the opinion on rehearing issued in the companion case, *Exxon v. Emerald Oil & Gas Co.*, ___ S.W.3d ___ (Tex. 2010) (reh'g. op.). The Miesches' claims for negligence, negligent misrepresentation, negligence per se, tortious interference and breach of regulatory duty to plug wells properly were dismissed by the trial court on directed verdict, and the Miesches conditionally challenged that ruling at the court of appeals.

[7] Emerald argues that "Exxon moved for directed verdict based on limitations on only one of Emerald's three common-laws claims, i.e., negligent misrepresentation," and thus failed to preserve its argument that the tortious interference and fraud claims are time-barred. In its motion for directed verdict at trial, Exxon argued that all of the claims "are barred by the applicable statutes of limitations." Exxon made the same argument before the court of appeals and raises the issue in this Court. Exxon preserved this issue for our review.

S.W.2d 507, 514 (Tex. 1998). When a cause of action accrues is normally a question of law. *Knott*, 128 S.W.3d at 221; *Moreno v. Sterling Drug, Inc*., 787 S.W.2d 348, 351 (Tex. 1990).

In this case, more than two years elapsed between the time that Exxon's asserted tortious conduct damaged the O'Connor Field and the date that Emerald and the Miesches sued Exxon. Emerald and the royalty owners assert that Exxon's plugging operations caused them injury. Exxon advised the royalty owners by letter in August 1991 that it had completed plugging all wells in the O'Connor Field. Thus, the alleged tortious conduct occurred by August 1991. Emerald filed suit in June 1996, and the Miesches intervened in the lawsuit in August and September 1996 to assert claims against Exxon. Both Emerald and the Miesches filed suit more than two years after the injuries occurred for these claims. However, Emerald and the royalty owners argue that the law recognizes exceptions to limitations that apply in this case.

Emerald and the royalty owners contend that they filed suit timely because Exxon fraudulently concealed its wrongful conduct, tolling the statute of limitations, and that the nature of their injuries was difficult to discover, thus delaying accrual of their claims. *See Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 736 (Tex. 2001) (distinguishing fraudulent concealment from the discovery rule); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455–56 (Tex. 1996). At trial, the jury found that the royalty owners discovered, or in the exercise of due diligence should have discovered, on January 24, 1995, the waste committed by Exxon. On that date Emerald's representatives met with the royalty owners and informed them, in the words of the court of appeals, "about the full extent of damage to the wells and the numerous discrepancies" in Exxon's plugging reports. 180 S.W.3d at 316. The court of appeals concluded that the statute of limitations was tolled

until that date, that the lawsuit filed in the summer of 1996 was therefore timely, and affirmed the trial court's judgment. *Id.* at 316–17. The court of appeals reasoned that "the discovery rule tolls limitations until the [royalty owners] knew of enough damage to know that the problems regarding the wells were not isolated." *Id.* at 317. Emerald and the royalty owners do not dispute that, unless accrual of the cause of action is deferred or the statute of limitations tolled, the two-year statute of limitations bars all of their claims addressed by the court of appeals except fraud and breach of contract, which have four-year statutes of limitations. *See* TEX. CIV. PRAC. & REM. CODE §§ 16.004, .051.

1. Conclusive Evidence of Emerald's and the Miesches' Knowledge of Problems in the Field

We do not reach the question of the impact of the discovery rule or fraudulent concealment on the limitations period for the pending claims because Emerald and the royalty owners had actual knowledge more than two years before they filed suit of Exxon's alleged wrongful actions and that those actions caused problems or injuries to their interests. The evidence of their actual knowledge is in documents written by or on behalf of Emerald and the Miesches, and it is conclusive. We review the relevant, undisputed facts.

Exxon completed 121 wells in the O'Connor Field and produced both oil and gas over the nearly forty years the parties did business together. By the mid 1980s mineral prices dropped, and production in the Lease declined. Exxon believed the Field was becoming unprofitable at the fifty percent royalty and attempted to negotiate a lower royalty with the Miesches. The effort was unavailing, and in the late 1980s Exxon plugged wells in anticipation of terminating the Lease. The

royalty owners were not obligated to accept a lower royalty, and they were not convinced that the Field was uneconomic. The Miesches advised Exxon by letter dated September 12, 1990 that they had received notice that it intended to plug and abandon six wells referenced in the letter. The letter was a "formal demand not to plug the above referenced six wells, as such would cause us irreparable harm and commit waste," and "would be contrary to public policy and laws." Two weeks earlier, counsel for the Miesches had also warned Exxon in writing that it would "be sued under the terms of the lease and the common law, both for present breach of contract and anticipatory damages" if it plugged and abandoned wells in the Field capable of producing in paying quantities. In their Fourth Amended Petition in Intervention (the live pleading at trial), the royalty owners alleged, separate from their claim for breach of an implied covenant under the Lease to reasonably develop the Field, that they "lost royalties due to [Exxon's] holding the lease but plugging wells instead of producing them." Therefore, by September 1990, the royalty owners had actual knowledge of facts underlying their claim of waste by Exxon for failure to produce available reserves of oil and gas from existing wells on the O'Connor Lease.

Notwithstanding this evidence, even if we assume that the royalty owners were not aware of problems allegedly impacting their lease interests by Exxon's plugging the wells by the time of the September 1990 letter, they assuredly were aware by August 16, 1991. That is the date of Exxon's letter advising them that it had completed plugging and abandoning the remaining wells in the O'Connor Field. Accordingly, limitations forecloses the royalty owners' waste claim.

On first rehearing, the royalty owners argued that their claim for waste actually focused on intentional damage or sabotage to wells in the Lease.[8] The first claim, discussed above, was waste occasioned by abandoning wells that were alleged to still be capable of producing in paying quantities. The second claim was for waste allegedly caused by sabotaging the wells as they were plugged. The royalty owners alleged that Exxon intentionally damaged the wells to hinder or preclude subsequent re-entry of the wells, causing increased re-entry costs, loss of some wells necessitating drilling new wells in some instances, and reduction in revenues they could recover from the O'Connor Field. The wrongful conduct alleged included improperly cutting production casing in the wells, placing junk in the wells, placing plugs in the wells below the surface at undisclosed locations, and pumping contaminants into the wells. They pled that Exxon's conduct damaged the leasehold and interfered with the business opportunity of the royalty owners to further develop the Field with another operator.

Assuming these allegations are true, which we must for limitations analysis, Emerald and the royalty owners were aware of or suspected problems resulting from Exxon's conduct well before

[8] Exxon asserts that the Miesches did not raise the second waste claim in the trial court. In this Court, the royalty owners seem to raise this second waste claim involving improper plugging methods used by Exxon to allegedly prevent future re-entry of production from the wells. It is arguable whether the Miesches raised this issue in the trial court as part of their claim for waste (Count 2). In Count 3 (Negligence Per Se) of the Miesches' Fourth Amended Petition in Intervention, they alleged negligence and state that lost royalties from the additional cost of re-drilling improperly plugged wells was the basis of that claim. In Count 2 (Breach of Regulatory Law—Duty Not to Commit Waste) of this Petition, the Miesches complain of "underground waste or loss" resulting from "drilling, equipping, locating, spacing or operating a well or wells in a manner that reduces or tends to reduce the total ultimate recovery of oil or gas from any pool" (quoting TEX. NAT. RES. CODE § 85.046). The Miesches only mention pumping contaminants into the wells in Count 2 (Waste), and specifically mention sabotaging, junking and pumping contaminants into the wells in Count 4 (Tortious Interference), Count 5 (Fraud), and Count 6 (Cost to Re-Enter). So it is arguable whether the Miesches raised the issue of sabotage in their claim for waste in Count 2, while they specifically complained of sabotage or intentional damage to wells in other counts of their pleading. For purposes of our analysis, we will assume the issue was raised in the trial court.

they filed suit. In a June 8, 1994 report, Emerald advised the royalty owners that it discovered that Exxon improperly cut casing in a number of wells and there was "junk" in at least one well Exxon had plugged. The Miesches also acknowledge that Emerald had discovered junk in at least one other well. The royalty owners argue that Emerald's report to them in June 1994 discussing cut casing and junk in a wellbore did not raise suspicion and does not constitute knowledge of damage to the wells. They also claim that the June 1994 letter does not say that Exxon put junk in the wells. The royalty owners' arguments contradict conclusive evidence from the trial, which we set forth in some detail below.

The royalty owners hired Emerald to redevelop a portion of the O'Connor Field after the Lease was terminated. Emerald prepared the June 1994 report for the royalty owners on the status of its efforts to reopen part of the Field. It states, in relevant part:

- "casing had been cut by Exxon at 1400'" for the M.E. O'Connor A-8 well,
- "[c]asing had been cut by Exxon" for the M.E. O'Connor B-11 well,
- "[c]asing had been cut by Exxon" for the M.E. O'Connor E-3 well,
- "[c]asing was cut by Exxon when plugged" for the M.E. O'Connor A-5 well,
- "[c]asing was cut when plugged. . . Could not drill past cuts at 1350'" for M.E. O'Connor B-1 well,
- "[c]asing cut by Exxon when plugged" for M.E. O'Connor E-6 well,
- "[c]asing cut by Exxon when plugged. . . . Casing shifted and collapsed" for M.E. O'Connor A-3 well, and

• Emerald "encountered junk in hole" for the M.E. O'Connor A-10 well.[9]

In addition to junk in well A-10, the report points out that Emerald discovered cut casing in seven wells prior to June 8, 1994. Emerald's principal, Glenn Lynch, testified at length at trial that leaving cut casing in oil wells before sealing them with cement is an improper plugging technique that creates costly and time-consuming problems to re-entering the well for further mineral production, rendered some plugged wells impossible to re-enter and, he believed, was prohibited by Railroad Commission rules.[10] Lynch testified that if casing is cut in the wellbore, it should be pulled. Emerald found cut casing in "the first couple of wells" it attempted to re-enter when it began re-entry of the Field in May 1993.

The alleged junking of the wells and cutting of production casing in the wellbores prior to capping the wells is the conduct that Emerald and the royalty owners characterize as deliberate sabotage of the wells, as violations of Texas laws and Railroad Commission regulations, and as constituting "illegal steps to intentionally and systematically damage the wells to prevent re-entry." There is no dispute that Exxon was responsible for plugging the wells in the Field, and the June 1994 report identifies Exxon throughout the report as the party that had cut well casing in plugging the wells in the O'Connor Field. That was no surprise to Emerald or the royalty owners because Exxon had been the operator in the O'Connor Field for nearly four decades.

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[9] The June 1994 report lists two other wells (B-4 and B-5), not included in this list, in which casing had been cut and pulled out of the hole, which Emerald and the Miesches state is the proper procedure.

[10] Exxon argues, citing administrative regulations, that cutting casing before plugging wells is not blanketly prohibited by the Railroad Commission's rules. *See* 16 TEX. ADMIN. CODE § 3.14 (d)(8) (R.R. Comm'n of Tex., Plugging). For purposes of this analysis, we assume the validity of Emerald's and the royalty owners' complaints that leaving cut casing in abandoned wellbores is improper.

The royalty owners argue that they did not appreciate the significance of the statements in the report Emerald sent to them in June 1994. Neither the Miesches nor Emerald contest that the damages Exxon allegedly caused to the leasehold occurred before 1992 or that Emerald and the Miesches knew of improper plugging, cut casing, and junk placed in capped wells in the Field before August 1994, at least to the extent documented in the June 1994 report. The Miesches contend that the evidence of cut casing is not notice that the wells were damaged or the Field was impaired. However, their live pleadings alleged that junk was left in the wellbores, casing was cut in multiple places in the well holes, and these acts of Exxon were the proximate cause of damages to the royalty owners. By June 1994, the royalty owners had actual knowledge of this alleged injury-causing conduct. The September 1990 letter (from the Miesches to Exxon threatening to sue for waste if wells were plugged) and the June 1994 report (the Emerald report to the Miesches alleging damage to the wells) by their terms conclusively establish that the royalty owners knew or suspected there were problems or damages allegedly caused by Exxon to their interests in the O'Connor Lease. The limitations period began to run no later than September 1990 on the first waste claim and no later than June 1994 on the second waste claim. Having actual notice of such problems, the royalty owners had two years under the applicable statutes of limitations to investigate the problems and file suit, or not.

Emerald contracted with the royalty owners in May 1993 to re-enter wells and further develop a portion of the Field. It admits to encountering problems in its initial re-entry attempts in 1993. The June 1994 report, which lists the re-entry date for some of the wells, expressly notes that re-entry was commenced in the prior year (1993) for several wells (A-5, B-1, and E-6) and that

Exxon had cut the casing in these wells. Emerald also acknowledges that it performed "due diligence in accord with industry practice by reviewing Exxon's sworn Railroad Commission filings" before entering the lease with the Miesches in May 1993. And, Glenn Lynch, a principal in Emerald, testified that eighty to ninety percent of the Commission filings, on which Emerald relied, were inaccurate and that cut casing caused significant problems to re-entry. Thus, Emerald's 1994 report indicates its belief that Exxon's actions allegedly caused further development in the Field to be more difficult, more costly, or impossible and that many problems in the wells were not listed in Railroad Commission reports, at least some of which Emerald had admittedly reviewed prior to entering the lease in 1993.

Emerald filed suit in July 1996, more than two years after the accrual of its causes of action for tortious interference with business opportunity and for negligent misrepresentation arising from allegedly false Railroad Commission filings. The Miesches claimed damages for waste when they intervened in August 1996, more than two years after the September 1990 letter and the June 1994 report. These claims were untimely.

The court of appeals concluded that the royalty owners were not on notice of the damage to the Lease until January 1995 when the "[royalty owners] knew of enough damage to know that the problems regarding the wells were not isolated." 180 S.W.3d at 317 (citation omitted). The applicable legal standard is the statute of limitations begins to run when a party has actual knowledge of a wrongful injury. *Knott*, 128 S.W.3d at 221. Once a claimant learns of a wrongful injury, the statute of limitations begins to run even if the claimant does not yet know "the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it." *PPG Indus.,*

Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79, 93-94 (Tex. 2004) (internal citations omitted); *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 531 (Tex 1997) (holding that the statute of limitations on claim for damage to real property ran as soon as property owner knew of presence of a hazardous chemical on the property, not when the residue exceeded regulatory contamination levels). Emerald and the Miesches had actual knowledge by June 1994 that there were problems re-entering a number of wells in the O'Connor Field due to cut casing or junk. After being put on notice of the alleged harm or injury-causing actions, the claimant must exercise reasonable diligence to investigate the suspected harm and file suit, if at all, within the limitations period. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998) (holding that "[r]oyalty owners cannot be oblivious" to potentially injurious activity taking place in the field); *KPMG Peat Marwick v. Harrison Cnty. Housing Fin. Corp.*, 988 S.W.2d 746, 750 (Tex. 1999) (noting that a plaintiff's known loss from a wrongful premature sale of assets should have caused the plaintiff to investigate the mismanagement of the assets as well as a different defendant's involvement in the mismanagement); *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981) (holding that the statute of limitations runs from the time fraud could have been discovered). Knowing that there were problems with re-entering wells in 1993 and documenting them in the June 1994 report, put Emerald and the Miesches on notice of actual or potential injury-causing conduct. Therefore, for limitations purposes, they had a duty to diligently investigate the suspected similar harm by the same operator in the O'Connor Field and file suit on these claims within two years of such notice.

The logic of the court of appeals' holding would create serious issues with application of legislated deadlines for filing actions where injury-causing conduct is known but the full extent of

the damages may not be known. In this case, the law accorded both Emerald and the Miesches the statutory two-year period to investigate the problems raised by Emerald and to file claims for damages arising from Exxon's alleged conduct in the Field. The limitations period began when facts came into existence that authorized them to seek a judicial remedy. *See Knott*, 128 S.W.3d at 221. A different rule that delays accrual of the cause of action until the putative claimant knew of enough damage to know the problems regarding the wells were not isolated would cause inconsistent and illogical results. Such a rule would extend the limitations period for a suit arising from the eight wells, known from the June 1994 report to be damaged, beyond the two-year period because, even though those wells were known to be damaged, limitations would not run until many more wells were known to be damaged. Alternatively, application of such a rule would mean that limitations may begin to run on the wells with known damage but not on other wells in the Field, setting up multiple limitations periods to be applied to different wells in the same Field for the same types of damage caused by the same operator during the same period of time, and undermining or eviscerating the legal duty of an injured party to be diligent in protecting his interests. This is not to mention the difficult and litigious problem of determining when there are enough problems that they are not considered to be isolated. Here, unlike *PPG Industries*, Emerald alleged consistent problems with a high percentage of wells from the beginning of its re-entry efforts. *See* 146 S.W.3d at 93–94. For these and other reasons, we have held that when a person is on notice of injury-causing conduct, the claimant has a duty to use reasonable diligence to discover if he has a claim and, if so, to file it within the limitations period to preserve his right to recover**.** *HECI Exploration Co.*, 982 S.W.2d at 886.

2. Royalty Owners' Testimony Concerning Emerald's June 1994 Report of Problems in the Field

The June 1994 report establishes that Emerald and the royalty owners were made aware of problems caused by Exxon. Emerald prepared the report and sent it to the royalty owners. The trial testimony of the royalty owners concerning this document confirms their knowledge by June 1994 of problems in Exxon's capping of the wells. Three royalty owners testified at trial—T. Michael O'Connor, Morgan Dunn O'Connor, and Laurie T. Miesch. T. Michael O'Connor and Morgan Dunn O'Connor discussed the June 1994 report. Laurie Miesch did not.

Royalty owner T. Michael O'Connor was a key representative for the royalty owners. At trial he testified:

> Question: So, would you agree with me now, Mr. O'Connor, that at least for chronology['s] sake, that in June of '94, you were advised by Mr. Taylor [of Emerald] of *problems they were having reentering the wells because of cut casing and junk in the hole*?
>
> O'Connor: Right here from what I saw from this [June 1994] report that I've seen—I don't remember it, of course, but—yes, they reported that *they had some problems with some wells*.
>
> Question: You don't—you're not suggesting that you didn't receive this letter, are you?
>
> O'Connor: No, I apparently did if it was in my deposition in my file.

(Emphasis added.) O'Connor explained that Emerald advised in the June 1994 report that it encountered problems re-entering the wellbores due to cut casing and "junk in the hole." Emerald contends in its post-submission brief that "T. Michael O'Connor [quoted above] did not understand the [June 1994] letter to mean that Exxon had done anything to deviate from industry standards or

had damaged the wells." O'Connor did not state that the report was insignificant or that it did not make him aware of any problems with plugging in the Field. He testified, as cited above, that the report advised of problems with re-entering the wells. He also testified that he was aware of "problems" in Exxon's abandonment of the field, "but I figured it was not necessarily showing some kind of trend of a problem until they came to us in January '95," referring to the date of Emerald's meeting with the royalty owners to explain the extent of damage to wells in the Field. Knowledge of damage to interests need not rise to the level of a "trend" before claimants are charged under the law with notice of its occurrence. As *PPG Industries* states, knowledge of "actual causes and possible cures" or "the full extent of the injury" is not necessary to preclude application of the discovery rule. 146 S.W.3d at 93–94. Knowledge of injury initiates the accrual of the cause of action and triggers the putative claimant's duty to exercise reasonable diligence to investigate the problem, even if the claimant does not know the specific cause of the injury or the full extent of it. *Id.*

Not having oil and gas expertise, Morgan Dunn O'Connor, a "spokesperson [and] organizational person" for the royalty owners, explained that she "had no idea what the significance of shifting casing was," in reference to a November 1994 letter from Emerald employee Johnny Yocham mentioning the term. Lynch had testified that cutting production casing without pulling it from the well in capping operations may allow the casing to shift such that re-entering a well with offset casing in the well would be difficult if not impossible. Notwithstanding the limits of her technical knowledge, Morgan Dunn O'Connor affirmed that she knew from the June 1994 report that

Exxon had cut casing, which had shifted and collapsed in wells it capped in the Field, and also knew of junk left in a well Exxon had capped.

The Miesches claim that these actions by Exxon were intentional acts of sabotage, violated the law, and caused them substantial damages. Although it is not within the scope of our review to determine whether these assertions are true or not, we cannot escape the significance of the documents in the record or these statements by and to the Miesches in light of the question we answer—whether the royalty owners were on notice more than two years before filing suit of Exxon's alleged conduct that they claim caused the damages. The inescapable conclusion is that the royalty owners were aware no later than June 1994 from undisputed facts of conduct they suspected or knew allegedly injured their property interests. *See City of Keller v. Wilson*, 168 S.W.3d 802, 814–17 (Tex. 2005) (explaining that courts conducting a no-evidence review cannot ignore evidence that has one logical conclusion).

We therefore conclude that the assertion of fraudulent concealment to toll limitations and of the discovery rule to postpone accrual of the limitations period is unavailing here. Irrespective of the potential effect of fraudulent concealment or the discovery rule on limitations, actual knowledge of alleged injury-causing conduct starts the clock on the limitations period. *See KPMG*, 988 S.W.2d at 750. Emerald's claims for negligent misrepresentation and tortious interference with business opportunity are barred by limitations. The royalty owners' claims for statutory and common law waste are barred by limitations.

B. Breach of Lease

The royalty owners claim that Exxon failed to "fully develop" two productive zones in the O'Connor Field, H12 and FS75, in violation of the Lease's development clause. Exxon counters that the royalty owners misread the term "fully develop" in the development clause, Article 3, and instead incorporate a provision from Article 4 that is a separate covenant that does not define Exxon's obligation to develop the Field. The court of appeals affirmed the trial court's judgment, holding that the testimony of the royalty owners' expert, George Hite, was some evidence that the Field was capable of further production in paying quantities until 1999 and that Exxon did not drill and complete wells in two productive zones, H12 and FS75.[11] 180 S.W.3d at 334–35. Exxon contends no evidence supports the jury's finding that Exxon failed to fulfill its obligations under the development clause of the oil and gas Lease.[12]

There are four oil and gas lease agreements, and the development clauses in them have somewhat different terminology. At trial, the parties used the Lease as the source of the terms and conditions of the parties' obligations, and Exxon acknowledged that the terms of the leases were similar.[13] The development clause is Article 3 of the Lease. Article 4 also contains relevant provisions.

> **Article 3(a)**. [L]essee covenants and agrees to prosecute diligently a continuous drilling and development program until said tract is *fully developed* for oil or gas.

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[11] The royalty owners and Hite used "horizon," "stratum," and "zone" interchangeably.

[12] The jury also found that Exxon fraudulently concealed its breach and that the royalty owners did not know, and could not have known with due diligence, that Exxon fraudulently concealed its failure to fully develop until February 1999 when Exxon produced previously requested documents during discovery. For the reasons that follow, we need not reach the royalty owners' fraudulent concealment claim.

[13] The specific terms at issue are from the Lease, Plaintiffs' Exhibit 1 at trial.

. . .

First Tract shall be deemed fully developed within the preceding paragraph of this Article if found to be productive of oil or gas or sulphur when there has been drilled to each horizon or stratum capable of producing oil or sulphur one (1) well for the number of acres fixed by the Railroad Commission . . . in determining the spacing pattern applicable to said First Tract; in the absence of such determination of a spacing pattern by said Railroad Commission . . . said First Tract shall be deemed *fully developed* when at least one (1) well has been drilled and completed in each horizon or stratum capable of producing oil or sulphur in paying quantities for each twenty (20) acres of said tract. First Tract shall be deemed *fully developed* within the intent of the preceding paragraph if found to be productive of gas only when one (1) well has been drilled and completed to each horizon or stratum capable of producing gas in paying quantities for the number of acres fixed by the Railroad Commission . . . in determining the spacing pattern applicable to said tract for the production of gas, or, in the absence of such determination, one (1) well for each one hundred sixty (160) acres of said tract so capable of producing gas in paying quantities.

Article 4. By the words "with diligence," "*diligence*," or "diligently," as used in this instrument, is meant, in each instance, that degree of action, conduct and effort which is consistent with that which would characterize the action and conduct and effort of a prudent and skillful oil operator possessed of ample equipment, material and money, and unhampered by obligations to third parties, and actuated by an honest desire to carry out and fulfill in good faith each and every obligation imposed upon the lessee by this lease. Lessee shall always develop and operate the leased premises for the production of oil and gas in accordance with the best practices of the industry at the applicable time, to the end that the full value of the leased premises for oil and gas shall be ascertained, conserved, and realized.

(Emphasis added).

Before we address the legal sufficiency of the evidence, we must first determine the scope of Exxon's development obligations under the Lease. "An oil and gas lease is a contract, and its terms are interpreted as such." *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 860 (Tex. 2005); *accord Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005) (interpreting an oil and

gas lease using contract principles). "In construing an unambiguous oil and gas lease, . . . we seek to enforce the intention of the parties as it is expressed in the lease." *Tittizer*, 171 S.W.3d at 860.

1. General Development Obligation—Article 3

The Lease contains a development clause, Article 3. The general development obligation in Article 3(a) relied on by the Miesches requires Exxon to "prosecute diligently a continuous drilling and development program until said tract is *fully developed* for oil and gas." (Emphasis added). The next paragraph of Article 3(a) then provides definitions of "fully developed" for oil and gas.

2. The Obligation to "Fully Develop"—Article 3

The Field "shall be deemed fully developed within the intent of the preceding paragraph of this Article" when at least one well has been drilled and completed in each horizon capable of producing oil or gas in paying quantities for each twenty acres of land for oil production and for each 160 of land for gas production.[14] This is a common definition in an oil and gas lease development clause. 4 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 671.4, at 136.1 (3d ed. 2008).

To understand the obligation to "fully develop," one must know the meaning of "drill" and "complete" in the development clause. The Lease does not define "drill" or "complete." It is a well recognized canon of construction that technical words are to be interpreted as usually understood by

[14] Article 3(b) provides the same general obligation for the Second Tract and includes the same definition of "fully developed" for both oil and gas production, but in the Second Tract the duty requires "one (1) well," rather than "at least one (1) well" be completed for oil as in the First Tract. The trial judge inquired whether the Lease language was ambiguous and was advised by the parties that it was unambiguous. They raise no distinctions in the obligations between the First and Second Tract in this Lease, or obligations regarding other tracts in the three remaining leases.

persons in the business to which they relate, unless there is evidence that the words were used in a different sense. *Barrett v. Ferrell*, 550 S.W.2d 138, 142 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). In oil and gas parlance, "drilling" refers to the "[a]ct of boring a hole through which oil and/or gas may be produced if encountered in commercial quantities." 8 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW: MANUAL OF OIL AND GAS TERMS at 281–82 (3d ed. 2008). A "completed well" refers to "a well *capable* of producing oil or gas." *Id.* at 172 (emphasis added). The "completion of a well" can also refer to "those processes necessary before production occurs [such as] perforating the casing and washing out the drilling mud." *Id.* at 174.

Certainly, the parties can define the operator's duty to drill and complete a well differently under a contract. For example,

> [c]ompensation for drilling an oil or gas well may be made contingent upon the discovery of oil or gas in paying quantities, but a contract will not be so construed in the absence of a clear expression or implication of such intent by the contract . . . . The courts in construing contracts for the drilling of wells are not disposed to imply warranties as to production.

Barrett, 550 S.W.2d at 142 (holding that a well was completed even though it was a dry hole) (citing W.L. SUMMERS, THE LAW OF OIL AND GAS § 687 (perm. ed. 1938)). These definitions in the Lease show that for a well to be considered "drilled and completed" as required by the development clause, a hole must be bored in the ground, and if oil or gas in paying quantities is encountered, the casing must be perforated or otherwise prepared for production. The Article 3(a) development clause does not obligate the operator to produce all oil and gas that can be produced in paying quantities. The duty is to drill and complete at least one well "capable" of producing in paying quantities. The term "in paying quantities" specifies a characteristic of the well to be drilled, not the volume of production

required. The royalty owners' statement of the duty omits the "in paying quantities" term, but all four definitions in the Lease of "fully develop" in Article 3(a) for oil and for gas in each tract include this language.[15]

This definition of a completed well in the treatises, where the term is not defined in an oil and gas lease, is also the one recognized by Texas courts. *See id.* at 142 (citing *Cannon v. Wingard*, 355 S.W.2d 776, 780 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.)). A "well need not be a producing well to be completed"; it only needs to be capable of producing oil or gas. *Id.*; *Seale v. Major Oil Co.*, 428 S.W.2d 867, 869 (Tex. Civ. App.—Eastland 1968, no writ) (noting that completion of a well does not mean it is an oil or gas producer, but "refers to completion of the required work on the well whether it becomes a producer or not").

3. Diligence—Article 4

Article 4 of the Lease contains two sentences. The first sentence defines "diligence," a term used in the general development clause in Article 3(a). It is defined as the conduct of a prudent and skillful oil operator actuated by an honest desire to fulfill in good faith each obligation in the Lease. Although not argued to the court of appeals or mentioned in the court of appeals' opinion, the Miesches argue in this Court that the second sentence of Article 4 sets out the determinative language for defining Exxon's duty to develop the Field:

> Lessee shall always develop and operate the leased premises for the production of oil and gas in accordance with the best practices of the industry at the applicable

[15] The royalty owners set out the duty as: "The leases are fully developed only when 'at least one (1) well has been drilled and completed in each horizon or stratum capable of producing oil or sulphur for each twenty (20) acres of said tract.'" In the Lease, the phrase "in paying quantities" occurs after the word "sulphur."

> time, to the end that the full value of the leased premises for oil and gas shall be ascertained, conserved, and realized.

Royalty owners argue, in effect, that this term is a warranty of a level of production—to produce all oil and gas in each zone per the specified acreage for each well that can be produced in paying quantities. While not an unreasonable agreement to strike, the question is whether the Lease contained that obligation given its somewhat less burdensome definition of the development obligation in Article 3(a), discussed above.

Articles 3 and 4 are the determinative provisions in the dispute over the development obligation.[16] The Miesches contend that under the Lease, Exxon was required to develop the tract fully by not only drilling and completing in each zone an oil well for every twenty acres and a gas well for every 160 acres, but also developing the oil and gas to realize the full value from each well in each horizon. They acknowledge that under Article 36, Exxon had a right to abandon the Lease, but contend it could do so only after producing the "full value" of oil and gas available in the O'Connor Field.[17]

At trial, the Miesches' expert, Hite, opined that Exxon should have drilled or reworked an additional fifteen wells in the FS75 zone and additional wells in the H12 zone to fully develop those

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[16] On initial rehearing, an amicus curiae brief by Professor Jacqueline Weaver of the University of Houston Law Center argued that we should determine Exxon's obligations by searching the entire oil and gas Lease. Certainly, the parties' obligations to each other concerning oil and gas operations in the O'Connor Field are determined by all 43 articles in the 26 pages of the Lease. However, on appeal, we address only those issues properly brought before us. The Miesches have not mentioned, much less argued, in this Court any articles in the Lease other than 3, 4 and 36 prior to rehearing. They argue Articles 3 and 4 in a few sentences in their brief and mention Article 36 in a footnote. Rather than attempt to predict which issues in a contract the parties should pursue, our analysis is limited to the issues they raise.

[17] We need not address this contention under Article 36 as surrendering the Lease does not relieve Exxon of its obligations under Article 3.

zones. Although he acknowledged that Exxon would have had to commit an additional $2 million to continue producing from the Field, he opined that wells in those two zones would have produced oil and gas in paying quantities for an additional eight years after the Field was abandoned in 1991. However, in this Court, the royalty owners acknowledge that Exxon complied with the spacing requirements of Article 3 of the Lease—to complete at least one well in every zone for each twenty acres for oil and one well completed in every zone for each 160 acres for gas—and do not argue that Exxon had a duty to drill additional wells in the Field. Likewise, the Miesches do not argue that Exxon had a duty to drill additional wells in the H12 or FS75 zones.

They take the position in this Court that Exxon breached the Lease by failing to produce all the oil and gas in horizons H12 and FS75 that was available in paying quantities from existing wells. Hite's charts of the production from the wells in the O'Connor Lease were admitted at trial. The charts show that Exxon drilled at least one well in each zone and produced 3,651,850 cubic feet of gas and 78,746 barrels of oil in zone FS75 and 1,728,728 cubic feet of gas and 3,933 barrels of oil in zone H12. Hite agreed that Exxon drilled at least one well in FS75 and at least one well in H12 and both wells produced in paying quantities in each zone.[18]

The Miesches argue that Exxon "did not complete every well in the H12 and FS75 zones." They also contend that the Article 3 duty to "complete" the wells required Exxon to produce all oil and gas in zones H12 and FS75 available in paying quantities. The Miesches equate "complete"

[18] Notwithstanding this testimony from their expert, the royalty owners argue that the "records reflected that Exxon had not produced from the only two wells completed in the H12 zone."

with the Article 3(a) duty to "fully develop" and define "fully develop" as fully realizing all oil and gas available in paying quantities in each zone per the specified acreage.

The royalty owners' analysis of Articles 3 and 4 of the Lease contradict its express terms and do not harmonize the terms in those Articles. As we noted, Article 3(a) of the Lease expressly provides that the duty to fully develop is satisfied by only drilling one well in each zone per the designated acreage and preparing it for production, even in the unlikely event that no production occurs. That obligation is less onerous than producing all oil and gas available in paying quantities from the wells in the two zones. As a matter of law, Exxon completed wells in zones H12 and FS75 by not only drilling them and preparing them for production, but producing significant quantities of hydrocarbons from those zones, according to Hite's numbers.

There is a difference between Article 3's obligation to fully develop the tracts and Article 4's obligation to realize the full value of the tracts. Fulfilling the duty in Article 3 to complete a well in each horizon would not satisfy Article 4. The former duty arises from the development clauses in Article 3. The royalty owners do not contend that Exxon had a duty to drill more wells, and likewise do not contend in this Court that the wells completed should have pierced additional zones in the Field. They concede that zones H12 and FS75 were pierced by wells Exxon drilled but contend that the zones were not sufficiently worked to realize their full value. They contend that Article 4's requirement to realize the "full value" of operations is incorporated into the general development obligation of Article 3, even though "fully developed" is the development duty specifically defined later in Article 3. Article 4 does not include this sentence in the definition of "diligence"; it defines "diligence" in the first sentence. The Miesches position would mean that

"fully developed" means one thing in the general development obligation of Article 3(a) and something different in a latter paragraph of Article 3(a), which defines "fully develop" as drilling and completing at least one well in each zone on specified acreage for oil or gas production. There is no reference in Article 3 to an obligation to realize the full value of available hydrocarbons. To bridge that gap, the Miesches argue that "completing" a well, a term in the specific development obligation in Article 3(a), means realizing its full value per Article 4. But the Lease does not define completion of a well, and nothing in Articles 3 or 4 indicates that completion means to realize the full value, or all hydrocarbons available in paying quantities of each zone for the specified acreage. And the second sentence of Article 4 does not state that it is part of the definition of "diligently" or that it defines "completed" wells.[19]

Hence, under one interpretation of the Lease, we are confronted with two different duties, both expressly set forth in the Lease and one contradictory to the other.[20] Where an ambiguity has not been raised by the parties, the interpretation of a contract is a question of law. *Seagull Energy E&P, Inc. v. Eland Energy, Inc*., 207 S.W.3d 342, 345 (Tex. 2006). The duty to fully develop in Article 3(a) is less onerous and is inconsistent with a duty to fully develop as defined by the Miesches in Article 4. We attempt to harmonize these provisions while giving effect to both. If the second sentence of Article 4 is the preeminent duty, it would vitiate the definition of "fully develop"

[19] Amicus Professor Weaver also concludes that Article 4 is an express covenant that "is separate and apart from any development obligations in Article 3."

[20] No party argues that the Lease is ambiguous. The trial judge inquired of the parties on more than one occasion whether the Lease terms are ambiguous. The parties maintained that they are not. However, at least one amicus brief acknowledges that the provisions of Articles 3 and 4 are not entirely consistent. Notwithstanding this, royalty owners contend the Court should give effect to the "full value" language in Article 4 but should not enforce the definition of "fully develop" in Article 3.

in Article 3(a). *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005) (holding that courts should harmonize the provisions of a contract such that none are rendered meaningless). Article 3 provides the definition of this duty. It expressly defines "fully develop" and states that the tracts of land "shall be deemed fully developed *within the intent of the preceding paragraph*." (Emphasis added). The preceding paragraph is the general development obligation that introduced the term "fully develop" in the Lease; the second paragraph in Article 3(a) defines "fully develop." Article 3(a) is more specific than Article 4 in addressing the development obligations in the Lease. *See Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133–34 (Tex. 1994) (noting that a specific contractual provision controls over the general provision concerning the same issue); *Southland Royalty Co. v. Pan Am. Petroleum Corp*., 378 S.W.2d 50, 57–58 (Tex. 1964) (holding specific provision for payment of gas royalty controls over a less specific provision).

The second sentence of Article 4 includes aspirational terminology that Exxon operate in accordance with the best practices of the industry "to the end" and that the full value of the Lease be "ascertained, conserved and realized." Article 3(a)'s development language is mandatory.

Clearly the extent of the duty to develop was defined by the parties in Article 3. Holding that Article 4 trumps this defined duty would render meaningless Article 3(a)'s specifically defined obligation to "fully develop" and potentially eliminate the spacing requirements for wells drilled in the Lease and require more wells (subject to applicable Railroad Commission regulations) to fully realize the mineral horizons. Where the Lease expressly defines the duty, we will not impose a more stringent obligation unless it is clear that the parties intended to warrant production beyond that defined obligation. *See Barrett*, 550 S.W.2d at 142. This reading of the Lease harmonizes and gives

effect to both articles. We conclude that the parties' expressed intent was to define in Article 3(a) the duty of the operator to develop the O'Connor Field. The aspirational language in Article 4 informs the duties in Article 3 such that they should be performed in accordance with the best practices of the industry with the goal of fully developing the tracts.

4. Evidence of Fulfillment of Development Duty

Having ascertained the scope of Exxon's development obligations, we now turn to Exxon's argument that the evidence is legally insufficient to support the breach of lease claim. Because Exxon is attacking the legal sufficiency of the evidence supporting an adverse finding on an issue for which it did not have the burden of proof, Exxon must show that no evidence supports the jury's adverse finding. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). Evidence is legally sufficient if it "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller*, 168 S.W.3d at 827. We "credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Id.*

Hite testified that "fully developed" means there are a "sufficient number of wells in it to get the reserves." And when asked whether Exxon completed "in the FS75 and the H12, in every well, that Exxon had good probability of producing oil and gas in those two zones," he answered "[n]o, they didn't." However, when asked whether "drilling the H12 and completing it in two wells complete[d] that zone in the wells on this tract that would penetrate that zone in paying quantities," he answered "[i]f your question is, did the two wells fully develop the lease, the answer is no." Asked whether the wells Emerald completed in FS75 were "completed in a fully-developed manner," he answered "[n]o, it was not." Hite opined that Exxon violated the Lease by not producing more

extensively, or exhausting the production, from the wells in zones H12 and FS75. He testified that zones H12 and FS75 had remaining reserve potential and that Exxon had information indicating they "could have been developed further."

Hite's stated assumption for his opinions is that "fully develop" meant to fully exploit the reserves in zones H12 and FS75. As we explained, the duty undertaken under the language of the development clause is to fully develop, not fully exploit the zones. Under the contractual standard in the Lease, the evidence does not support Hite's conclusions. Hite's charts of the production from the wells in the O'Connor Lease, admitted at trial, show that Exxon drilled at least one well in each zone and produced 3,651,850 cubic feet of gas and 78,746 barrels of oil in zone FS75 and 1,728,728 cubic feet of gas and 3,933 barrels of oil in zone H12. The royalty owners submitted evidence establishing that Exxon drilled at least one well in both zones FS75 and H12 and both wells produced in paying quantities. They also conceded that the well spacing requirements were met. Evidence that further development potential existed when Exxon abandoned the leasehold in 1991 is no evidence that Exxon failed to comply with the parties' obligations embodied in the development clause. And evidence that Exxon did not fully exploit the reserves in FS75 and H12 is no evidence that Exxon did not "drill and complete" the requisite number of wells for zones FS75 and H12. The evidence establishes that Exxon completed at least one well capable of producing in paying quantities in each zone for every twenty acres for oil and every 160 acres for gas. Therefore,

we reverse the court of appeals' judgment and render judgment in favor of Exxon on the royalty owners' breach of lease claim.[21]

C. Fraud

Unlike most of Emerald's and the royalty owners' other claims, which have a two-year statute of limitations, the statute of limitations for fraud is four years. TEX. CIV. PRAC. & REM. CODE § 16.004(a)(4). The statute of limitations for fraud begins to run from the time the party knew of the misrepresentation. *Little v. Smith*, 943 S.W.2d 414, 420 (Tex. 1997) ("[T]he statute does not begin to run until the claimant knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the wrongful act.).

Emerald claims that Exxon committed fraud by filing plugging reports (W-3s) with the Railroad Commission that deliberately misrepresented that it properly plugged the wells when it did not. That conduct allegedly caused Emerald increased costs to re-enter wells and made re-entry of some wells impossible resulting in loss of revenues. At trial, the royalty owners asserted fraud both for filing false W-3s and misrepresenting the remaining reserves in the O'Connor Field. At the court of appeals, having recovered on other claims, the Miesches conditionally appealed the trial court's fraud judgment but only on the issue of the remaining reserves.

The trial court granted Exxon's motion for directed verdict on both Emerald's and the Miesches' fraud claims, therefore, there was no fact finding identifying the dates that Emerald

[21] Because we conclude no evidence supports the royalty owners' breach of lease claim, we need not reach the issue of whether the claim is time-barred or whether the doctrine of fraudulent concealment tolls the statute of limitations. *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 n.1 (Tex. 1990) (noting that the doctrine of fraudulent concealment estops a defendant who conceals the existence of a cause of action from asserting the statute of limitations as an affirmative defense).

learned of alleged false plugging reports or that Exxon allegedly misrepresented the reserves to the royalty owners. However, Emerald notes that "the first place subsequent operators turn is to those very filings at the Railroad Commission when deciding whether redevelopment can be economically undertaken." Lynch testified that Emerald reviewed the W-3s for the Field. The June 1994 letter states that Emerald encountered cut casing in the wells on the O'Connor Lease in 1993 and junk in the well prior to June 1994. Thus, Emerald may have learned about the asserted misrepresentations on or around that date. Based on either of these dates, the fraud claim filed by Emerald would be timely, and therefore, we reach the merits of Emerald's fraud claim.[22]

1. Emerald's Fraud Claim

The court of appeals reversed the trial court's directed verdict on Emerald's fraud claim, holding that the jury should have been allowed to consider whether the evidence was sufficient to establish fraud. It asserted that the evidence did not conclusively disprove the intent-to-induce reliance element of the fraud claim. In reviewing a trial court's directed verdict, we examine the evidence in the light most favorable to the person suffering an adverse judgment and decide whether there is any evidence of probative value to raise an issue of material fact on the question presented. *Henderson v. Travelers Ins. Co.*, 544 S.W.2d 649, 650 (Tex. 1976). We do not hold that public filings, such as Railroad Commission reports, alone satisfy the intent-to-induce reliance element of fraud. We conclude there was some evidence presented at trial tending to show that Exxon knew, at the time it filed the plugging reports, of an especial likelihood that the identified future operators

[22] This opinion does not preclude the parties on remand from seeking to establish the date on which Emerald learned of the alleged misrepresentations.

would rely on the inaccurate plugging reports. We, therefore, agree with the court of appeals on this issue.

A plaintiff seeking to prevail on a fraud claim must prove that (1) the defendant made a material misrepresentation; (2) the defendant knew the representation was false or made the representation recklessly without any knowledge of its truth; (3) the defendant made the representation with the intent that the other party would act on that representation or intended to induce the party's reliance on the representation; and (4) the plaintiff suffered an injury by actively and justifiably relying on that representation. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983).

Emerald claims that Exxon committed fraud by misrepresenting material information in its plugging reports to the Railroad Commission with the intent that known lessees and lessors of such mineral interests would rely on the information in the future. Emerald claims, as a result of its reliance, that it is entitled to damages measured by "the value of lost wells and minerals, the additional costs of reentering those wells that were improperly plugged, [and] the increased risk of loss of producing zones and wells due to improper plugging." The court of appeals held that evidence that Exxon knew that unidentified, subsequent lessees and operators might rely on Railroad Commission filings to make business decisions was sufficient to satisfy the intent-to-induce reliance element of fraud. 180 S.W.3d at 337. Exxon argues that the court of appeals' decision is erroneous for two reasons. First, Exxon argues there is no evidence that future operators would rely on the plugging reports because the reports' only purpose is to allow the state to protect against pollution. Second, Exxon argues that Emerald's approach reduces the intent-to-induce reliance element of

fraud to mere foreseeability, counter to the Court's analysis in *Ernst & Young, L.L.P. v. Pacific Mutual Life Insurance Co.*, 51 S.W.3d 573, 580 (Tex. 2001).

We begin with the duty to plug wells. "Proper plugging is the responsibility of the operator of the well." 7 Tex. Reg. 3991 (1982) (16 TEX. ADMIN. CODE § 3.14(c)(1)), *amended by* 23 Tex. Reg. 9304 (1998) (current version at 16 TEX. ADMIN. CODE § 3.14(c)(1) (R.R. Comm'n of Tex., Plugging)). The Railroad Commission mandates:

> Non-drillable material that would hamper or prevent re-entry of a well shall not be placed in any wellbore during plugging operations . . . . Pipe and unretrievable junk shall not be cemented in the hole during plugging operations without prior approval by the district director or the director's delegate.

16 TEX. ADMIN. CODE § 3.14(d)(10) (R.R. Comm'n of Tex., Plugging). Exxon argues that this section and similar plugging requirements are not intended to benefit future operators, but only to protect the environment. Thus, Exxon argues, no evidence supports Emerald's argument that there was an especial likelihood that Exxon knew future operators would rely on the reports because that is not the reports' purpose.

Although the Railroad Commission explained that it revised section 3.14 "to protect fresh water in the state from pollution," the plugging reports are not limited to this purpose. 7 Tex. Reg. at 3989. One of the objectives of the plugging regulations is to prevent plugging of wells that hinder or prevent re-entering wells, which could be desired by the same or subsequent owners or operators. *Id.* To police this regulation, the Commission requires that the W-3 plugging reports be verified under oath, be filed within thirty days after the plugging is completed, and disclose the methods used to plug a well. *Id.* at 3991. Thus, the purpose of requiring operators to file plugging reports with

the Commission is to ensure that operators follow a plugging procedure that not only prevents pollution, but also allows re-entry into the wells for commercial purposes.

However, the mere fact that subsequent lessees might or should rely on statements in Exxon's plugging reports alone is not sufficient to establish an intent to induce reliance, as the court of appeals held and as Emerald argues. *Ernst & Young*, 51 S.W.3d at 580. In *Ernst & Young*, we considered the proof necessary to establish the intent-to-induce reliance element of a fraud claim. Although we declined to decide whether to adopt the reason-to-expect standard outlined in section 531 of the Restatement (Second) of Torts, we concluded that this standard is consistent with Texas fraud jurisprudence. *Id.* Section 531 provides:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

RESTATEMENT (SECOND) OF TORTS § 531 (1977). Like the defendants in *Ernst & Young*, Exxon argues that this approach reduces the intent-to-induce element to a foreseeability standard. We rejected that argument in *Ernst & Young*, holding that section 531's "reason-to-expect standard requires more than mere foreseeability; the claimant's reliance must be 'especially likely' and justifiable, and the transaction sued upon must be the type the defendant contemplated." *Ernst & Young*, 51 S.W.3d at 580; *see also Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 922 (Tex. 2010) (quoting *Ernst & Young*, 51 S.W.3d at 575). Evidence that reliance on false public information as part of a general industry practice is insufficient, as a matter of law, to prove an intent to induce reliance. *See Ernst & Young* at 581–82. Even an obvious risk that a

misrepresentation might be repeated to a third party is not sufficient to satisfy the reason-to-expect standard. A plaintiff must show that "[t]he maker of the misrepresentation [has] information that would lead a reasonable man to conclude that there is an especial likelihood that it will reach those persons and will influence their conduct." RESTATEMENT (SECOND) OF TORTS § 531 cmt. d (1977), *quoted in Ernst & Young*, 51 S.W.3d at 581. The standard is not met if a defendant merely foresees that some party may rely on statements made in a public filing.

Therefore, if the evidence shows only that Exxon made material misrepresentations in its plugging reports to the Railroad Commission and knew that lessors and operators in the future may rely on the filings, such evidence would fail as a matter of law under the *Ernst & Young* standard. *See Ernst & Young*, 51 S.W.3d at 581–82. Such a holding would open the cause of action to any person who subsequently relied on any public filings—including stocks and bonds, security interests, real property deeds, and tax filings—with few limits in sight. The intent-to-induce reliance element of fraud is a focused inquiry, more akin to a rifle shot than a shotgun blast. Intent-to-induce reliance is not satisfied by evidence that a misrepresentation may be read in the future by some unknown member of the public or of a specific industry.

Here, however, there is some evidence that Exxon knew of an especial likelihood that Emerald specifically would rely on the plugging reports in a transaction being considered at the time it filed the plugging reports. In 1990, Exxon concluded that it could no longer profitably operate the leases unless Exxon's royalty obligation could be renegotiated. The negotiations failed, and Exxon abandoned the field, plugging the last well in the O'Connor Lease in 1991. In their letter of September 12, 1990 to Exxon, the royalty owners stated, "[W]e have located a group of oil and gas

companies that are willing to accept the plugging obligations and an Assignment of the above referenced [six] wells [and certain acreage around each well]." They also offered their consent to assign all of Exxon's right, title, and interest in the leases to several companies and indicated their interest in future oil and gas operations in the Lease.

In 1989, "Pace Production Company" expressed that it was "most anxious to proceed" with production in the O'Connor Lease and offered to purchase Exxon's interest. It renewed its offer in January 1990. By letter of July 23, 1990, Exxon advised each of the royalty owners that "Pace Production Company" had expressed an interest in the Lease. On May 25, 1993, Pace West Production acquired the interests to develop the Lease from the royalty owners.

Exxon knew the royalty owners had a continuing interest in further developing the O'Connor Lease, received offers from the putative subsequent lessee to purchase Exxon's interest in the Lease, and knew the transaction proposed by the Miesches and Emerald's predecessors was the continued production of oil and gas in a portion of the Lease. Exxon argues that the company that made an offer on the Miesches' oil and gas interests was "Pace Production Company," which is a different company from Emerald's alleged predecessor "Pace West Production." Therefore, it contends the trial court properly granted its motion for directed verdict. In reviewing a directed verdict, we decide whether there is any evidence of probative value to raise an issue of material fact on the question presented, and we review the evidence in the light most favorable to the person suffering the adverse judgment. *Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681, 684 (Tex. 2004) (citation omitted); *Henderson v. Travelers Ins. Co.*, 544 S.W.2d 649, 650 (Tex. 1976) (citations omitted). In this case, the presence of some evidence of any entity other than "Pace West Production" as the

predecessor to Emerald will defeat the directed verdict. We searched the record to answer this question.

Exxon's correspondence in 1989 and 1990 concerning the sale of its lease in the O'Connor Field called the entity that expressed interest in purchasing the Lease "Pace Oil & Gas Company," "Pace Petroleum Company," and "Pace Production Company." T. Michael O'Connor, one of the royalty owners, testified that he could not distinguish between "Pace and Pace West." At the relevant time concerning the fraud claim, there is evidence that the parties involved—Exxon and the royalty owners—used at least five names, at times interchangeably, for the entity that was interested in purchasing the O'Connor lease from Exxon. A May 25, 1993 "Agreement for Waivers" between Emerald and the royalty owners states that Emerald was the successor to two different Pace West entities as it was "formerly known as Pace West Production, L.C., and also formerly known as Pace West Production, Ltd." An undated "Memorandum of Amended Oil and Gas Lease and Security Agreement" states that Emerald was formerly known as "Pace West Production, L.C." and also as "Pace West Production, Ltd." Exxon contends that "Pace West" is a different entity from "Pace Production Company," but, as noted, T. Michael O'Connor testified that he could not distinguish between "Pace and Pace West." Although Exxon points out, in its second motion for rehearing, that there is evidence that "Pace West Production, L.C." was not created until 1993, after the time the alleged misrepresentations were made, that does not address the evidence that Emerald was also

formerly known as the different entity, "Pace West Production, Ltd." In sum, the evidence raises a fact issue and precludes granting a directed verdict on the issue.[23]

Thus, legally sufficient evidence in the record supports the claim that Exxon had information that would lead a reasonable person to conclude there was an especial likelihood Emerald would rely on Exxon's allegedly inaccurate filings with the Railroad Commission. The question of whether the W-3s are inaccurate is not before us and we do not decide it. We hold that the trial court erred in granting a directed verdict on Emerald's fraud claim on the ground that there was no evidence of the intent-to-induce element of the claim. Accordingly, the trial court's grant of directed verdict on the fraud claim on this basis was in error.[24]

2. Royalty Owners' Remaining Claims

At the court of appeals, the royalty owners defended the trial court's judgment in their favor on the waste and breach of lease claims and conditionally challenged the trial court's directed verdict on their claims for negligence, negligence per se, negligent misrepresentation, tortious interference with economic opportunity, breach of regulatory duty to plug wells properly, and fraud in allegedly making misrepresentations of the remaining reserves in the O'Connor Field. They asserted that their fraud claims are not precluded by the Lease and are supported by the evidence. The court of appeals

[23] We decide that there is legally sufficient evidence contrary to Exxon's factual position; therefore, it was error for the trial court to grant the directed verdict. We do not suggest that the parties cannot clarify this factual question before the trial court in future proceedings.

[24] Emerald claims that it is entitled to damages that include profit on lost mineral production due to the alleged fraud. Because this issue was not presented to this Court, we need not address it. However, we note that the "measure of damages in a fraud case is the actual amount of the plaintiff's loss that directly and proximately results from the defendant's fraudulent conduct." *Tilton v. Marshall*, 925 S.W.2d 672, 680 (Tex. 1996).

upheld the trial court's judgment in their favor and did not address the claims the royalty owners conditionally challenged. The royalty owners briefed the claims conditionally appealed to the court of appeals, but did not address those claims before this Court. They did, however, identify the unbriefed issues. We therefore remand those issues to the court of appeals.

III. CONCLUSION

We hold the royalty owners' statutory and common law waste claims, and Emerald's negligent misrepresentation and tortious interference claims are time-barred and reverse and render judgment for Exxon with respect to those claims. We also hold that the evidence conclusively establishes that Exxon satisfied its duty to develop the Field and reverse and render judgment for Exxon with respect to the breach of Lease claim. We affirm the court of appeals' judgment, for different reasons, reversing the trial court's directed verdict in favor of Exxon on Emerald's fraud claim. Finally, we remand the case to the court of appeals (1) to consider the royalty owners' claims for fraud, negligence, negligent misrepresentation, negligence per se, tortious interference with economic opportunity, and breach of regulatory duty to plug wells properly, and (2) to remand Emerald's fraud claim to the trial court for further proceedings.

_____

Dale Wainwright
Justice

OPINION DELIVERED: April 1, 2011

IN THE SUPREME COURT OF TEXAS

No. 06-0243

SOLAR APPLICATIONS ENGINEERING, INC., PETITIONER,

v.

T.A. OPERATING CORPORATION, RESPONDENT

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

Argued October 16, 2007

JUSTICE WAINWRIGHT delivered the opinion of the Court.

JUSTICE GREEN did not participate in the decision.

In this case, a general contractor and an owner dispute performance and final payment under a construction contract.[1] Solar Applications Engineering, Inc. d/b/a Wade Construction (Solar), the general contractor, and T.A. Operating Corporation d/b/a TravelCenters of America (TA), the owner, entered a contract to build a truck stop in San Antonio, Texas. After Solar substantially completed the project, disputes arose regarding the completion of certain remaining work and the attachment of liens on the property by subcontractors and Solar. TA eventually terminated the contract and refused to make final payment to Solar. Solar sued TA for breach of contract to recover the contract balance, and TA counterclaimed for delay and defective work. At trial, the court's jury charge

[1] We also received an amicus brief from the American Subcontractors Association, Inc.

focused primarily on damages. The verdict substantially favored Solar, with the jury awarding actual damages of $400,000 offset by $8,000 in defects and omissions.

On appeal, TA argued that because Solar did not provide a lien-release affidavit, which TA argues was a condition precedent to final payment under the contract, Solar cannot recover for breach of contract. On rehearing, the court of appeals reversed the trial court's judgment, holding that the lien release provision was a condition precedent and that Solar failed to prove it complied with the lien-release provision. It rendered a take-nothing judgment in favor of TA.[2]

The issue before this Court is whether the lien-release provision is a condition precedent to Solar's recovery for breach of contract and whether failure to provide it is a bar to recovery. TA reasonably argues that an owner who has paid the contract amount to the general contractor is entitled to a building free of subcontractor's liens. Solar contends, also reasonably, that it is entitled to the balance remaining under the contract for completing the project offset by the cost to remedy defects and omissions. Under normal circumstances, Solar might have provided a conditional lien-release affidavit to allow Solar to fulfill its obligation under the contract, to allow TA to be assured that it will not be double-billed for work on the project, and to allow the parties to resolve their dispute regarding the scope of the work. But the standard operating procedure broke down here, and the court of appeals ultimately ruled that TA was entitled to a windfall, even though the issue of breach or satisfaction of conditions precedent was not tried to the jury.

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[2] At the trial court and the court of appeals, TA also argued that Solar owed it $431,415.91, from damages due to delay, experts, other costs, subcontractor liens, and attorney's fees and that the trial court should have submitted a fraud instruction to the jury. The court of appeals affirmed the trial court's judgment on the damage calculation of the defects, whether the delay was excused by TA, and whether the trial court erred in refusing to submit a fraud instruction. These issues were not appealed by TA and are not before us.

We hold that the lien-release provision is a covenant, not a condition precedent to Solar's recovery on the contract. We reverse the judgment of the court of appeals, reinstate the trial court's judgment, and remand to the trial court for further proceedings consistent with this opinion.

I. BACKGROUND

TA entered into a contract with Solar to construct, for approximately $4 million, a retail building for use as a truck stop, restaurant, and convenience store. The contract between Solar and TA contemplates a specific sequence of events leading up to completion and final payment that is common in construction contracts. This procedure is consistent with a statutory scheme that provides contractors and builders with lien rights to secure payment for labor, but also gives owners the right to retain a percentage of the contract balance to satisfy any outstanding liens on the project if necessary.

The contractual sequence for the truck stop project is as follows: The parties agree on a construction schedule and then Solar begins work according to the schedule. On application for payment by Solar, TA is required to provide monthly progress payments. When Solar believes the construction project ready for its intended use, that it is "substantially complete," it so notifies TA. After an inspection, if TA agrees that the project is substantially complete, TA issues a "certificate of Substantial Completion" and attaches a list of items, referred to as the "punch list," to be completed or corrected before final payment.[3] Next, upon written notice from Solar that the punch

[3] Section 14.04(A) of the contract entitled "*Substantial Completion*" provides:

> When [Solar] considers the entire Work ready for its intended use [Solar] shall notify [TA] in writing that the entire Work is substantially complete . . . . [TA] [sic] will prepare and deliver to [TA] a tentative certificate of Substantial Completion which shall set the date of

list is done and the project is complete, TA conducts a final inspection with Solar to identify any deficiencies, and Solar remedies those deficiencies.[4] After Solar corrects the identified deficiencies, it may submit a "final Application for Payment" that is accompanied by complete and legally effective releases or waivers of all lien rights ("lien-release affidavit").[5]

In this case, the parties agree that the project was substantially complete in August 2000. A few weeks later, TA presented Solar with a punch list, but disputes arose over the remaining items that needed to be completed before final payment. Solar then filed a lien against the project for $472,393, and subcontractors also filed liens against the property. TA terminated Solar pursuant to the contract's "for cause" termination provision contending that, among other things, Solar had failed to keep the project lien-free and failed to complete the punch list.[6] The termination letter also

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> Substantial Completion. There shall be attached to the certificate a tentative list of items to be completed or corrected before final payment.

[4] Section 14.06 of the contract entitled "*Final Inspection*" provides:

> Upon written notice from [Solar] that the entire Work . . . is complete, [TA] will promptly make a final inspection with [Solar] and will notify [Solar] in writing of all particulars in which this inspection reveals that the Work is incomplete or defective. [Solar] shall immediately take such measures as are necessary to complete such Work or remedy such deficiencies.

[5] Section 14.07(A)(2) of the contract entitled "*Application for Payment*" provides:

> The final Application for Payment shall be accompanied (except as previously delivered) by: (i) all documentation called for in the Contract Documents, including but not limited to the evidence of insurance; (ii) consent of the surety, if any, to final payment; and (iii) complete and legally effective releases or waivers (satisfactory to [TA]) of all Lien rights arising out of or Liens filed in connection with the Work.

[6] Section 15.02 of the contract entitled "*OWNER May Terminate for Cause*" provides:

> A. The occurrence of any one or more of the following events will justify termination for cause . . . 4. [SOLAR's] violation in any substantial way of any provisions of the Contract Documents.

notified Solar that TA was asserting claims for $736,800.15 against Solar for its failure to complete the construction project on time. The day after TA terminated the contract, Solar provided TA with an "Application and Certificate for Payment" for $472,149, the amount Solar believed to be the remaining contract balance. TA refused to make payment, contending Solar had not complied with the lien-release provision by failing to submit a lien-release affidavit. TA contended it had no obligation to make final payment on a building with outstanding construction liens. Solar then sued TA for breach of contract under the theory of substantial performance for the unpaid balance of the contract, and TA counterclaimed for alleged delays and defective work.

By the time of trial, subcontractors filed $246,627 in liens against the project. The trial court severed the subcontractors' claims and ordered that any sums recovered by Solar, other than attorney's fees, would be held in trust for the benefit of the subcontractors' claims. The jury found in favor of Solar, and the trial court entered a judgment on the verdict in favor of Solar, awarding $392,000 in damages, which represented the balance due under the contract less an $8,000 offset to remedy all remaining "punch list" defects and omissions found by the jury.

TA appealed, and the court of appeals initially affirmed the trial court's judgment. On rehearing, however, the court of appeals reversed and rendered judgment that Solar take nothing. The court of appeals assumed that the lien-release provision was a condition precedent and held that the doctrine of substantial performance did not excuse Solar's failure to provide a lien-release affidavit, and thus Solar forfeited final payment under the contract. 191 S.W.3d 173, 180–81 (Tex. App.–San Antonio 2005, pet. granted). Solar petitioned this Court, complaining that the court of appeals erred because: (1) the lien-release provision was not triggered; (2) the lien-release provision

is not a condition precedent; and (3) even if the lien-release provision is a condition precedent and was triggered, the court of appeals' decision results in a forfeiture of Solar's right to recover under the contract instead of delaying payment until the liens are released, which is inconsistent with the doctrine of substantial performance and the purpose of statutory lien rights. We granted Solar's petition.

II. LAW AND ANALYSIS

Whether Solar is barred from receiving the contract balance depends on whether the lien-release provision is a condition precedent to Solar's recovery for breach of contract. "A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992) (citations omitted); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981) ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."); *id.* § 225 (noting the effects of the non-occurrence of a condition). A covenant, as distinguished from a condition precedent, is an agreement to act or refrain from acting in a certain way. *Reinert v. Lawson*, 113 S.W.2d 293, 294 (Tex. Civ. App.—Waco 1938, no writ). Breach of a covenant may give rise to a cause of action for damages, but does not affect the enforceability of the remaining provisions of the contract unless the breach is a material or total breach. *E.g.*, *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692–94 (Tex. 1994); RESTATEMENT (SECOND) OF CONTRACTS §§ 236 cmt. a, 241, 242 cmt. a. Conversely, if an express condition is not satisfied, then the party whose performance is conditioned is excused from any obligation to perform. *See Dalton*, 840 S.W.2d at 956; RESTATEMENT (SECOND) OF CONTRACTS § 225.

Solar claims that the court of appeals erred in concluding that the lien-release provision is a condition precedent because it lacks conditional language normally associated with express conditions. *See Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990). When the lien-release provision is read in context, Solar contends it constitutes a "hoop" or step that the general contractor must follow in order to collect final payment, not a condition precedent to sue and recover under the contract. Because a different and reasonable interpretation of the contract is possible, Solar argues the Court should construe the provision to prevent a forfeiture. *See id.* Further, the lien-release provision should not be applied as a condition precedent because its purpose—to protect TA from the possibility of having to pay twice—was accomplished by the trial court's severance of the subcontractors' claims against the project and order that the sums awarded to Solar be held in trust to pay outstanding sub-contractor liens.

TA responds that the court of appeals correctly held Solar was not entitled to the contract balance because it did not show that it complied with an express condition precedent to final payment. Section 53.085 of the Texas Property Code specifically authorizes an owner to require a lien-release affidavit as a condition of final payment. *See* TEX. PROP. CODE § 53.085(a), (c)(1).[7]

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[7] Section 53.085 provides:

> Any person who furnishes labor or materials for the construction of improvements on real property shall, if requested and as a condition of payment for such labor or materials, provide to the requesting party, or the party's agent, an affidavit stating that the person has paid each of the person's subcontractors, laborers, or materialmen in full for all labor and materials provided to the person for the construction. . . . The affidavit may include . . . a waiver or release of lien rights by the affiant that is conditioned on the receipt of actual payment or collection of funds when payment is made by check or draft.

TEX. PROP. CODE § 53.085(a), (c)(1).

Consistent with section 53.085, section 14.07(A) of the contract requires that an application for final payment include a lien-release affidavit, and section 14.07(B) provides that TA's obligation to pay the final amount is conditioned on its review of the final application. Contending that the language of the contract is "unmistakable," TA concludes that forfeiture does not excuse Solar's failure to comply with this express condition. *See* RESTATEMENT (SECOND) OF CONTRACTS § 229 cmt. a (1981) ("[I]f the term that requires the occurrence of the event as a condition is expressed in unmistakable language, the possibility of forfeiture will not affect the interpretation of that language."). Being quite candid, TA offered at oral argument that the Legislature may well have intended such a windfall for owners.

"In order to determine whether a condition precedent exists, the intention of the parties must be ascertained; and that can be done only by looking at the entire contract." *Criswell*, 792 S.W.2d at 948 (citing references omitted); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 226. "In order to make performance specifically conditional, a term such as 'if', 'provided that', 'on condition that', or some similar phrase of conditional language must normally be included." *Criswell*, 792 S.W.2d at 948 (citing *Landscape Design v. Harold Thomas Excavating*, 604 S.W.2d 374, 377 (Tex. Civ. App.–Dallas 1980, writ ref'd n.r.e.)). "While there is no requirement that such phrases be utilized, their absence is probative of the parties intention that a promise be made, rather than a condition imposed." *Id.* (citing *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976)). When no conditional language is used and another reasonable interpretation of the contract is possible, "the terms will be construed as a covenant in order to prevent a forfeiture." *Id.*

Section14.07(A) of the contract states:

> 1. After [Solar] has, satisfactorily completed all corrections identified during the final inspection and has delivered . . . [pertinent] documents, [Solar] may make application for final payment following the procedure for progress payments.
>
> . . .
>
> 2. The final Application for Payment shall be accompanied (except as previously delivered) by: (i) all documentation called for in the Contract Documents, including but not limited to the evidence of insurance; (ii) consent of the surety, if any, to final payment; and (iii) complete and legally effective releases or waivers (satisfactory to [TA]) of all Lien rights arising out of or Liens filed in connection with the Work.

The operative language, that Solar will provide "complete and legally effective releases or waivers . . . of all Lien rights" does not contain language that is traditionally associated with a condition precedent. The language preceding the lien-release provision does not make performance conditional. In the absence of any conditional language, a reasonable reading of the lien-release provision is that it is a promise or covenant by Solar to provide a lien-release affidavit in exchange for receiving final payment. This interpretation avoids forfeiture and completes the contract: Solar is paid for the work it completed, and TA receives an unencumbered building. TA correctly noted in its motion for rehearing at the court of appeals that Solar's breach results in "a delay in payment to Solar until the liens are released." The court of appeals' contrary interpretation results in a forfeiture to Solar and a windfall to TA. *Cf. Criswell*, 792 S.W.2d at 948; RESTATEMENT (SECOND) OF CONTRACTS § 227, cmt. d (1981) (Section 227(2) favors "an interpretation that . . . avoids the harsh results that might otherwise result from the non-occurrence of a condition and still gives adequate protection to the obligor.").

TA alleges that key language in section 14.07(B) creates the condition precedent. That section states:

> If, on the basis of [TA's] observation of the Work during construction and final inspection, and [TA's] review of the final Application for Payment and accompanying documentation as required by the Contract Documents, [TA] is satisfied that the Work has been completed and [SOLAR's] other obligations under the Contract Documents have been fulfilled, [TA] will, within ten days after receipt of the final Application for Payment, indicate in writing [TA's] recommendation of payment and present the Application for Payment for payment. At the same time [TA] will also given written notice to [SOLAR] that the Work is acceptable . . . . Otherwise [TA] will return the Application for Payment to [SOLAR], indicating in writing the reasons for refusing to recommend final payment, in which case [SOLAR] shall make the necessary corrections and resubmit the Application for Payment.

While TA is correct that section 14.07(B) contains the conditional language "if," the section does not create a condition of payment to the lien-release affidavit. Rather, the condition is *if* TA is satisfied with the Work and the Contractual Documents, *then* it will recommend that Solar be paid the retainage. If TA is not satisfied with the work, then Solar "shall make the necessary corrections and resubmit the Application for Payment." Solar's obligation to provide a lien-relase affidavit, and TA's obligation to pay, lie separate and apart from TA's approval of the project. If this condition were allowed to prevent Solar from suing on the contract when a building was substantially complete, then Solar would be beholden to TA to be "satisfied." In other words, if either Solar or TA disagreed with the other party's performance under the document, TA could likely sue Solar, but Solar could not sue to be paid, because TA was not satisfied under the contract.

While the Legislature's statutory scheme for contractor's lien rights provides that the parties may have chosen an alternative path, the overall scheme of the Property Code suggests interpreting

the provision to avoid a forfeiture. The process for final payment common to construction contracts is complemented by statutes that protect contractors and owners in case the contractual process breaks down. First, the Texas Constitution and the Texas Property Code grant a lien in favor of contractors and builders extending to the building on which they have labored. TEX. CONST. art. XVI, § 37;[8] TEX. PROP. CODE §§ 53.001–.260. Thus, if the owner becomes insolvent or refuses to pay, the contractor has recourse to recover the sums owed by foreclosing on the liens on the property. However, the contractor's lien gives contractors unequal leverage over owners and leaves owners vulnerable to insolvent contractors. For instance, if disagreements arise over the quality of the work and the owner threatens to withhold payment to the general contractor absent remedial measures, the general contractor can simply refuse to pay a subcontractor who can then place a lien on the property. Owners do not have similar self-help remedies and must resort to litigation. Similarly, if the owner pays the general contractor the full contractual sum, but the general contractor does not pay a subcontractor, the subcontractor can place a lien on the property. The owner, after already paying the general contractor in full, is forced to pay the subcontractor in order to receive the property lien-free and must again resort to litigation to recover the money already paid to the general contractor, who at this point may be insolvent.

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[8] Article XVI, section 37 of the Texas Constitution provides:

> Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.

TEX. CONST. art. XVI, § 37.

The unequal bargaining positions created by the contractor's lien rights is addressed through the mechanism of "retainage." The Property Code requires that, during the progress of work under a contract for which a contractor's lien may be claimed, the owner shall retain ten percent of the contract price. TEX. PROP. CODE § 53.101. This retainage secures the payment of any contractor or subcontractor who may assert a lien on the property in the event that the general fails to pay them. *Id*. § 53.102. In turn, retainage gives the owner offsetting leverage against the general contractor, whose receipt of the final ten percent of the contract balance is subject to its payment of the subcontractors in full. Thus, the contractor receives leverage over the owner in the form of the contractor's lien, and the owner receives equal leverage over the contractor in the form of the retainage. Both then have the incentive to complete the terms of the deal and the enforcement mechanisms to help ensure payment.[9]

Finally, the Property Code allows the parties to contract for payment of the retainage to the contractor upon the owner's receipt of a lien-release affidavit. *Id*. § 53.085. This contractual mechanism preserves the rights of the parties but avoids the more cumbersome statutory process for retainage release. *See*, *e.g.*, *id*. § 53.106. Essentially, the owner trades the retainage for the contractor's sworn assurance that property is lien-free. An all-bills-paid is different from a lien release, and is generally not enforceable as a condition precedent to final payment. *See Lesikar Consr. Co. v. Acoustex, Inc.*, 509 S.W.2d 877, 880–81 (Tex. Civ. App.—Fort Worth 1974, writ ref'd

[9] Likewise, chapter 56 of the Business and Commerce Code, formerly section 35.521 of the Business and Commerce Code, neither of which is applicable to this case, protects subcontractors by setting circumstances in which contingent payment, or "pay-when-paid" clauses are enforceable. Act of June 16, 2007, 80th Leg. R.S., ch. 498 § 1, 2007 Tex. Gen. Laws 879, *repealed by* Acts 2007, 80th Leg., ch. 885, § 2.47(a)(1), 2007 Tex. Gen. Laws 2086 (current version at TEX. BUS. & COMM. CODE ch. 56).

n.r.e.). However, the parties may agree that, as part of the affidavit, the contractor swears that lien rights are released "conditioned on the receipt of actual payment or collection of funds . . . ." TEX PROP. CODE § 53.085(c)(1). Under peaceful circumstances, the all-bills-paid affidavit accomplishes the statutory goals of the contractor's lien and retainage in a voluntary and efficient manner. The general contractor provides an affidavit and conditional release of lien, stating that when the contractor receives payment, all liens on the property will be released. *Id.*; *see also* THE CONSTRUCTION PROJECT: PHASES, PEOPLE, TERMS, PAPERWORK, PROCESSES § 4.VII.B.5 (Marilyn Klinger & Marianne Susong, eds., 2006) (defining a conditional lien release for subcontractor work). The standoff is resolved; the contractor gets paid (to be distributed to the subcontractors, with whom they have a conditional lien release), and the owner gets its building free of encumbrances.

Nonetheless, TA argues we should hold that the lien release is not only a condition to receive the retainage, but also a condition to fulfillment of Solar's contractual duties and thus entitlement to the contractual balance. Under this reading, Solar effectively waived its statutory and constitutional contractor's lien rights in the contract because it would not be entitled to the contractual balance until it released those rights. That view would have a contractor bargain away any leverage it had under the default rules, as an owner could simply accept the lien release and then refuse to pay, forcing the contractor to sue for the retainage. Holding that these lien-release provisions, common to construction contracts for the reasons outlined above, are conditions precedent to suit on the contract without express conditional language contravenes the lien statutes' goal of allowing the contractor or owner to avoid litigation by foreclosing on their lien or withholding the retainage. Parties are free, of course, to contract out of statutory default rules such

as those established by the lien statutes and may even contractually waive constitutional rights. *See Fort Worth Indep. School Dist. v. City of Fort Worth*, 22 S.W.3d 831, 844 (Tex. 2000) ("A party contractually waives its constitutional or statutory rights by intelligently, voluntarily, and knowingly relinquishing a known right or acting inconsistent with claiming that right.") But there would be little need for TA to bargain *ex ante* for a forfeiture clause in the contract in case Solar refused to provide a lien release. If the situation were to arise in which Solar was unable to assure TA that no liens would be placed on the property, the default rules already give TA the ability to withhold the retainage. A forfeiture clause would be overkill and expensive.

In this case, because both owner and contractor had a dispute over the scope of the work and subcontractors had placed liens on the property, the trial court severed the subcontractors claims. Alternatively, and ideally, Solar could have provided a conditional lien-release affidavit, which, when the trial court determined the amount owed to Solar, would have been effective once TA paid. But even under our interpretation of section 14.07 of the contract, TA will not be saddled with concerns about double-payment. The trial court will determine whether any subcontractor liens are still pending and, if so, TA may seek to discharge the liens, sue Solar for breach of the lien-release provision, or seek indemnification (either through common law or express terms of the parties contracts) from Solar for Solar's failure to pay the subcontractors.

For all of these reasons, absent clear language that a lien release is a condition precedent to a general contractor performing under the contract and receiving the contract balanced owed to it, we interpret the lien-release provision to be a covenant. We recognize that parties are free to contract as they choose, and TA should not be denied the benefit it specifically bargained for in the

lien-release provision. *Cf. Citizens Nat'l Bank in Abilene v. Texas & P. Ry. Co.*, 150 S.W.2d 1003, 1006-07 (Tex. 1941) (declining to apply the lien-release provision because no liens had been filed). The lien-release provision here gives TA the right to sworn assurances that it will receive a lien-free property prior to making final payment. The contract specifies that "complete and legally effect releases or waivers of all Lien rights" will satisfy as such assurance, but also that Solar "may furnish a Bond or other collateral satisfactory to [TA] to indemnify [TA] against any lien." Accordingly, on remand the trial court must determine whether the subcontractors' liens have been satisfied and TA is adequately assured of a lien-free property before reinstating the judgment in favor of Solar for the balance owed under the contract.[10]

III. CONCLUSION

For the foregoing reasons, we reverse the court of appeals' judgment and remand to the trial court for proceedings consistent with this opinion.

_____
Dale Wainwright
Justice

OPINION DELIVERED: December 3, 2010

[10] Evidently, the trial court attempted to protect TA from double liability by severing the subcontractors' liens and ordering that any recovery Solar obtained would be held in trust for the benefit of the subcontractors. However, it is unclear whether by adjudicating Solar's and TA's cross-claims first the trial resulted in a judgment for Solar against TA for the final payment amount with the liens remaining against TA's property. The judgment did not bind the subcontractors and did not necessarily guarantee that TA would receive a lien-free property prior to making final payment. At oral argument, TA conceded that the liens have all been satisfied, but this fact is not in the record.

IN THE SUPREME COURT OF TEXAS

NO. 06-0714

BARBARA ROBINSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOHN ROBINSON, DECEASED, PETITIONER,

v.

CROWN CORK & SEAL CO., INC., INDIVIDUALLY AND AS SUCCESSOR TO MUNDET CORK CORPORATION, RESPONDENT

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

Argued February 7, 2008

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

JUSTICE MEDINA filed a concurring opinion.

JUSTICE WILLETT filed a concurring opinion, in which JUSTICE LEHRMANN joined.

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

JUSTICE GUZMAN did not participate in the decision.

The issue we address in this case is whether a statute that limits certain corporations' successor liability for personal injury claims of asbestos exposure violates the prohibition against

retroactive laws contained in article I, section 16 of the Texas Constitution[1] as applied to a pending action. We hold that it does, and therefore reverse the judgment of the court of appeals[2] and remand the case to the trial court.

I

In 2002, petitioner Barbara Robinson ("Robinson") and her husband, John, Texas residents, filed suit alleging that John, age 63, had contracted mesothelioma from workplace exposure to asbestos products. As often happens, John had used several such products over the course of his life, and the Robinsons sued twenty-one defendants, including respondent Crown Cork & Seal Co., alleging that they were all jointly and severally liable. With respect to Crown, the Robinsons claimed that during John's service in the United States Navy from 1956 to 1976, he worked with asbestos insulation manufactured by the Mundet Cork Corporation, and that when Crown and Mundet merged, Crown succeeded to Mundet's liabilities.

Crown has never itself engaged in the manufacture or sale of asbestos products.[3] It manufactures metal bottle-caps, known in the industry as "crowns", and other packaging for consumer goods. Crown and its affiliates have over 20,000 employees around the world, about

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[1] TEX. CONST. art. I, § 16 ("No . . . retroactive law . . . shall be made.").

[2] 251 S.W.3d 520 (Tex. App.–Houston [14th Dist.] 2006).

[3] Robinson argued in the lower courts that Mundet's asbestos business was still in operation when Crown became Mundet's majority shareholder, and that Crown should be held to have operated the business for several weeks before it was sold, 251 S.W.3d at 539, but she does not make that argument here.

1,000 of whom work in Texas at facilities in Conroe, Sugar Land, and Abilene. In 2009, the parent company reported $1.193 billion gross profit on $7.938 billion net sales.[4]

In November 1963, Crown's predecessor, a New York corporation with the same name, which was then the nation's largest manufacturer of crowns, acquired a majority of the stock in Mundet, another New York corporation, which besides insulation, also manufactured crowns. Within ninety days, in February 1964, Mundet sold all its assets related to its insulation business. Two years later, in February 1966, the companies merged. In 1989, Crown's predecessor was reincorporated as Crown, a Pennsylvania corporation.

Crown acknowledges that under New York and Pennsylvania law, it succeeded to Mundet's liabilities, which, as pertaining to Mundet's asbestos business, have been hefty. Over the years, Crown has been named in thousands of lawsuits claiming damages from exposure to asbestos manufactured by Mundet. While Crown acquired Mundet for only about $7 million, by May 2003 Crown had paid over $413 million in settlements, and Crown's parent company estimated in its 2003 Annual Report that payments could reach $239 million more.[5] Mundet's aggregate insurance coverage totaled $3.683 million.[6]

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[4] CROWN HOLDINGS, INC., 2009 ANNUAL REPORT (FORM 10-K) iii, 51, 88, 96, 104 (Mar. 1, 2010) (annual reports are available online at http://investors.crowncork.com/phoenix.zhtml?c=85121&p=irol-reports, and Form 10-K filings are available at http://www.sec.gov/cgi-bin/browse-edgar?CIK=0001219601&action=getcompany).

[5] CROWN HOLDINGS, INC., 2003 ANNUAL REPORT (FORM 10-K) 9, 39 (Mar. 12, 2004) (the Company estimated that its probable and estimable liability for pending and future claims would range between $239 and $406 million). Crown's parent's 2009 Annual Report estimates future payments through 2019 of $230 million. CROWN HOLDINGS, INC., 2009 ANNUAL REPORT 13, 23, 64.

[6] Prior to 1998, amounts paid to claimants were covered by a fund of $80 million resulting from a 1985 settlement with carriers insuring Crown Cork through 1976, when Crown Cork became self-insured. CROWN HOLDINGS, INC., 2002 ANNUAL REPORT 15, 34 (Mar. 19, 2003).

At first, Crown did not contest its successor liability to the Robinsons for any compensatory damages; consequently, the trial court granted the Robinsons' motion for partial summary judgment on that issue. But about the same time, the Texas Legislature enacted Chapter 149 of the Texas Civil Practice and Remedies Code, which limits certain corporations' successor liability for asbestos claims.[7] Chapter 149 applies (with exceptions not relevant here) to "a domestic corporation or a foreign corporation that has . . . done business in this state and that is a successor which became a successor prior to May 13, 1968"[8] — a date by which, the Legislature appears to have thought, the dangers of asbestos should have been commonly known.[9] For a covered corporation (again with some exceptions not relevant here), "the cumulative successor asbestos-related liabilities . . . are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation",[10] including "the aggregate coverage under any applicable liability

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[7] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 17.01, 2003 Tex. Gen. Laws 847, 892-896.

[8] TEX. CIV. PRAC. & REM. CODE § 149.002(a). "Successor" is defined as "a corporation that assumes or incurs, or has assumed or incurred, successor asbestos-related liabilities", *id*. § 149.001(4), defined broadly as "any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, that are related in any way to asbestos claims that were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation", *id*. § 149.001(3). Asbestos claims include any claim for property damage or personal injury "wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos". *Id*. § 149.001(1).

[9] Although there was growing awareness of the dangers of exposure to asbestos before the mid-1960s, Dr. Irving J. Selikoff is widely credited with publicizing those dangers in his 1965 article, *The Occurrence of Pleural Calcification Among Asbestos Insulation Workers*, 132 ANN. N.Y. ACAD. OF SCI. 351 (1965). On May 13, 1968, the American Conference of Governmental Industrial Hygienists reduced the recommended workplace limit for asbestos in the air. This was, according to the legislative record, "[t]he earliest date after Selikoff's warnings when even a quasi-governmental organization in the United States suggested a tighter standard for asbestos in the workplace". H.J. of Tex., 78th Leg., R.S. 6044 (June 1, 2003) (statement of legislative intent by Rep. Nixon on amendments concerning successor asbestos-related civil liabilities arising from certain mergers) (Journal available at http://www.journals.house.state.tx.us/hjrnl/78r/html/home.htm).

[10] TEX. CIV. PRAC. & REM. CODE § 149.003(a).

insurance that was issued to the transferor . . . collectable to cover successor asbestos-related liabilities".[11] This cap does not apply to a successor that continued in the asbestos business after the consolidation or merger.[12] By restricting application of the cap to a corporation that had never engaged in selling asbestos products itself and had succeeded to another's liability for asbestos claims at a time when the extent of that liability was not fully appreciated, the supporters of Chapter 149 intended to protect only what they called the "innocent successor".

Chapter 149 contains a choice-of-law provision, making it applicable, "to the fullest extent permissible under the United States Constitution, . . . to the issue of successor asbestos-related liabilities" in Texas courts.[13] Furthermore, the Legislature made Chapter 149 applicable to all actions:

> (1) commenced on or after the effective date of this Act; or
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> (2) pending on that effective date and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that effective date.[14]

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[11] *Id*. § 149.004(c).

[12] *Id*. § 149.002(b)(5) ("The limitations in Section 149.003 shall not apply to . . . a successor that, after a merger or consolidation, continued in the business of mining asbestos or in the business of selling or distributing asbestos fibers or in the business of manufacturing, distributing, removing, or installing asbestos-containing products which were the same or substantially the same as those products previously manufactured, distributed, removed, or installed by the transferor . . . .").

[13] *Id*. § 149.006.

[14] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 17.02, 2003 Tex. Gen. Laws 847, 895.

Because the Act of which Chapter 149 was part, House Bill 4, passed by more than a two-thirds vote in both the House and Senate,[15] it took effect immediately on approval by the Governor,[16] which occurred on June 11, 2003.

House Bill 4 was massive tort reform legislation, of which Chapter 149 was a very small piece — two pages of a 52-page bill.[17] Chapter 149 was not included in the bill as filed but was added when the bill came to the House floor by an amendment offered by the bill's sponsor. When asked which manufacturers "in particular" would be protected, the sponsor replied that he was "advised that there's one in Texas, Crown Cork and Seal".[18] Although House debate on the whole

[15] The vote in each chamber was well over two-thirds, 114 yeas to 32 nays in the House, H.J. of Tex., 78th Leg., R.S. 6041-6042 (June 1, 2003), and 27 yeas to 4 nays in the Senate, S.J. of Tex., 78th Leg., R.S. 5008 (June 1, 2003).

[16] TEX. CONST. art. III, § 39 ("No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals."). *See Mann v. Gulf States Utils. Co.*, 167 S.W.2d 557, 560 (Tex. Civ. App.–Austin 1942, writ ref'd) ("[W]here a statute is passed with the emergency clause by the required vote when approved by the Governor, it becomes effective and immediately operative.").

[17] Among other things, House Bill 4 limited attorney fees in class actions (§ 1.01), provided for an offer-of-judgment procedure that could result in the shifting of attorney fees and expenses (§ 2.01), created a multidistrict litigation panel and provided for the transfer of cases for consolidated and coordinated pretrial proceedings (§ 3.02), tightened venue statutes (§§ 3.03-.04), provided for joinder of responsible third parties (§ 4.04), revamped proportionate responsibility among joint tortfeasors (§§ 4.06-.07), restricted recovery in product liability cases (§§ 5.01-.02), limited the amounts required for supersedeas bonds (§ 7.02), rewrote statutes limiting health care liability claims (§ 10.01), limited the liability of volunteer fire fighters, teachers, and other government employees (§§ 11.01, 11.05, 15.02-.05, 19.01-.02), and further limited recovery of exemplary and noneconomic damages (§§ 13.02-.09). Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847.

[18] Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. (Mar. 25, 2003) (statement of Rep. Joe Nixon) (archived video available at http://www.house.state.tx.us/media/chamber/78.htm) (video time 5:04:24-40).

bill took days, debate on Chapter 149 lasted just over an hour.[19] Four unfriendly amendments,[20] one of which would have made Chapter 149 inapplicable to "successor asbestos-related liabilities that were assumed or incurred before [its] effective date",[21] all failed by wide margins. In the Senate, Chapter 149 was significantly revised but drew only one brief comment in that chamber, this observation by the committee chair as hearings commenced: "This, members, is the Crown Cork and Seal asbestos issue. What we have put in this bill is what I understand to be an agreed arrangement between all of the parties in this matter."[22]

No legislative findings or statement of purpose accompanied Chapter 149. But after the conference committee report on House Bill 4 was adopted in the House, the sponsor inserted a "statement of legislative intent" in the House Journal, which did not mention Crown and explained the policy basis for Chapter 149 as follows:

> A corporation is currently liable up to its total value for all injuries it causes. If that corporation merges with a much larger corporation, however, the successor corporation is liable for the injuries caused by its predecessor (even though not caused in any way by the successor) up to the successor's much higher value. In the case of long-tailed and unknown asbestos-related liabilities, a much larger successor

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[19] *Id*. at 4:52:40 - 6:09:50.

[20] Amendments 7, 9, 10, and 11 to Amendment 6 to Committee Substitute for House Bill 4 were tabled. H.J. of Tex., 78th Leg., R.S. 818-819 (Mar. 25, 2003) (text of amendments available at http://www.capitol.state.tx.us/Search/AmendSearchResults.aspx?Leg=78&Sess=R&Bill=HB4&Hse=1&Sen=0&Auth=All&2nd=1&3rd=1&Type=All&Action=All&Dateon=&Srch=simple&All=&Any=&Xact=&Xclude=&Custom=&ID=hlQCrLY8x).

[21] Amendment 9 to Amendment 6 to Committee Substitute for House Bill 4 (available at http://www.capitol.state.tx.us/tlodocs/78R/amendments/pdf/HB00004H29.PDF).

[22] Hearings on the Proposed Senate Substitute for H.B. 4 Before the S. Comm. on State Affairs, 78th Leg., R.S. (Apr. 30, 2003) (Statement of Sen. Bill Ratliff, Chairman, S. Comm. on State Affairs) (archived video available at http://www.senate.state.tx.us/avarchive/ and http://www.senate.state.tx.us/75r/Senate/commit/c570/c570_78.htm) (video time 19:00- 19:23)).

> can easily be bankrupted by the asbestos-related liabilities it innocently received from a much smaller predecessor with which it merged [many] decades ago.
>
> To eliminate that unfairness — and even to save successor corporations from bankruptcy — some have proposed a new rule limiting liability especially for asbestos-related successor liabilities acquired solely through a merger. The successor would be liable only up to the entire gross asset value of the predecessor from whom it received the asbestos-related liabilities.[23]

The statement described Chapter 149 as a "new concept" that was being tested "by taking one step at a time and providing realistic relief to those innocent successor corporations most at peril financially without limiting every type of asbestos liability."[24] According to the statement, Chapter 149's restrictions had been crafted to ensure that "the benefits of this legislation should be limited . . . to those successor corporations who were the most innocent about the potential hazards of asbestos" and "were also at the greatest financial peril, especially those threatened with bankruptcy".[25]

Crown promptly moved for summary judgment under the new law, requesting that the prior order establishing its successor liability to the Robinsons be vacated and that their claims for asbestos exposure be dismissed. Crown asserted that the summary judgment evidence established that its merger with Mundet occurred before May 13, 1968, that it had never engaged in Mundet's insulation business, and that its successor asbestos-related liabilities, already more than $413 million, greatly exceeded the fair market value of Mundet's total gross assets determined as required by the

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[23] H.J. of Tex., 78th Leg., R.S. 6042-6043 (June 1, 2003).

[24] *Id*. at 6043.

[25] *Id*.

statute[26] — about $15 million in 1966 (some $57 million in 2003 dollars). Thus, Crown contended, Chapter 149 barred the Robinsons from recovering on their claims. In response, the Robinsons argued that the record did not establish the applicability of Chapter 149,[27] or if it did, the statute violated several provisions of the Texas Constitution.[28]

The trial court granted Crown's motion. Days later, John Robinson died.[29] Barbara Robinson amended her petition to assert statutory wrongful death[30] and survival actions[31] against Crown and the other defendants still remaining in the case. (Several defendants had settled for amounts totaling $859,067 and been dismissed.) Without addressing these statutory actions, Crown moved to sever the summary judgment to make it final and appealable,[32] and the trial court granted the motion. The court also stayed proceedings in Robinson's case against the other defendants.

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[26] *See* TEX. CIV. PRAC. & REM. CODE § 149.004.

[27] The Robinsons disputed Crown's valuation of Mundet's total gross assets and, as noted above, Crown's assertion that Mundet had ceased its insulation business before Crown acquired its stock, so that Crown never engaged in that business, even as Mundet's majority stockholder. Robinson raised the latter argument in the court of appeals. 251 S.W.3d at 539-540. Robinson does not make either argument in this Court.

[28] The Robinsons argued that Chapter 149 as applied violates Texas Constitution art. I, § 13 ("All courts shall be open, and every person for an injury done him . . . shall have remedy by due course of law."); art. I, § 16 ("No . . . retroactive law, or any law impairing the obligation of contracts, shall be made."); art. I, § 17 ("No person's property shall be taken . . . without adequate compensation . . . ."); art. I, § 19 ("No citizen of this State shall be deprived of . . . property . . . except by the due course of the law . . . ."); and art. III, § 56 ("The Legislature shall not . . . pass any . . . special law . . . .").

[29] After John died, Robinson asserted the additional argument on motion for new trial that Chapter 149 violated art. XVI, § 26 of the Texas Constitution ("Every . . . corporation . . . that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving . . . widow . . . .").

[30] *See* TEX. CIV. PRAC. & REM. CODE §§ 71.002, 71.009.

[31] *See id*. § 71.021.

[32] The Robinsons had asserted claims against Crown that were not disposed of by the summary judgment, but they were later nonsuited and dismissed.

On appeal, Robinson contends that Chapter 149 is a retroactive law prohibited by article I, section 16 of the Texas Constitution. The law is well-settled, she asserts, that the Legislature has no authority to extinguish vested rights, and that her accrued cause of action against Crown is a vested right. A majority of the court of appeals did not "find the law on vested rights to be as consistent and lucid as Mrs. Robinson claims"[33] and concluded that it provides "no clear answer" to whether Chapter 149 is an invalid retroactive law.[34] Relying on this Court's decision in *Barshop v. Medina County Underground Water Conservation District*,[35] the court decided that whether a law is unconstitutionally retroactive depends not on whether it infringes upon a vested right but on whether it is a "'valid exercise of the police power by the Legislature to safeguard the public safety and welfare'".[36] Whether an exercise of the police power is valid, the court of appeals determined, depends on

> (1) whether the act is appropriate and reasonably necessary to accomplish a purpose within the scope of the police power, and (2) whether the ordinance is reasonable by not being arbitrary and unjust or whether the effect on individuals is unduly harsh so that it is out of proportion to the end sought to be accomplished.[37]

The court found that "the purpose for which [Chapter 149] was enacted — the financial viability of the State and businesses in the State — is a valid exercise of police power."[38] The court

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[33] 251 S.W.3d 520, 526 (Tex. App.–Houston [14th Dist.] 2006).

[34] *Id*. at 527.

[35] 925 S.W.2d 618 (Tex. 1996).

[36] 251 S.W.3d at 523 (quoting *Barshop*, 925 S.W.2d at 633-634).

[37] *Id*. at 532.

[38] *Id*.

further found that the restrictions in the statute left "the pool of potential defendants as large as possible for claimants having valid claims for damages resulting from asbestos products",[39] thereby limiting the "detrimental impact on plaintiffs such as the Robinson so that [it] was not out of proportion to the end sought".[40] Concluding that deference must be given to the Legislature in the exercise of its police power, the court held that Chapter 149 is not unconstitutionally retroactive because it is "(1) within the Legislature's police power and (2) narrowly tailored (a) to protect the most innocent corporations hard hit by asbestos litigation but (b) to leave the potential pool of asbestos defendants as large as possible."[41] Accordingly, the court affirmed the summary judgment.[42]

The dissent disagreed with the majority's approach to assessing unconstitutionality. It argued that "the Legislature has no police power to enact retroactive laws in violation of section 16", even if reasonably exercised.[43] *Barshop* notwithstanding, the dissent insisted, "the weight of precedent . . . requires the use of the vested-rights analysis."[44] The dissent contended that "an accrued cause

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[39] *Id*. at 532-533.

[40] *Id*. at 532.

[41] *Id*. at 533.

[42] 251 S.W.3d at 541. The court rejected Robinson's other two arguments, that Chapter 149 is a special law prohibited by article III, section 56 of the Texas Constitution, and that Crown has not established the factual predicate for applying Chapter 149 in this case. *Id*. at 535-540. Robinson makes the former argument in this Court, but we do not reach it.

[43] *Id*. at 541.

[44] *Id*.

of action is a vested right",[45] rejecting some caselaw that "an accrued claim is not vested until it is reduced to a judgment final by appeal".[46] Thus, the dissent reasoned, "[b]ecause Mrs. Robinson's claims accrued and were pending in the trial court when [Chapter 149] took effect, Mrs. Robinson held vested rights in these claims that could not be destroyed",[47] irrespective of the fact that Chapter 149 "does not bar all of Mrs. Robinson's remedy for the claimed injuries because she can sue other companies not protected".[48] Without assessing the reasonableness of the Legislature's action, the dissent concluded that Chapter 149 is unconstitutionally retroactive because the "Legislature created a new substantive defense to successor liability and made it immediately effective in all pending cases, destroying Mrs. Robinson's vested rights in her accrued tort claims against Crown".[49]

We granted Robinson's petition for review.[50] Another court of appeals, also divided, has since reached the opposite result from the court of appeals in this case.[51]

II

As a threshold matter, it is important to note the precise issue before us. The Robinsons' pleading on which Crown moved for summary judgment asserted common-law causes of action for

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[45] *Id*. at 549.

[46] *Id*. at 550.

[47] *Id*.

[48] 251 S.W.3d at 550.

[49] *Id*. at 551.

[50] 51 Tex. Sup. Ct. J. 292 (Jan. 11, 2008).

[51] *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190 (Tex. App.–Austin 2008, no pet.).

negligence and strict liability, and claimed compensatory and punitive damages.[52] For herself, Barbara claimed damages for John's medical expenses that she had incurred, as well as her loss of consortium and mental anguish, and punitive damages. Had John lived, the summary judgment would have disposed of all the Robinsons' claims against Crown.

But John died a few days after summary judgment was granted, and Robinson amended her petition to add statutory wrongful death and survival actions. The record does not reflect that Crown moved for summary judgment on Robinson's statutory claims, or that the trial court ever disposed of them specifically. The trial court and parties appear to have assumed, correctly, that the summary judgment was nevertheless final because Robinson's statutory claims are wholly derivative of John's common-law claims, and the adjudication of the latter effectively disposed of the former.[53]

But even though the summary judgment was final, an analysis of the retroactive effect of Chapter 149 on common-law claims and statutory claims presents different considerations. As we discuss more fully below, Crown argues that in determining whether the constitutional prohibition against retroactive laws applies in this case, it is significant that successor liability is a creature of statute. The same argument could be made to Robinson's wrongful death and survival claims,

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[52] The Robinsons also asserted a claim for conspiracy, but it was later nonsuited.

[53] *Russell v. Ingersoll-Rand Co.,* 841 S.W.2d 343, 345-346 (Tex. 1992) ("The survival action, as it is sometimes called, is wholly derivative of the decedent's rights. The actionable wrong is that which the decedent suffered before his death. The damages recoverable are those which he himself sustained while he was alive and not any damages claimed independently by the survival action plaintiffs (except that funeral expenses may also be recovered if they were not awarded in a wrongful death action). Any recovery obtained flows to those who would have received it had he obtained it immediately prior to his death — that is, his heirs, legal representatives and estate. Defenses that could have been raised against a claim by the injured person may also be raised against the same claim asserted by the person's heirs and estate. . . . Wrongful death actions are also derivative of the decedent's rights." (citing TEX. CIV. PRAC. & REM. CODE § 71.003(a) ("This subchapter [creating a wrongful death cause of action] applies only if the individual injured would have been entitled to bring an action for the injury if the individual had lived or had been born alive.") (other citations omitted)).

though not to the common-law claims the Robinsons previously asserted. Also, Robinson argues that it is important for our constitutional analysis that the common-law claims barred by Chapter 149 had both accrued and were the subject of a pending lawsuit before the statute was enacted. But neither is true of her statutory claims.

The parties have not briefed — or even mentioned — any of these issues but have confined their arguments regarding whether Chapter 149 is an unconstitutionality retroactive law as applied to the common-law claims the Robinsons asserted before John's death, which were adjudicated by summary judgment. These arguments are the only ones we address. We intimate no view on whether Chapter 149 limits Robinson's statutory wrongful death and survival claims except insofar as they are derivative of the claims specifically adjudicated by the trial court.

III

Before we can decide whether Chapter 149 is unconstitutionally retroactive, we must first resolve the parties' dispute over the proper standards to be applied in making that determination. Robinson, like the dissenting opinion in the court of appeals, argues that the test is simply whether vested rights have been impaired, period; if so, the law is prohibited, regardless of the Legislature's reasons for enacting it. Crown counters that the majority opinion in the court of appeals was correct in focusing instead on the reasonableness of the Legislature's exercise of its police power; the prohibition against retroactive laws does not invalidate a proper exercise of that power despite its impairment of private rights.[54] As each position finds support in our case law, we begin by returning

[54] The following have submitted amicus curiae briefs in support of Crown: the State of Texas, Texas Civil Justice League, American Tort Reform Association, National Federation of Independent Business Legal Foundation, Chamber of Commerce of the United States of America, National Association of Manufacturers, Property Casualty

to first principles. We conclude that the history and purpose of the constitutional provision require a fuller statement of its proper application than we have previously given.

A

There exists in this country, as the United States Supreme Court observed in *Landgraf v. USI Film Products*, a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence[] and embodies a legal doctrine centuries older than our Republic. . . . [T]he 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.'"[55] In a concurring opinion in an earlier case, Justice Scalia noted that this principle

> was recognized by the Greeks, by the Romans, by English common law, and by the Code Napoleon. It has long been a solid foundation of American law. . . . Justice Story said that "retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact."[56]

The United States Constitution does not expressly prohibit retroactive laws, but "the antiretroactivity principle finds expression" in its prohibitions of bills of attainder, ex post facto laws, and state laws impairing the obligation of contracts.[57] The thrust of each is easily stated:

Insurers Association of America, American Chemistry Council, National Association of Mutual Insurance Companies, 3M Company, Texans for Lawsuit Reform, and Product Liability Advisory Council, Inc.

[55] 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

[56] *Kaiser*, 494 U.S. at 855-856 (Scalia, J., concurring) (citations omitted).

[57] *Landgraf*, 511 U.S. at 266; *see also* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id*. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."); *U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 17 n.13 (1977) ("The Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly harsh and oppressive." (internal quotation marks omitted)).

> The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation. . . . States [are prohibited] from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." . . . The prohibitions on "Bills of Attainder" in Art. 1 §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct.[58]

But the application of each prohibition must be measured by the object to be obtained. Thus, while the bill of attainder originated as an English parliamentary act sentencing to death someone who had attempted to overthrow the government,[59]

> the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The . . . Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature.[60]

With respect to ex post facto laws:

> The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention of the prohibition is this; that the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it.[61]

And as for the prohibition against laws impairing contract obligations, Chief Justice Marshall observed:

> Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and

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[58] *Landgraf*, 511 U.S. at 266.

[59] *United States v. Brown*, 381 U.S. 437, 441 (1965).

[60] *Id*. at 442.

[61] *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

> unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument, a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "*contract*" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that, since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.[62]

Texas Constitutions have contained these provisions as well as a general prohibition against retroactive or retrospective laws.[63] This prohibition against retroactive laws, like other constitutional bars, must be governed by its purpose, for "retroactive" simply means "[e]xtending in scope or effect

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[62] *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 628-629 (1819); *see U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 21 (1977) ("Although the Contract Clause appears literally to proscribe 'any' impairment, . . . 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.'" (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934))).

[63] TEX. CONST. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts shall be made."); TEX. CONST. OF 1869, art. I, § 14 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made; . . . nor shall any law be passed depriving a party of any remedy for the enforcement of a contract, which existed when the contract was made."); TEX. CONST. OF 1866, art. I, § 14 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made . . . ."); TEX. CONST. OF 1861, art. I, § 14 (same); TEX. CONST. OF 1845, art. I, § 14 (same); REPUB. TEX. CONST. OF 1836, DEC. OF RIGHTS § 16 ("No retrospective or ex post facto law, or laws impairing the obligations of contracts shall be made."). In the 1845 Constitutional Convention, the prohibition against retrospective laws was omitted from the first draft of the Bill of Rights, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF TEXAS 34 (1845), but one against retroactive laws was inserted just before final passage by floor amendment by Thomas Jefferson Rusk, formerly Chief Justice of the Supreme Court of Texas, *id*. at 264.

to matters which have occurred in the past; retrospective",[64] and "retrospective", even more simply, means "[d]irected to, contemplative of, past time".[65] In our first case construing the retroactivity clause, *DeCordova v. City of Galveston*, Chief Justice Hemphill cautioned that applying this prohibition without regard to the objects to be achieved would have

> a latitude of signification, which would embarrass legislation on existing or past rights and matters, to such an extent as to create inextricable difficulties, and, in fact, to demonstrate that it was incapable of practical application. A retrospective law literally means a law which looks backwards, or on things that are past; or if it be taken to be the same as retroactive, it means to act on things that are past. If it be understood in its literal meaning, without regard to the intent, then all laws, having an effect on past transactions or matters, or by which the slightest modification may be made of the remedy for the recovery of rights accrued, or the redress of wrongs done, are prohibited equally with those which divest rights, impair the obligation of a contract, or make an act, innocent at the time it was done, subsequently punishable as an offence.[66]

The constitutional prohibition was not intended to operate so indiscriminately. "Mere retroactivity is not sufficient to invalidate a statute. . . . Most statutes operate to change existing conditions, and it is not every retroactive law that is unconstitutional."[67]

The presumption against retroactivity has two fundamental objectives identified by the Supreme Court in *Landgraf*. First, it protects the people's reasonable, settled expectations.

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly;

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[64] 13 THE OXFORD ENGLISH DICTIONARY 796 (2d ed.1989).

[65] *Id.* at 801.

[66] 4 Tex. 470, 475-476 (1849).

[67] *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971); *accord Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) ("[N]ot all statutes that apply retroactively are constitutionally prohibited.").

> settled expectations should not be lightly disrupted. . . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.[68]

In other words, the rules should not change after the game has been played. Second, the presumption against retroactivity protects against abuses of legislative power.

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.[69]

As James Madison argued, "retroactive legislation also offer[s] special opportunities for the powerful to obtain special and improper legislative benefits."[70]

Still, not all retroactive legislation is bad. *Landgraf* also notes:

> Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary.[71]

Constitutional provisions limiting retroactive legislation must therefore be applied to achieve their intended objectives — protecting settled expectations and preventing abuse of legislative power.

B

In *DeCordova*, Chief Justice Hemphill wrote that "[l]aws are deemed retrospective and within the constitutional prohibition, which by retrospective operation, destroy or impair, vested

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[68] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-266 (1994) (text and citations omitted).

[69] *Id*. at 266.

[70] *Id*. at 267 n.20.

[71] *Id*. at 267-268.

rights".[72] For this formulation of the prohibition, he, like many judges since, cited Justice Story's statement in *Society for the Propagation of the Gospel v. Wheeler*, applying the New Hampshire constitution's prohibition against retroactive laws:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . .[73]

But as both cases explained, "impairs vested rights" has special meaning. "[A] statute merely regulating a remedy," Justice Story added, "and prescribing the mode and time of proceeding" does not impair vested rights.[74] Chief Justice Hemphill agreed,

> unless the remedy be taken away altogether, or encumbered with conditions that would render it useless or impracticable to pursue it. Or, if the provisions regulating the remedy, be so unreasonable as to amount to a denial of right, as, for instance, if a statute of limitations, applied to existing causes, barred all remedy or did not afford a reasonable period for their prosecution; or if an attempt were made by law, either by implication or expressly, to revive causes of action already barred; such legislation would be retrospective within the intent of the prohibition, and would therefore be wholly inoperative.[75]

In other words, in applying the prohibition against retroactivity, a law that impairs a remedy does not impair a right, except sometimes. On further reflection, this Court conceded more than a century

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[72] 4 Tex. 470, 479 (1849).

[73] 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156); *see* Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 233 n.9 (1927) ("Justice Story's definition of a retroactive law is perhaps the one most frequently cited.").

[74] *Id*. at 768.

[75] *DeCordova*, 4 Tex. at 480 (citations omitted).

later: "Remedies are the life of rights. While our precedents recognize and apply the distinction [between a remedy and a right], they also recognize that the two terms are often inseparable."[76]

The obscurity in the right/remedy distinction typifies the problems in using "impairs vested rights" as a test for unconstitutional retroactivity, as our cases illustrate. In *DeCordova*, we held that a statute of limitations on suits for debt enacted after the defendant executed notes payable to the plaintiff but before they matured merely limited the plaintiff's collection remedy and therefore was not unconstitutionally retroactive.[77] The idea that the debt had not been extinguished, only the means of collection, might be viewed by most creditors as a distinction without a difference. But the Court reasoned that the absence of a statute of limitations when the notes were executed did not give the plaintiff a vested right to sue forever. In *Texas Water Rights Commission v. Wright*, we upheld a statute authorizing forfeiture of a water permit after ten years of non-use, concluding that permit holders could reasonably expect enforcement of the "conditions inherently attached" to their permit, and that a permit included no right to be forever free of a remedy to enforce those conditions.[78] Moreover, a retroactive use requirement was valid for the State "to assert and protect its own rights and interests in the water."[79] In *City of Tyler v. Likes*, we held that a statute reclassifying a city's proprietary functions as governmental, thereby limiting liability, affected only a remedy, not a right,

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[76] 464 S.W.2d 642, 648-649 (Tex. 1971) (internal quotation marks omitted).

[77] 4 Tex. at 480-482.

[78] Wright, 464 S.W.2d at 649.

[79] *Id*.

even though a claimant would recover less or perhaps not at all.[80] And in *In re A.D.*, we held that a statute removing the limitations period for enforcing child support decrees by ordering withholding of wages affected only a remedy, even though it expanded enforcement of the debt.[81]

In each of these cases, significant interests were adversely impacted by changes in the law, yet the Court held that vested rights were not impaired. The results of the cases seem entirely reasonable in a very general sense, although the claimants in the cases doubtless had a different view, but it is not clear how they were driven by a concern for protecting vested rights. In a recent case, *Owens Corning v. Carter*, we did not mention the right/remedy distinction in upholding a law that required application of the statute of limitations of the plaintiff's state of residence, even though doing so barred pending actions in Texas courts.[82] We simply held that for a plaintiff who has not sued within the time permitted by the state in which he resides and in which the cause of action arose, barring suit in Texas "is not inequitable".[83] Nevertheless, the plaintiff in a pending case had a viable claim that the change in the law extinguished.

In three of these five cases, *DeCordova*, *Wright*, and *Likes*, it was important that, as it happened, the people involved had ample opportunity after the change in the law to protect their

[80] 962 S.W.2d 489, 502 (Tex. 1997).

[81] 73 S.W.3d 244, 248-249 (Tex. 2002).

[82] 997 S.W.2d 560, 573 (Tex. 1999).

[83] *Id*.

interests: four years to sue in *DeCordova*,[84] seven years to resume pumping water in *Wright*,[85] and two months to sue in *Likes*.[86] But in the other two cases, *A.D.* and *Owens Corning*, the persons affected by changes in the law had no time to respond. We have since held that a change in the law need not provide a grace period to prevent an impairment of vested rights.[87]

"Statutes of limitations are procedural",[88] but sometimes a change may impair vested rights. In 1887, we stated in *Mellinger v. City of Houston* that when a law "shall operate in favor of a defendant as a defense against a claim made against him, then it must be said that a right exists, has become fixed or vested, and is beyond the reach of retroactive legislation".[89] Thus, we said, a law extending a limitations period so as to resurrect barred claims would be unconstitutionally retroactive. But only two years earlier the United States Supreme Court had held in *Campbell v. Holt* that just such a law reviving claims did not offend due process under the United States Constitution because "no right is destroyed when the law restores a remedy which had been lost."[90] *Campbell*

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[84] The plaintiff sued on three promissory notes, all executed in 1840, and maturing in 1842, 1843, and 1844, respectively. The statute of limitations was passed in 1841, and the plaintiff did not sue until 1849. *DeCordova*, 4 Tex. at 470-471.

[85] The plaintiffs held permits issued in 1918 and 1928, but they stopped pumping water in 1954. The forfeiture statute was enacted in 1957, and forfeiture was not sought until 1967. *Wright*, 464 S.W.2d at 644.

[86] The plaintiff had seventeen months to sue before the statute was enacted and two months to sue after it was enacted and before it took effect. *Likes*, 962 S.W.2d at 502.

[87] *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 634 (Tex. 1996).

[88] *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999).

[89] 3 S.W. 249, 253 (Tex. 1887).

[90] 115 U.S. 620, 628 (1885).

arose out of Texas, and the Supreme Court cited this Court's 1870 decision in *Bender v. Crawford*,[91] which held that a retroactive suspension of limitations statutes during the aftermath of the Civil War was not a prohibited retroactive law, even though claims that would have been barred were not.[92] *Mellinger* cited *Campbell*, and "not wish[ing] to be understood as questioning its correctness", distinguished the due process guarantees in the state and federal constitutions from the prohibition of retroactive laws.[93] But while due process and antiretroactivity may protect vested rights differently, *Mellinger* did not explain why a limitations bar is a vested right in one context but not in the other. In other words, a law that is prohibitively retroactive might not also offend due process, but not because a vested right for one is not a vested right for the other. Nor did *Mellinger* cite *Bender*.

A generation later, we held in *Wilson v. Work* that "it is the settled law that, after a cause has become barred by the statute of limitation, the defendant has a vested right to rely on such statute as a defense."[94] We repeated that view more recently in *Baker Hughes, Inc. v. Keco R. & D., Inc.*[95] The earlier confusion may be attributable to the time in which the issues arose. *Bender* offered this insight:

> [T]hey who talk about vested rights in the bar of limitations should at least remember the times in which we have been living; and those who think our constitution is not

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[91] *Id*. at 629-630.

[92] 33 Tex. 745, 759-760 (1870).

[93] *Mellinger*, 3 S.W. at 252.

[94] 62 S.W.2d 490, 490 (Tex. 1933) (per curiam) (permission to file mandamus petition denied).

[95] 12 S.W.3d 1, 4 (Tex. 1999).

> republican, nor in accordance with the great republican conception of our institutions, should remember that from the second of March, 1861, to the twenty-ninth of March, 1870, we had no republican government in Texas. Four years of that period were one of bloody and unrelenting war. From 1865 to 1870 we were a military government; he who gained a vested right in the statute of limitations during at least a portion of that period, gained it only because *inter arma leges silent.* Vultures and wolves gain vested rights when armies are slaughtered, if these *be* vested rights.[96]

Bender dared to speak plainly: there are vested rights and then there are vested rights, and not all laws which may fairly be said to retroactively impair vested rights are constitutionally prohibited. The problem is not confined to the aftermath of the Civil War. Many years ago, one commentator lamented:

> One's first impulse on undertaking to discuss retroactive laws and vested rights is to define a vested right. But when it appears, as soon happens, that this is impossible, one decides to fix the attention upon retroactive laws and leave the matter of definition to follow rather than precede the discussion, assuming for the purpose that a right is vested when it is immune to destruction, and that it is not vested when it is liable to destruction, by retroactive legislation. The simplification of the task which this plan seems to involve, turns out to be something of an illusion, however, when it appears, as also soon happens, that one's preconceived notions of retroactive laws are irreconcilable with the data with which one has to deal.[97]

What constitutes an impairment of vested rights is too much in the eye of the beholder to serve as a test for unconstitutional retroactivity.

This can hardly be more vividly demonstrated than in today's opinions by JUSTICE WAINWRIGHT and JUSTICE MEDINA. The arguments and authorities ably marshaled in each show a deep division over whether a retroactive restriction on a cause of action impairs vested rights. Of course it does, if a claim, no matter how flimsy, is a vested right; or not, if a claim, even a strong one,

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[96] *Bender*, 33 Tex. at 759.

[97] Bryant Smith, *Retroactive Laws and Vested Rights,* 5 TEX. L. REV. 231, 231 (1927) (footnote omitted).

must be reduced to judgment before it becomes a vested right. The dispute over whether to call something a vested right appears driven not so much by what the words mean as by the consequence of applying the label — that its impairment is prohibited. Or as one commentator has put it: "it has long been recognized that the term 'vested right' is conclusory — a right is vested when it has been so far perfected that it cannot be taken away by statute."[98] The "impairs vested rights" test thus comes down to this: a law is unconstitutionally retroactive if it takes away what should not be taken away.

C

In two cases this Court has held that retroactive laws were not constitutionally prohibited, despite their impairment of vested rights, because they were each a valid exercise of the Legislature's police power. The first, *Barshop v. Medina County Underground Water Conservation District*,[99] involved a facial challenge to the Edwards Aquifer Act.[100] Before the Act, withdrawal of groundwater from the Aquifer was unrestricted. The Act created an Authority to regulate groundwater withdrawals, capped annual withdrawals, required that wells be operated under permits, gave preference to existing users, and restricted withdrawals under a permit based on the owner's historic use.[101] The Act operated retroactively in basing the right to groundwater on historic use and gave landowners no opportunity to preserve their prior right to unlimited water, but we stated that

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[98] Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960).

[99] 925 S.W.2d 618 (Tex. 1996).

[100] Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350.

[101] *Barshop*, 925 S.W.2d at 624.

"article I, section 16 does not absolutely bar the Legislature from enacting such statutes."[102] Acknowledging that "retroactive laws affecting vested rights that are legally recognized or secured are invalid",[103] we nevertheless held that "[a] valid exercise of the police power by the Legislature to safeguard the public safety and welfare can prevail over a finding that a law is unconstitutionally retroactive."[104] The Legislature had included in the Act findings that the Authority was necessary "'to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state'"[105] and that "the aquifer was 'vital to the general economy and welfare of this state.'"[106] "Based on these legislative findings," we concluded that the Act was "necessary to safeguard the public welfare of the citizens of this state" and therefore the Act's retroactive effect did not "render it unconstitutional" on its face.[107]

The second case, *In re A.V.*,[108] involved section 161.001 of the Texas Family Code, which lists several grounds for terminating parental rights. An amendment had added subsection (1)(Q) to the list, thus providing for termination when a parent "has knowingly engaged in criminal conduct for which the parent is incarcerated and unable to care for the child 'for not less than two years from

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[102] *Id*. at 634.

[103] *Id*. at 633.

[104] *Id*. at 633-634.

[105] *Id*. at 634 (quoting Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.01, 1993 Tex. Gen. Laws 2350, 2350-2351).

[106] *Id*. (quoting Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.06(a), 1993 Tex. Gen. Laws 2350, 2355).

[107] *Barshop*, 925 S.W.2d at 634.

[108] 113 S.W.3d 355 (Tex. 2003).

the date of filing the petition'".[109] The issue was whether the amendment was unconstitutionally retroactive as applied to a parent convicted before it was enacted. The amendment, we noted, was primarily prospective, focusing on "the parent's future imprisonment and inability to care for the child, not the criminal conduct that the parent committed in the past."[110] But to the extent the amendment had a retroactive effect, we held it was not unconstitutional. Recognizing that "a parent's constitutionally-protected relationship with his or her children [is] a right that presumably cannot be altered through retroactive application of law",[111] we stated, quoting *Barshop*, that a "'valid exercise of the police power by the Legislature to safeguard the public safety and welfare' is a recognized exception to the unconstitutionality of retroactive laws."[112] Given the Legislature's declaration that "'[t]he public policy of this state [is to] provide a safe, stable, and nonviolent environment for the child'", we concluded that public policy justified the statute's retroactive effect.[113] Furthermore, we said, "[a] law that does not upset a person's settled expectations in reasonable reliance upon the law is not unconstitutionally retroactive."[114] In our view, a person "could not reasonably expect that the State would not act to provide a safe environment for his children while he was imprisoned."[115]

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[109] *Id*. at 356 (quoting TEX. FAM CODE § 161.001(1)(Q)).

[110] *Id*. at 360.

[111] *Id*. at 361.

[112] *Id*. (quoting *Barshop*, 925 S.W.2d at 633-634).

[113] *Id.* (quoting TEX. FAM. CODE § 153.001(a)(2)).

[114] *A.V.*, 113 S.W.3d at 361.

[115] *Id*.

Robinson does not argue that *Barshop* and *A.V.* were wrongly decided but nevertheless insists that the test for unconstitutional retroactivity is not whether a law is a reasonable exercise of the Legislature's police power but whether it impairs vested rights. In her view, rights may be "vested for different purposes depending on the context",[116] thereby affecting the constitutional provision's operation, and thus prohibiting retroactive laws limiting liability for asbestos claims but not laws preserving groundwater and protecting children. Stated differently: the right to sue is protected from retroactive impairment while the rights to groundwater or one's children are not. One might view this as backwards, that a parent's right to a child, which is "fundamental",[117] "'one of constitutional dimensions'",[118] and "'far more precious than any property right'",[119] would be more deserving of protection from impairment by retroactive laws than a claim of injury that might not even result in recovery. But regardless of the three rights' relative importance, Robinson's argument that they are somehow vested differently for purposes of determining unconstitutional retroactivity establishes the fundamental failure of the "impairs vested rights" test.

We agree with Robinson, however, that *Barshop* and *A.V.* do not except a retroactive law from the constitutional prohibition merely because there was a rational basis for its enactment, or even because, on balance, it is likely to do more good than harm. The Legislature found the water-

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[116] Petitioner's Reply Brief at 15.

[117] *In re Chambless*, 257 S.W.3d 698, 700 (Tex. 2008) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion)).

[118] *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 622 (Tex. 2004) (quoting *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976)).

[119] *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-759 (1982)).

permitting scheme established in the Edwards Aquifer Act to be necessary to discharge its constitutional duty to conserve groundwater,[120] and the necessity of providing for the welfare of children of incarcerated convicts is too obvious to require justification. But necessity alone cannot justify a retroactive law. The retroactive laws in *Barshop* and *A.V.* were not unconstitutional because they did not defeat the objectives of the constitutional prohibition. There can be no settled expectation that a limited resource like groundwater, affected by public and private interests, will not require allocation, or that a person unable to care for his children has greater rights if his inability is due to prolonged incarceration than for other reasons. And in both cases, the Legislature acted for the general public good.

D

We think our cases establish that the constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power; it protects settled expectations that rules are to govern the play and not simply the score, and prevents the abuses of legislative power that arise when individuals or groups are singled out for special reward or punishment. No bright-line test for unconstitutional retroactivity is possible. Rather, in determining whether a statute violates the prohibition against retroactive laws in article I, section 16 of the Texas Constitution, courts must consider three factors in light of the prohibition's dual objectives: the nature and strength of the public interest served by

[120] TEX. CONST. art. XVI, § 59 ("The conservation and development of all of the natural resources of this State . . . [is] hereby declared [a] public right[] and dut[y]; and the Legislature shall pass all such laws as may be appropriate thereto.").

the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment.[121] The perceived public advantage of a retroactive law is not simply to be balanced against its relatively small impact on private interests, or the prohibition would be deprived of most of its force. There must be a compelling public interest to overcome the heavy presumption against retroactive laws. To be sure, courts must be mindful that statutes are not to be set aside lightly. This Court has invalidated statutes as prohibitively retroactive in only three cases, all involving extensions of statutes of limitations.[122] But courts must also be careful to enforce the constitutional prohibition to safeguard its objectives.

Under this test, changes in the law that merely affect remedies or procedure, or that otherwise have little impact on prior rights, are usually not unconstitutionally retroactive. But these consequences of the proper application of the prohibition cannot substitute for the test itself. The results in all of our cases applying the constitutional provision would be the same under this test. The cases that considered only whether the challenged statute impaired vested rights implicitly concluded that any impairment did not upend settled expectations and was overcome by the public interest served by the enactment of the statute. And the cases that focused on the propriety of the

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[121] *See* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 697 (1960) ("[T]he constitutionality of [a retroactive] statute is determined by three major factors, each of which must be weighed in any particular case. These factors are: the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters."); *see also Owen Lumber Co. v. Chartrand*, 73 P.3d 753, 755 (Kan. 2003); *Peterson v. City of Minneapolis*, 173 N.W.2d 353, 357 (Minn. 1969).

[122] *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 5 (Tex. 1999); *Wilson v. Work*, 62 S.W.2d 490 (Tex. 1933) (per curiam) (original proceeding); *Mellinger v. City of Houston*, 3 S.W. 249, 254-255 (Tex. 1887).

Legislature's exercise of its police power implicitly concluded that the exercise was not merely reasonable but was compelling, notwithstanding the statute's effect on prior rights.

The test the court of appeals distilled from the cases focuses too much on the reasonableness of legislative action and does not give full voice to the concerns addressed by the prohibition against retroactive laws. The court believed that one consideration in applying the prohibition is whether a statute is "appropriate and reasonably necessary to accomplish a purpose within the scope of the police power".[123] But the necessity and appropriateness of legislation are generally not matters the judiciary is able to assess. In *Barshop*, for example, we did not undertake to determine whether the regulation scheme fashioned by the Legislature in the Edwards Aquifer Act was the only, the best, or even a good way to conserve and allocate groundwater among those claiming a right to it. The important considerations were that the Act discharged the Legislature's constitutionally mandated duty to conserve public resources, that some regulation was entirely to be expected, and that the burden of its retroactive effect in basing future withdrawals on historic use was shared by all those claiming a right to groundwater.

The second factor in the court of appeals' test was whether a statute is unreasonable, arbitrary, unjust, unduly harsh, or disproportionate to the end sought to be accomplished.[124] But the intent of the prohibition against retroactive laws is to foreclose these kinds of considerations to the Legislature in enacting laws and to the judiciary in reviewing them. A retroactive law is not permissible merely because the end seems to justify the means. The presumption is that a retroactive

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[123] 251 S.W.3d 520, 532 (Tex. App.–Houston [14th Dist.] 2006).

[124] *Id*.

law is unconstitutional without a compelling justification that does not greatly upset settled expectations.

Robinson would go further. She argues that because the prohibition against retroactive laws is part of the Texas Constitution's Bill of Rights, it is absolute, and any weighing of the government's interest in enacting a retroactive law is precluded by article I, section 29 of the Texas Constitution, which states:

> To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

But Robinson's argument begs the question. We do not disagree that the constitutional prohibition is absolute when it applies, as are the right to worship, the right to free speech, the freedom from unreasonable search and seizure, the guaranty of due course of law, and the other protections of the Bill of Rights. But section 29 does not determine whether and how the Bill of Rights' provisions apply. What Justice Oliver Wendell Holmes observed about all rights applies to the right to be free from retroactive laws:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line . . . are fixed by decisions that this or that concrete case falls on the nearer or farther side.[125]

[125] *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

IV

Using the standards we have set out, we must now determine whether chapter 149 is unconstitutionally retroactive as applied to Robinson.

A

We first consider the nature of the rights claimed by the Robinsons and Chapter 149's impact on them. Chapter 149 does not directly restrict the Robinsons' common law action for personal injuries due to exposure to asbestos in the workplace. Rather, it supplants the usual choice-of-law rules for determining what state's successor liability law should apply in asbestos cases in Texas by mandating Texas courts to apply Texas law, then for the first time prescribes limits on that liability, even if, as here, successor liability arose under the law of another state. Crown argues that by allowing for an expansion of liability beyond the tortfeasor to include a successor by merger, successor liability is largely remedial in nature, and in any event, is a creature of statute in which there can be neither right nor expectation. Crown cites *Dickson v. Navarro County Levee Improvement District*, where we gave immediate effect to a statute that repealed a special, statutory cause of action.[126] Crown analogizes this case to *Owens Corning*, which upheld the change in Texas law to allow a plaintiff no more time to sue here than he would have had in his state of residence.[127]

But the successor liability in this case is not a creature of Texas law; the parties agree that without Chapter 149, New York or Pennsylvania law would apply, and that under the law of those states, Crown's successor liability is unquestionable. So this is not a case like *Dickson*, in which the

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[126] 139 S.W.2d 257 (Tex. 1940).

[127] *Owens Corning v. Carter*, 997 S.W.2d 560, 573 (Tex. 1999).

Legislature abolished a cause of action it had itself created; Chapter 149 limits liability created under other states' laws. Nor is this a case like *Owens Corning*, in which the Legislature changed the statute of limitations so that a nonresident plaintiff would gain no advantage by suing in Texas rather than in his home state; Chapter 149 disadvantages Texas residents, as well as nonresidents, who sue Crown in Texas rather than New York or Pennsylvania. Nevertheless, Crown has a point that choice-of-law rules are purely procedural and subject to change, often by courts, but certainly by the Legislature if it chooses to do so.

However, Chapter 149 extinguishes the Robinsons' claim and all other such claims against Crown in Texas, and while it does so indirectly, extinction was the Legislature's specific intent. An interest in maintaining an established common-law cause of action is greater than an interest in choice-of-law rules. We have held that an unliquidated personal-injury claim was not a property interest under the common law,[128] but it is now assignable as other property interests.[129] The rights protected by the constitutional prohibition against retroactive laws are no more limited to those recognized at the time the prohibition was adopted than are the rights protected by due course of law. An unliquidated claim may have little or no value, as for example when the cause of action has not been recognized or the elements of recovery cannot be proved. But here, claims like the Robinsons' have become a mature tort, and recovery is more predictable, especially when the injury is mesothelioma, a uniquely asbestos-related disease. Discovery taken in the case shows that the

[128] *Graham v. Franco*, 488 S.W.2d 390, 395 (Tex. 1972).

[129] TEX. PROP. CODE § 12.014.

Robinsons' claims had a substantial basis in fact. Their right to assert them was real and important, and it was firmly vested in the Robinsons.

Crown argues that when Mundet was still selling the asbestos insulation to which John Robinson was exposed in ship boiler rooms, the Robinsons could not reasonably have expected Mundet to be able to pay all the claims that would eventually arise, or that the company would merge with a deeper pocket like Crown. But those are not the expectations the prohibition against retroactive laws protects. The Robinsons could well have expected, then as now, that a rule of law that permitted their recovery, and many others' before them, would not be changed after they had filed suit to abrogate their claim.

Crown argues that the Robinsons have alleged that all the defendants they have sued are jointly and severally liable and that they are likely to recover all their damages from those who have already settled and the others than remain. We refuse to speculate about what might happen. If Crown would otherwise be responsible for the Robinsons' injury, then by insulating Crown, Chapter 149 either reduces the recovery to which the Robinsons are entitled or requires the other defendants to pay Crown's share. Either way, the statute disturbs settled expectations.

We therefore conclude that Chapter 149 significantly impacts a substantial interest the Robinsons have in a well-recognized common-law cause of action.

B

We next consider whether Chapter 149 serves the public interest. Crown argues that the statute helps alleviate the asbestos litigation crisis that has already bankrupted many companies, resulting in lost jobs and a burden on the State's economy. The Legislature has recognized the

severity of that crisis in another context,[130] but it did not do so in enacting House Bill 4 and Chapter 149. On the contrary, the legislative record is fairly clear that chapter 149 was enacted to help only Crown and no one else. Crown itself has been unable to identify to us any other company affected by Chapter 149. There is evidence that Crown has about 1,000 employees in Texas and about the same number of former employees on retirement, and that it operates three facilities here. Crown asserts that it continues to be sued on asbestos claims in Texas, but the record is silent concerning the number of those claims or the amount of Crown's probable exposure.

The Legislature made no findings to justify Chapter 149. Even the statement by its principal House sponsor fails to show how the legislation serves a substantial public interest. No doubt Texas will benefit from reducing the liability of an employer and investor in the State, but the extent of that benefit is unclear on this record. And in any event, there is nothing to indicate that it rises to the level of the public interest involved in *Bastrop* and *A.V.*

Crown argues that the public interest has been recognized by other states' legislatures in enacting similar legislation. We are aware of ten other state legislatures that have enacted laws similar to chapter 149. In one state, Pennsylvania, the legislation was fully retroactive,[131] just as chapter 149 is, but the Supreme Court of Pennsylvania has held the statute to violate the Open Courts provision of the Pennsylvania Constitution.[132] Statutes adopted in three states — Florida, Indiana,

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[130] Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1, 2005 Tex. Gen. Laws 169 (finding an "asbestos litigation crisis" in Texas and throughout the country).

[131] 15 PA. CONS. STAT. ANN. § 1929.1 (West 2010).

[132] *Ieropoli v. AC&S Corp.*, 842 A.2d 919 (Pa. 2004).

and Wisconsin — apply to pending actions if trial has not commenced.[133] Statutes adopted in three other states — North Dakota, Ohio, and Oklahoma — have the same application *unless it is found to be unconstitutional*.[134] South Carolina's statute applies only to actions filed after the statute's effective date,[135] and Georgia's applies only to actions that accrue after the statute's effective date.[136] The effect of Mississippi's statute on accrued or pending claims is unclear from the text.[137] Other states' perception of the public interest served by retroactive legislation is at best ambiguous.

It is tempting to think that the real burden of Chapter 149 on the Robinsons and other plaintiffs in their shoes will be light compared to the benefit to Crown, its current and former employees, and the State. The Robinsons' case, and most others like it, involves many defendants and large settlements funded from many pockets. The impact of Chapter 149 on individual cases may be slight, relative to the cumulative impact on Crown without Chapter 149. But we think that an important reason for the constitutional prohibition against retroactive laws is to preempt this weighing of interests absent compelling reasons. Indeed, it is precisely because retroactive rectification of perceived injustice seems so reasonable and even necessary, especially when there are few to complain, that the constitution prohibits it.

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[133] FLA. STAT. ANN. §§ 774.001-.008 (West 2010); IND. CODE ANN. §§ 34-31-8-1 to -12 (West 2010); WIS. STAT. ANN. § 895.61 (West 2010).

[134] N.D. CENT. CODE § 32-46-06 (2010); OHIO REV. CODE ANN. § 2307.97 (West 2010); OKLA. STAT. ANN. tit. 76, §§ 72-79 (West 2010).

[135] S.C. CODE ANN. § 15-81-110 to -160 (2010).

[136] O.C.G.A. § 51-15-1 to -8 (2010) (see § 51-15-3, Chapter Note, Editor's Notes, on effective date and non-codified provisions); Ga. L. 2007, p. 4, §§ 2, 4 (text of SB 182, as passed, is available at http://www.legis.state.ga.us/legis/2007_08/fulltext/sb182.htm).

[137] MISS. CODE ANN. § 79-33-1 to -11 (2010).

Accepting the legislative record as indicating the reasons for its actions, we conclude that the public interest served by Chapter 149 is slight.

* * *

For these reasons, we hold that Chapter 149, as applied to the Robinsons' common-law claims, violated article I, section 16 of the Texas Constitution. The court of appeals' judgment is reversed and the case is remanded to the trial court for further proceedings.

Nathan L. Hecht
Justice

Opinion delivered: October 22, 2010

IN THE SUPREME COURT OF TEXAS

NO. 06-0714

BARBARA ROBINSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOHN ROBINSON, DECEASED, PETITIONER,

v.

CROWN CORK & SEAL COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR TO MUNDET CORK CORPORATION, RESPONDENT

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

Argued February 7, 2008

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, dissenting.

The Legislature enacted Chapter 149 of the Civil Practice and Remedies Code to protect businesses, which acquired other entities, from financial disaster based solely upon the acquired entities' past, discontinued manufacture of asbestos products. The statute limits the liability of the acquiring business, which had not engaged in the asbestos business, to the fair market value of the acquired entity at the time of the acquisition. Through Chapter 149, the Legislature balances limitations on asbestos-related recoveries against protecting the assets and employees of businesses who did not cause the illness, while leaving intact the entirety of potential liability and damages proven against companies that were involved in the asbestos business and are, perhaps, more

culpable. The Court's holding that the legislation is unconstitutional prevents the Legislature from addressing an injustice arising from a crisis that caused dozens of bankruptcies and the loss of thousands of jobs in this state and throughout the country due to asbestos-related litigation. *See, e.g.*, Jonathan Orszag, The Impact of Asbestos Liabilities on Workers in Bankrupt Firms, Remarks at the Asbestos Litigation Symposium at the South Texas College of Law in Houston, Tex. (Mar. 7, 2003), *in* 44 S. TEX. L. REV. 1077, 1078–80 (2003) (describing results of a study indicating that sixty-one companies entered into bankruptcy and that 52,000 to 60,000 people lost their jobs due to asbestos litigation).

The Court's new balancing test reaches the wrong result. By holding that an unliquidated claim with "substantial basis in fact" is entitled to constitutional protection, it ignores an important principle. ___ S.W.3d ___. The constitutional retroactivity doctrine does not protect an asserted entitlement to property one does not own, and until a final judgment in a case, we do not know whether the claim will be vindicated or refuted. The Court's reasoning that the right to file a claim is protected by the retroactivity doctrine because, at least in part, the claim is well founded with a "substantial basis in fact" springing from a "mature tort" with " more predictable" recovery, is a troubling proposition. ___ S.W.3d ___. It is unclear what that means, but it suggests that the constitutional retroactivity protection is dependent on the perceived strength of a claim. The likelihood of success in litigation is dependent on a myriad of factors that make such predictions difficult at best. We have held that an unliquidated personal injury claim is not a protected property interest, and the contingent recovery from one should not be either.

While JUSTICE MEDINA, who writes separately, and I disagree on the result, we agree that the Court should not abandon vested rights jurisprudence in favor of a new and uncertain approach. The analysis in the Court's opinion is contrary to both the clear rule among the federal courts of appeals that have addressed the issue and the majority rule among our courts of appeals. The Court could rely on traditional police power jurisprudence in which, even if the Robinsons had a vested right in their unliquidated cause of action, courts consider whether the Legislature's action was justified by its constitutionally recognized police power to act in the interest of the health and welfare of Texas. Indeed, the Court's new balancing test for retroactivity analysis is similar to the police power balancing test I expound under existing law, but is newly incorporated into the retroactivity doctrine. For all these reasons, I respectfully dissent.

I. BACKGROUND

John Robinson served in the Navy for twenty years, and during that time he was exposed to steam pipes and boiler doors coated with insulation containing asbestos. Some of the insulation and other products were marked with a "big M," the trademark used by Mundet Cork Corporation. In August 2002, Robinson was diagnosed with mesothelioma. He claims the disease occurred as a result of his exposure to asbestos in, among others, insulation products produced by Mundet.

Crown Cork itself has never been in the business of mining, manufacturing, installing, selling, distributing, removing, or otherwise making asbestos or any asbestos-containing product. However, on November 7, 1963, Crown Cork's predecessor entered into an agreement to purchase the majority of Mundet's stock after the majority shareholder died and offered the shares for sale. Crown Cork paid approximately $7 million for the stock, a majority interest in the company.

Mundet ceased manufacturing insulation products prior to Crown Cork's acquisition of Mundet, but continued to hold insulation products in stock until early 1964, when a third-party entity purchased the assets of Mundet's insulation division, including its inventory, contracts, raw materials, and accounts receivables. On January 4, 1966, Mundet statutorily merged with Crown Cork's predecessor, and in 1989 Crown Cork was reincorporated in Pennsylvania.[1]

After he had been diagnosed with mesothelioma, Mr. Robinson and his wife filed suit in 2002 against Crown Cork and twenty other defendants for damages caused by Mr. Robinson's exposure to asbestos-containing products. The Robinsons sought to hold each defendant jointly and severally liable. On November 25, 2002, the Robinsons filed a motion for partial summary judgment to establish Crown Cork's liability for actual damages as Mundet's successor. Crown Cork did not contest its successor liability for compensatory damages, and on July 16, 2003 the trial court granted the Robinsons' motion, holding that Crown Cork "is liable and bears responsibility for the compensatory damages, if any, awarded to Plaintiffs that are attributable to the conduct, products, or torts of its predecessor Mundet Cork Corporation."

House Bill 4, a bill drafted to comprehensively address perceived crises in medical malpractice, asbestos, and other litigation issues in Texas, was introduced in the Texas House of Representatives on February 17, 2003, without any provision regarding successor asbestos liability. Tex. H.B. 4, 78th Leg., R.S. (2003). Its purpose was to operate as a "comprehensive civil justice

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[1] The term "statutory merger" is used to distinguish business mergers made pursuant to the statutory scheme of the state of incorporation from other, nonstatutory forms of combinations, for example asset-purchase and stock-purchase transactions. 20A ROBERT W. HAMILTON, ELIZABETH S. MILLER, & ROBERT A. RAGAZZO, TEXAS PRACTICE SERIES: BUSINESS ORGANIZATIONS § 43.2 (2d ed. 2004).

reform bill intended to address and correct problems that currently impair the fairness and efficiency of our court system." House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. at 1 (2003).

In late March 2003, more than 100 amendments were submitted to the Bill, including Article 17, the asbestos successor-liability article. The article was debated on the floor of the House on March 25, 2003 and passed the House three days later. Both the House and Senate held hearings on the bill as a whole. In an April 30, 2003 meeting of the Senate State Affairs Committee, Senator Ratliff, the committee chair, introduced hearings on the Senate Substitute to House Bill 4. He described Article 17 as follows:

> Article 17, limitations in civil actions of liabilities relating to certain mergers or consolidations. This, members, is the Crown Cork and Seal asbestos issue. What we have put in this bill is what I understand to be an agreed arrangement between all of the parties in this—in this matter.

Hearings on the Proposed Senate Substitute for H.B. 4 Before the S. Comm. on State Affairs, 78th Leg., R.S. (Apr. 30, 2003) (Statement of Sen. Bill Ratliff, Chairman, S. Comm. on State Affairs). The act passed the Senate on May 16, 2003; the House accepted the Conference Committee compromise bill on June 1, 2003; both adopted corrections on June 2, 2003; and the bill was signed into law by the Governor on June 11, 2003. Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847, 899 (codified at TEX. CIV. PRAC. & REM. CODE §§ 149.001–.006). With a two-thirds vote in both chambers, the bill took effect immediately and was made retroactive to all cases "pending on that effective date and in which the trial, or any new trial or retrial following motion,

appeal, or otherwise, begins on or after that effective date."[2] *Id.* § 17.02(2), 2003 Tex. Gen. Laws at 895; *see also* TEX. CONST. art. III, § 39 ("No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals.").

The act limits the "cumulative successor asbestos-related liabilities" "incurred by a corporation as a result of or in connection with a merger or consolidation . . . with or into another corporation or that are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation that occurred" prior to May 13, 1968. TEX. CIV. PRAC. & REM. CODE §§ 149.001–.003.[3] The asbestos liabilities of successor corporations "are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation," *id.* § 149.003(a), and adjusted for inflation at a simple interest rate of the prime rate plus one percent, *id.* § 149.005(a). An "asbestos claim" is "any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos, including" property damage caused by

[2] The House also defeated an amendment making the bill applicable only to successor liabilities assumed or incurred after the effective date of the act. H.J. of Tex., 78th Leg., R.S. 818–19 (2003).

[3] The act also provides a number of exceptions, excluding, among other things, workers' compensation claims, an insurance corporation, a claim made in a bankruptcy proceeding begun prior to April 1, 2003, claims for premises liability, or claims against a "successor that, after merger or consolidation, continued in the business of mining asbestos or in the business of selling or distributing asbestos fibers or in the business of manufacturing, distributing, removing, or installing asbestos-containing products which were the same or substantially the same as those products previously manufactured . . . by the transferor." *Id.* § 149.002(b).

asbestos, the health effects of asbestos exposure, or any claim made by or on behalf of any person exposed to asbestos. *Id.* § 149.001(1). The Legislature clearly intended to limit recoveries only against so-called "innocent" successor companies.

According to Crown Cork's experts, by May 2003, Crown Cork had paid or agreed to pay asbestos related claims, not covered by insurance, totaling more than seven times the present value of Mundet according to the statutory formula. On July 3, 2003, Crown Cork filed a Motion for Summary Judgment raising the affirmative defense of Chapter 149, introducing evidence of the value of Mundet and total asbestos-related payments made by Crown Cork to date. The Robinsons asserted that the statute was a "special law" in violation of article III, section 56 of the Texas Constitution, that it deprived the Robinsons of a vested property right in violation of article I, section 16 of the Texas Constitution, that the statute was an unconstitutional taking, violating article I, section 17 of the Texas Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, that it constituted a deprivation of substantive due process rights under the Texas and United States Constitutions, that it deprived John Robinson of a contractual right, contrary to article I, section 16 of the Texas Constitution, and deprived John Robinson of his common law causes of action in violation of the Open Courts guarantee in article I, section 13 of the Texas Constitution. The Robinsons raise only the retroactivity and special law challenges before this Court. Implicitly finding that Crown Cork had established that the statute applied to it as a matter of law, and that Crown Cork had already paid liabilities in excess of Mundet's adjusted value, the trial court granted Crown Cork's motion for summary judgment on October 2, 2003. It issued an amended order

nineteen days later, dismissing claims against Crown Cork brought by the Robinsons.[4] The Robinsons nonsuited their remaining claims against Crown Cork and then appealed the summary judgment.[5] The court of appeals affirmed. Characterizing the jurisprudence on vested rights as "inconsistent and difficult to use as a guide," the court instead balanced the Legislature's police power against the private rights impacted by the statute, and held that the statute was constitutional. 251 S.W.3d 520, 532–35 (Tex. App.—Houston [14th Dist.] 2006, pet. granted). One justice dissented, arguing that the court should have applied a vested rights analysis and concluded that the statute violated article I, section 16. *Id.* at 551–52 (Frost, J., dissenting).

II. ANALYSIS

In this Court, the Robinsons raise only two issues, and both are grounded exclusively in Texas law. They argue that Chapter 149 of the Texas Civil Practice and Remedies Code is an unconstitutional "special law" and that it is unconstitutionally retroactive when applied to the Robinsons' claims to effectively bar recovery.[6] As the party challenging the constitutionality of the statute, the Robinsons must overcome the presumptions that "the Legislature intended for the law

[4] The Robinsons' remedies against the other defendants pending at the time of the enactment of the statute was not limited by Chapter 149, but their remedy against Crown Cork was. The Robinsons eventually recovered at least $850,000 from other defendants sued in addition to Crown Cork.

[5] On November 16, 2003, after the trial court entered its amended order granting summary judgment, John Robinson died. Mrs. Robinson continued to prosecute her claims individually and as representative of the estate of John Robinson. Because the claims still live independently, one for Mrs. Robinson and one for the estate of John Robinson, this opinion will refer to petitioners as the Robinsons.

[6] The Court astutely notes that, due to the odd procedural posture of the case, as well as Mr. Robinson's untimely passing, it is unclear which legal claims are being allegedly retroactively extinguished. Because the parties raise only whether Chapter 149 is unconstitutionally retroactive as applied to Mr. Robinson's common law claims (kept alive through the survival statute and pursued derivatively through the wrongful death statue) I, as the Court, address only those arguments. However, as more fully discussed below, the fact that the Robinsons' claims are statute-based reinforces the conclusions of this vested rights analysis.

to comply with the United States and Texas Constitutions, to achieve a just and reasonable result, and to advance a public rather than a private interest." *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 381 (Tex. 2002) (citing TEX. GOV'T CODE § 311.021; *Spence v. Fenchler*, 180 S.W. 597, 605 (Tex. 1915)). The Robinsons also bear the burden of showing that the law is contrary to a provision of the state constitution. *See, e.g.*, *Walker v. Guiterrez*, 111 S.W.3d 56, 66 (Tex. 2003). The Robinsons' retroactivity claim is an as-applied challenge, which means that they must demonstrate that the statute is unconstitutional as it operates in practice against them. *Tex Mun. League*, 74 S.W.3d at 381 (citing *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995)). Their special law challenge is a facial challenge, which means that the Robinsons must demonstrate there is no conceivable set of facts that could exist under which the statute would be constitutional. *Garcia*, 893 S.W.2d at 520.

In this case the Court determines that the law is unconstitutionally retroactive and thus does not reach the special law challenge. However, for the reasons that follow, I would hold that the law survives both challenges, but for reasons different from those articulated by the court of appeals.

A. Retroactive Law

Article I, section 16 of the Texas Constitution, part of the Texas Bill of Rights, declares that "[n]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." TEX. CONST. art. I, § 16. A retroactive law "takes away or impairs vested rights acquired under existing laws . . . ." *Paschal v. Perez*, 7 Tex. 348, 365 (1851). A retroactive law means a law applying to things that are past. *DeCordova v. City of Galveston*, 4 Tex. 470, 475 (1849).

Of course, not every law that affects relationships among parties based upon events occurring in the past is automatically unconstitutional, just as not every law that may affect a person's right to speak, that may affect a contractual obligation, or that may allow a search of a person's dwelling without a warrant, is unconstitutional. *See Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002). This Court has articulated three doctrines that further define the scope of the retroactivity prohibition. First, a law is not unconstitutionally retroactive unless it impairs a person's "vested rights." *E.g.*, *id.* at 219. Second, a law is not unconstitutionally retroactive if it only modifies or reduces the person's remedy. *E.g.*, *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997); *Holder v. Wood*, 714 S.W.2d 318, 319 (Tex. 1986). And finally, even if the law affects a person's vested rights, and not a remedy, a law may not violate the retroactivity prohibition if the government's interest in protecting society, based upon its police power, outweighs the individual's interest in his or her particular right. *E.g.*, *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 633–34 (Tex. 1996). The first two tests are definitional—this Court has determined that a retroactive law does not implicate article I, section 16 of the Constitution unless the law both affects a vested right and impairs an actual right, not merely a remedy or a procedure. The third test may operate as an exception to the rule. Although related, the review of each doctrine is separate. *E.g.*, *In re A.V. & J.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (describing "exceptions" to retroactivity); *David McDavid Nissan*, 84 S.W.3d at 219 (analyzing the procedural/remedial test as part of the vested rights exception because "procedural and remedial statutes typically do not affect a vested right"). Although the Court has not had occasion recently

to address the specific meaning of article I, section 16's prohibition of retroactive laws, our precedents provide a useful roadmap.

1. Vested Rights

Vested rights derive from "[c]onsiderations of fair notice, reasonable reliance, and settled expectations." *Owens-Corning v. Carter*, 997 S.W.2d 560, 572–73 (Tex. 1999). "A retroactive statute only violates our Constitution if, when applied, it takes away or impairs vested rights acquired under existing law." *David McDavid Nissan*, 84 S.W.3d at 219 (citing *Ex parte Abell*, 613 S.W.2d 255, 260 (Tex. 1981)); *McCain v. Yost*, 284 S.W.2d 898, 900 (Tex. 1955).

We explained "vested rights" in *Ex parte Abell*:

> *[A] right, in a legal sense, exists, when, in consequence of the existence of given facts, the law declares that one person is entitled to enforce against another a given claim,* or to resist the enforcement of a claim urged by another. Facts may exist out of which, in the course of time or under given circumstances, a right would become fixed or vested by operation of existing law, but until the state of facts which the law declares shall give a right comes into existence there cannot be in law a right; and for this reason it has been constantly held that, *until the right becomes fixed or vested, it is lawful for the lawmaking power to declare that the given state of facts shall not fix it*, *and such laws have been constantly held not to be retroactive* in the sense in which that term is used.

613 S.W.2d at 261 (quoting *Mellinger v. City of Houston*, 3 S.W. 249, 253 (Tex. 1887)) (emphasis added). "A right cannot be considered a vested right unless it is something more than "a *mere expectation* as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable . . . ." *Id.* (citation omitted) (emphasis added). This Court has clearly articulated that "no one has a vested right in the continuance of present laws in relation to a

particular subject . . . . There cannot be a vested right, or a property right, in a mere rule of law." *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916).

The court of appeals called the vested rights analysis "inconsistent and difficult to use as a guide." 251 S.W.3d at 526. Other courts of appeals have called the vested rights analysis "amorphous." *Sims v. Adoption Alliance*, 922 S.W.2d 213, 216 (Tex. App.—San Antonio 1996, writ denied); *Ex parte Kubas*, 83 S.W.3d 366, 369 (Tex. App.—Corpus Christi 2002, pet. ref'd). Courts from other states and commentators have also criticized vested rights analyses, preferring an analysis requiring a balancing of the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the pre-enactment right, and the nature of the right the statute alters. *See, e.g.*, *Owen Lumber Co. v. Chartrand*, 73 P.3d 753, 755–56 (Kan. 2003); *Peterson v. City of Minneapolis*, 173 N.W.2d 353, 356–57 (Minn. 1969); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 697 (1960). And the Court's opinion, in rejecting a "bright-line test for unconstitutional activity," and in recognizing that the Texas Constitution "does not insulate every vested right from impairment," seems to abandon the vested rights analysis altogether, or, at a minimum, detaches the concept of vested rights from its traditional significance in a retroactivity analysis. ___ S.W.3d ___. However, the doctrine's difficulty is not a justification to abandon it wholesale. For, at the core of the vested rights doctrine lies an extremely important principle—the constitutional retroactivity doctrine does not protect an asserted entitlement to property one does not own, and until a final judgment in a case, we do not know whether the lawsuit will prove or refute a claim to recover.

Applying our century-old jurisprudence, I would hold that an accrued, but unliquidated cause of action is not a vested right because: (1) the framers of the Texas Constitution would not have considered an unliquidated cause of action to be a vested property right entitled to protection under the Retroactivity Clause; (2) a lawsuit is not a right to recover anything but a contingent and unliquidated pursuit of a claimed injury that may or may not be successful; and (3) until and unless a final judgment is rendered in favor of the claimant, there is no right to recover damages on the claim against another. *See Mellinger*, 3 S.W. at 252; *Graham v. Franco*, 488 S.W.2d 390, 393 (Tex. 1972); *Ex parte Abell*, 613 S.W.2d at 260.

In interpreting the Texas Constitution, our duty is "to ascertain and give effect to the plain intent and language of the framers of [the constitution] and of the people who adopted it." *Wilson v. Galveston Cnty. Cent. Appraisal Dist.*, 713 S.W.2d 98, 101 (Tex. 1986) (quoting *Gragg v. Cayuga Indep. Sch. Dist.*, 539 S.W.2d 861, 866 (Tex. 1976)). We look

> to such things as the language of the constitutional provision itself, its purpose, the historical context in which it was written, the intentions of the framers [and ratifiers], the application in prior judicial decisions, the relation of the provision to [other parts of the constitution and] the law as a whole, the understanding of other branches of government, the law in other jurisdictions, state and federal, constitutional and legal theory, and fundamental values including justice and social policy.

Davenport v. Garcia, 834 S.W.2d 4, 30 (Tex. 1992) (Hecht, J., concurring) (citations omitted).

Examining the state of "vested rights" and what constitutes a vested property right at the time of the framing of the 1876 Constitution provides important insight into what the Framers considered protected by the Retroactivity Clause. Prior to and at the time of the adoption of the Texas Constitution in 1876, it was well established that the doctrine of vested rights created an exception

to the prohibition on retroactive legislation. *See, e.g.*, *DeCordova*, 4 Tex. at 475; *Paschal*, 7 Tex. at 365 ("Mr. Justice Story defines a retrospective law to be, one which takes away or impairs vested rights acquired under existing law, or creates a new obligation, or imposes a new duty, or attaches a new disability in relation to transactions already past." (citing *Soc'y for the Propagation of the Gospel v. Wheeler*, 2 Gall. 105, 138, 22 F. Cas. 756, 767 (No. 13,156) (C.C.D.N.H. 1814))).[7] A vested right is now, and was then, considered some form of "property right." *Middleton*, 185 S.W. at 560. However, at the time of the framing of the cCnstitution of 1876, an accrued, but unliquidated, cause of action for personal injury, was not "property" in any sense. *See G. H. & S. A. R.R. v. Freeman*, 57 Tex. 156 (1882); *Stewart v. H. & T. C. Ry. Co.*, 62 Tex. 246 (1884). Common law tort causes of action for personal injury could not be assigned and did not survive the death of the victim. As described by Chief Justice Greenhill:

> By the clear weight of common law authority, *a cause of action for personal injury is not property in any sense, nor for any purpose till it has been reduced to judgment*; and the judgment, as property, takes its character as separate or common from the right violated in committing the wrong—the personal injury.

Graham, 488 S.W.2d at 393 (emphasis added) (quotation omitted); *see also State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 706–07 (Tex. 1996) (discussing the role at common law regarding the assignability and survivability of personal injury tort causes of action). Legislation was required to amend both of those common law rules. *E.g.*, Act of May 4, 1895, 24th Leg., R.S., ch. 89, § 1,

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[7] *See also Milam Cnty. v. Bateman*, 54 Tex. 153, 163 (1880); *Moore v. Letchford*, 35 Tex. 185, 222 (1871) (Ogden, J., dissenting) (noting that the Legislature may pass retrospective legislation that "would *regulate" and neither "create nor destroy* vested rights" (emphasis added)); *Hamilton v. Avery*, 20 Tex. 612 (1857); *Nichols v. Pilgrim*, 20 Tex. 426, 428–29 (1857) (discussing whether an executed contract for the sale of land was a "vested right" allowing suit for partition of land, notwithstanding the enactment of the statute of frauds).

1895 Tex. Gen. Laws 143 (current version at TEX. CIV. PRAC. & REM.CODE § 71.021) (allowing survival of personal injury claims); TEX PROP. CODE § 12.014(a) (allowing "an interest in a cause of action on which suit has been filed" to be "sold, regardless of whether the . . . cause of action is assignable in law or equity"); *Gandy*, 925 S.W.2d at 707 (noting that personal injury claims only became assignable after they could survive the owner's death).

As in other circumstances, property is treated differently. In 1876, choses in action for injury to property were considered property, and they were alienable, assignable, and devisable.

> [W]hen the injury affects the estate rather than the person, when the action is brought for damage to the estate and not for injury to the person . . . the right of action could be bought and sold. Such right of action, upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee as a part of his assets . . . .

Graham, 488 S.W.2d at 393 (quoting *Freeman*, 57 Tex. at 158); *see also Gandy*, 925 S.W.2d at 706 (noting that "[t]he pressures against the rule of inalienability were commercial and thus affected only debts and other contract rights that were not personal to the owner and could survive to his estate upon his death"). The common law in Texas did not consider tort causes of action for personal injury to be "property," and "vested rights"— a concept recognized in common law at the time of the framing of the 1876 Constitution—are a species of property. Therefore, under the Texas Constitution, ratified in 1876, an accrued, but unliquidated personal injury cause of action was not considered to be a "vested right" for purposes of the Retroactivity Clause. *Gandy*, 925 S.W.2d at 706. This reasoning applies with special force to the Robinsons' as-applied challenge, because at common law Mr. Robinson's claims would not have survived his death. His claims exist today only by virtue of statutes. The framers of the Texas Constitution would have not believed that there

would be a settled expectation in allowing Mrs. Robinson to continue to prosecute these uncertain claims, either as Mr. Robinsons's personal representative or derivatively through a statutorily created wrongful death action.

The Court recognizes this historical disconnect, yet dismisses it in a single sentence, stating simply that "[t]he rights protected by the constitutional prohibition against retroactive laws are no more limited to those recognized at the time the prohibition was adopted than are the rights protected by due course of law." ___ S.W.3d ___. A court should be cautious in providing new protections for rights that were not part of the sphere of rights contemplated by the democratic institutions that enacted the constitution. *See McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020, 3051–53 (2010) (Scalia, J., concurring) (criticizing the dissent's conceptual framework to "'do justice to [the Due Process Clause's] urgent call and its open texture' by exercising the 'interpretive discretion the latter embodies" and to hold that the Clause encompasses "new freedoms the Framers were too narrow-minded to imagine" (quoting *Id.*, ___ U.S. ___, 130 S. Ct. at 3099–100 (Stevens, J., dissenting))).

The right to file a cause of action is not an entitlement to enforce the alleged claim, but a "mere expectation" subject to numerous contingencies. *Ex parte Abell*, 613 S.W.2d at 261–62; *Mellinger*, 3 S.W. at 252–53. A plaintiff's ultimate recovery is contingent upon more than just success at trial. For example, it is contingent upon finding—and serving with process— the right defendant, who may be an inaccessible foreign defendant, or, as in this case, may be a corporation long since out of business. *See, e.g.*, TEX. R. CIV. P. 103–109a (discussing methods of service); *GFTA Trendanalysen B.G.A. Herrdum GMBH & Co., K.G. v. Varme*, 991 S.W.2d 785, 785 (Tex.

1999) (per curiam) (holding special appearance by foreign corporation did not waive challenge to jurisdiction). A plaintiff's recovery may be contingent upon following particular pretrial procedures, such as the filing of an expert report or providing discovery. *See* TEX. CIV. PRAC. & REM. CODE § 74.351 (requiring the service of an expert report by the plaintiff in a health care liability claim and demanding dismissal of the claim if the report is not timely served); *Cire v. Cummings*, 134 S.W.3d 835, 841–42 (Tex. 2004) (holding that "death penalty" sanctions of dismissing plaintiff's claim was warranted because of plaintiff's failure to produce audiotapes that would have proved or disproved plaintiff's legal malpractice claims). Any informed client knows that winning a lawsuit, even a seemingly "open and shut" case, is never certain, particularly when multiple defendants and multiple products may have caused the same injury, and no reasonable person has a "settled expectation" of achieving monetary recovery once she discovers a harm inflicted upon her.

Rather, I would hold, consistent with the jurisprudence of the United States Supreme Court[8] a majority of the federal courts of appeals,[9] a number of other states,[10]

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[8] *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (recognizing that the "*constitutional* impediments to retroactive civil legislation are now modest"); *see also* Hochman, 73 HARV. L. REV. at 717 & n.135 ("[T]he Court has many times sustained the application of a retroactive statute to an accrued cause of action." (citing *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467 (1911))).

[9] *Hammond v. United States,* 786 F.2d 8, 12 (1st Cir. 1986) ("The question whether the rights asserted in plaintiff's state-law causes of action are 'vested' cannot be answered by looking to see whether suit had already been filed . . . . No person has a vested interest in any rule of law [and] this is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained." (citations and quotations omitted)); *In re TMI*, 89 F.3d 1106, 1115 n.9 (3d Cir. 1996) (distinguishing cases holding accrued causes of action to be vested rights, calling them "contrary to current federal constitutional precedent that finds no vested right in a tort cause of action before final judgment); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 335 (4th Cir. 1997) ("No person has a vested right in a nonfinal tort judgment . . . ."); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (quoting *Sowell*); *Konizeski v. Livermore Labs, (In re Consol. U.S. Atomospheric Testing Litig.)*, 820 F.2d 982, 989 (9th Cir. 1987) (quoting *Hammond*); *Grimesy v. Huff*, 876 F.2d 738, 743–44 (9th Cir. 1989) (reviewing vested rights cases under a Fifth Amendment takings analysis); *Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1477–78 (10th Cir. 1984) (holding that "inchoate" rights, such as the right to pursue legal remedies are not "vested" for purposes of the Colorado

and a majority of the courts of appeals to address the issue in this state,[11] that a cause of action

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state and federal constitutions); *Salmon v. Schwartz,* 948 F.2d 1131, 1143 (10th Cir. 1991) (quoting *Arbour* and *Sowell*); *Sowell v. Am. Cyanid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) ("The fact that the statute is retroactive does not make it unconstitutional [because] a legal claim affords no definite or [enforceable] property right until reduced to a final judgment."); *see also Lunsford v. Price*, 885 F.2d 236, 240–41(5th Cir. 1989) (holding the applicability of a statute to pending claims was not manifestly unjust); *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 968 (6th Cir. 2004) (noting that Michigan statute of repose, which "prevent[s] causes of action from accruing" did not violate retroactivity provisions of the federal constitution); *Symens v. SmithKline Beecham Corp.*, 152 F.3d 1050, 1056 n.3 (8th Cir. 1998) (noting that federal regulations, which may preempt state law claims would apply to plaintiffs' tort and implied warranty claims "because plaintiffs had no vested rights in these unasserted claims at the time [the] preemption was modified" (citing *Landgraf*, 511 U.S. at 269, 273)). *But see Davis v. Blige*, 505 F.3d 90, 103 (2d Cir. 2007) (recognizing, in a copyright case applying patent law, that a retroactive assignment destroys an owner's "valuable and *vested* right to enforce her claim"); *Hoyt Metal Co. v. Atwood*, 289 F. 453, 454–55 (7th Cir. 1923) (deciding whether a *judgment* is to be accorded the status of a vested right and stating "[t]hat an accrued cause of action is a vested property right is well settled . . . . Certainly a judgment is a vested property right."); *De Rodulfa v. United States*, 461 F.2d 1240, 1257 (D.C. Cir. 1972) (indicating that "a vested cause of action, whether emanating from contract or common law principles, *may* constitute property beyond the power of the legislature to take away," but not so holding because no cause of action—interference with contract—existed in the case (emphasis added)).

[10] I concede that a majority of other states to directly address the issue have held that an accrued, yet unliquidated cause of action is a "vested right" under either retroactivity or due process analyses. However, a number of other states provide a more nuanced view. For example, Colorado, one of the jurisdictions whose constitution also includes a prohibition on retroactive legislation, has held that a "vested right" is "one that is not dependent on the common law or statute but instead has an independent existence." *In re Estate of DeWitt*, 54 P.3d 849, 853 (Colo. 2002). The Colorado Supreme Court would determine this "independent existence" by balancing: "(1) whether the public interest is advanced or retarded; (2) whether the statute gives effects to or defeats the bona fide intentions or reasonable expectations of the affected individuals; and (3) whether the statute surprises individuals who have relied on a contrary law." *Id.* Nonetheless, the court, and the state's lower courts, do not recognize that an accrued cause of action is a vested right per se. *City of Greenwood Vill. v. Pets. for the Proposed City of Centennial*, 3 P.3d 427, 445–46 (Colo. 2000) ("[C]ontemporary precedent also demonstrates that expectations of parties to litigation are not equivalent to vested rights."); *see also Miller v. Brannon*, 207 P.3d 923 (Colo. App. 2009) ("A vested right must be a contract right, a property right, or a right arising from the transaction in the nature of a contract which has become perfected to the degree that it is not dependent *on the continued existence of the statute or common law*." (emphasis added) (quotations omitted)).

[11] *See Houston Indep. Sch. Dist. v. Houston Chronicle Publ'g Co.*, 798 S.W.2d 580, 589 (Tex. App.—Houston [1st Dist.] 1990, writ denied); *see also Walls v. First State Bank of Miami*, 900 S.W.2d 117, 122 (Tex. App.—Amarillo 1995, writ denied) (holding that retroactive application of federal law shielding employees of a financial institution for reporting suspected wrongdoing was properly applied to lawsuit for malicious prosecution and defamation that had been filed prior to the enactment of the law and stating that "only final, nonreviewable judgments will be accorded the dignity of vested, constitutionally guarded rights, and a law will be deemed to have a prohibited retroactive effect only when it impairs those rights"); *Tex. Gas Exploration Corp. v. Fluor Corp.*, 828 S.W.2d 28, 32 (Tex. App.—Texarkana 1991, writ denied) ("A party has no vested right to a cause of action; neither the Constitution of the United States nor this state forbids the abolition of common-law rights to attain a permissible legislative objective."); *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280, 285 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (noting that even though a plaintiff's cause of action had accrued against a minor child, the plaintiff could not proceed because the Legislature amended the statute to foreclose recovery against children the defendant's age and the plaintiff "had not acquired a 'title . . . to the present

becomes a "vested right" for the constitutional retroactivity analysis when it has reached a final determination—that is, where it has been reduced to an enforceable judgment in the plaintiff's favor.[12] As aptly put in an opinion of the Court of Appeals for the First District:

> A "vested right" implies an immediate right or entitlement—it is not an expectation or a contingency. . . . Engrained in the concept of vested rights is the idea of certainty. . . . The filing of a lawsuit in order to obtain relief or pursue a remedy is generally held not to create or destroy vested rights; the triggering event for the vesting of a right is the resolution of the controversy and the final determination—not the filing of the suit.

Houston Indep. Sch. Dist. v. Houston Chronicle Publ'g Co., 798 S.W.2d 580, 589 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

This rule is most consistent with the understanding of vested property rights at the time of the ratification of the 1876 Constitution. It is consistent with our subsequent interpretation of the words of the Retroactivity Clause.[13] It is consistent with our case law and the great weight of court

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or future enforcement of a demand'" (quotations omitted)); *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190, 221–41 (Tex. App.—Austin 2008, no pet.) (Law, C.J., dissenting) (noting that the plaintiffs had no vested right in the successor liability remedy against Crown because vested rights are "certain and immediately enforceable," the successor liability theory does not create a cause of action, and economic interests could be considered in police power balancing). *But see Satterfield*, 268 S.W.3d at 206–09 (holding that plaintiff in asbestos suit had vested rights in accrued cause of action).

[12] The Open Courts Clause of the Texas Constitution, not at issue in this case, may impose limitations on the extent to which unliquidated claims may be barred. TEX. CONST. art. I, § 13; *Sax v. Votteler*, 648 S.W.2d 661, 665–66 (Tex. 1983) (holding that the "right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress"); *see also Walters v. Cleveland Reg'l Med. Ctr.*, 307 S.W.3d 292, 295 (Tex. 2010).

[13] JUSTICE MEDINA, citing *Ex parte Abell* and quoting *Mellinger*, alleges that the Retroactivity Clause "goes beyond federal guarantees of property and due process." ___ S.W.3d ___ (Medina, J., concurring). While *Abell* recognized that proposition, it did so while simultaneously recognizing that "[i]n practice . . . retroactive lawmaking has not been viewed as the gross abuse of power once assumed." *Ex parte Abell*, 613 S.W.2d at 259–60. Further, commentators and jurists from other states have more recently recognized that specific retroactivity clauses should not be read overly broadly. *See, e.g.*, 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 58 (1977) ("The other prohibition concerning 'retroactive laws' seems to spring from a

of appeals opinions. And it is more predictable and avoids confusion and ambiguity when the Legislature attempts to constitutionally craft a law affecting past conduct.

This Court's first significant discussion of retroactivity occurs in *Mellinger v. City of Houston*, 3 S.W. 249 (Tex. 1887). The City of Houston sued to recover taxes on property that would otherwise have been barred by a subsequently repealed statute of limitations. The Court ruled that the statute was not to be applied retroactively and thus *did not* specifically decide whether Mellinger had a vested right that would be violated by retroactive application of the law. *Id.* at 251–52. It then stated that "an action barred by the statute of limitations was forever barred" and explained that a law may be unconstitutionally retroactive "if a statute of limitations applied to existing causes barred all remedy, or did not afford a reasonable period for their prosecution; or if an attempt were made by law, either by implication or expressly, to revive causes of action already barred . . . ." *Id.* at 253–55. *Mellinger* did not hold that an unaccrued cause of action was a vested right subject to protection, but it did indicate that a shortening of the statute of limitations would require a grace

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general suspicion regarding all retroactive laws of which the three mentioned [ex post facto, bills of attainder, and laws impairing the obligation of contracts] were notorious examples. Early judicial restriction of the scope of ex post facto laws to retroactive criminal laws may have prompted a desire to re-establish the broader sweep, which the prohibition had in the minds of some people, by general condemnation of retroactive laws."); *see also id.* at 59 (discussing the *Mellinger* dicta also quoted by JUSTICE MEDINA and commenting that the authoring justice's argument "excluded not only the specific guarantees of section 16 but the due course of law limitation as well. Although he perceived the growing scope of due process of law at the time of his opinion, Justice Straton could not have foreseen its remarkable subsequent development . . . . Thus, it has been said that laws are retroactive in the sense of section 16 only when they contravene another specific prohibition of the Constitution."); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231 (1926) (noting that, in most states at the time, the explicit retroactive law provisions in other states' constitutions were coterminous with due process). Regardless of whether the Retroactivity Clause in section 16 deserves a broader read than just due process, there is nothing in the text of the Constitution to suggest that it should apply to contingent expectancies such as exist in this case.

period to allow those who had not filed their cause of action to do so before the new limitations period would come into effect. *Id.*

Subsequent cases from this Court recognize that the Legislature cannot resurrect causes of action that have already been extinguished by retroactively lengthening the statute of limitations. *E.g.*, *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 & n.12 (Tex. 1999); *Wilson v. Work*, 62 S.W.2d 490, 490–91 (Tex. 1933) (per curiam). This rule makes sense because "[t]o permit barred claims to be revived years later would undermine society's interest in repose, which is one of the principal justifications for statutes of limitations." *Baker Hughes*, 12 S.W.3d at 4. In other words, when the statute extinguished a cause of action, a defendant received a vested right of repose barring the extinguished claim.

In *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997), a case upon which the Robinsons principally rely, this Court held that a modification of the Tort Claims Act to provide the city with sovereign immunity from the plaintiff's common law tort claims was not constitutionally retroactive. It recognized that the statute "affect[ed] a remedy" for the plaintiff, which usually does not implicate the Retroactivity Clause unless the "remedy is entirely taken away." *Id.* at 502 (citation omitted). We noted that "[t]he Legislature can affect a remedy by providing a shorter limitations period for an accrued cause of action without violating the retroactivity provision of the Constitution if it affords a reasonable time or fair opportunity to preserve a claimant's rights under the former law, or if the amendment does not bar all remedy." *Id.* (citing *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 649 (Tex. 1971); *Mellinger*, 3 S.W. at 254–55). Because the statute became effective seventeen months after her action accrued, the Court held that the plaintiff had a reasonable time to

preserve her rights, and thus the statute was not unconstitutional as applied. *Id.* *Likes* emphasizes (as discussed further below) that where the legislation affects the plaintiff's remedy without entirely taking it away, the legislation is not unconstitutionally retroactive. *Id.*

Finally, this Court has specifically held that the *Mellinger* retroactivity exception, requiring that a party receive reasonable time to preserve its rights, which was relied on in *Likes*, has an exception itself. In *Owens Corning v. Carter*, 997 S.W.2d 560 (Tex. 1999), the Court upheld a retroactive application of an amended borrowing statute against a constitutional challenge. At the time the lawsuit underlying the case was filed, Texas's borrowing statute provided that a non-Texan who was injured in a foreign state could bring an action in Texas, even if the limitations period in the plaintiff's home state had run, so long as the action was begun within the time provided by Texas law. *Id.* at 565; *cf. Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 90–91 (Tex. 2008) (holding that res judicata bars relitigation of administratively determined facts and distinguishing a rule where "a claimant whose action is precluded by limitations in one state court may still be able to pursue the same action in a different state with a longer limitations period"). In early 1997, while the plaintiffs' lawsuits were pending, the Legislature amended the statute to require, among other things, that the action is begun in Texas within the time provided both by Texas law and the law of the foreign state in which the wrongful act, neglect, or default took place. *Carter*, 997 S.W.2d. at 572 (citing TEX. CIV. PRAC. & REM. CODE § 71.031(a)(3)). The plaintiffs challenged the law as unconstitutionally retroactive, and we rejected that challenge. First, we recognized that the plaintiffs did not have any settled expectations in the continuance of the current law—the limitations period. Second, we noted that "requiring a grace period for otherwise time-barred claims would defeat the

very purpose of the borrowing statute: a plaintiff should not be able to gain greater rights than he would have in the state where the cause of action arose and where he lives simply by bringing suit in Texas." *Id.* at 573. In other words, even if the statute of limitations "grace period" rule articulated in *Mellinger* were to apply, because Alabama plaintiffs applying Alabama law had no expectation in the continuation of the borrowing statute, "such concerns play a minimal role and do not justify the application of a grace period." *Id.* (citing *In re TMI*, 89 F.3d 1106, 1116 (3d Cir. 1996)).

This Court has recognized that contingencies, future expectations, and mere rules of law do not constitute vested rights. We have upheld retroactivity challenges only when it interferes with a final judgment, involved the vested parent-child relationship, or when the statute attempts to revive a cause of action previously barred by the statute of limitations. *E.g.*, *Milam County*, 54 Tex. at 168; *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003); *Baker Hughes*, 12 S.W.3d at 5. Otherwise, we have held on many occasions that laws, even those that explicitly apply retroactively, do not violate the Retroactivity Clause in article 1, section 16. *See, e.g.*, *David McDavid Nissan*, 84 S.W.3d at 219–20; *Carter*, 997 S.W.2d at 573; *Likes*, 962 S.W.2d at 502; *Barshop*, 925 S.W.2d at 634; *Ex parte Abell*, 613 S.W.2d at 262; *Exxon Corp. v. Brecheen*, 526 S.W.2d 519, 525 (Tex. 1975); *McCain*, 284 S.W.2d at 900; *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1012–13 (Tex. 1937).

The Robinsons' expectation that they could recover damages against Crown Cork as one of the numerous defendants in their lawsuit was low at the time Mr. Robinson's common law causes action accrued. Numerous contingencies surrounded their litigation, not the least of which were the identity of the potential tortfeasors and proving causation against Mundet from among nine other

defendants.[14] If they knew that Mundet was one of the parties responsible for producing asbestos that Mr. Robinson was exposed to, it is unlikely that they knew that Mundet had been bought by Crown Cork decades prior. This is not a situation where the obligations of two parties are identified by contract, where the government seeks to interfere with the parent-child relationship, or a party seeks to resurrect a claim long extinguished by a statute of limitations. Our case law is consistently hesitant to void statutes outside those categories as retroactive, and this is not an area into which our jurisprudence should expand.[15]

Finally, a "brighter-line" view provides more certainty and predictability and avoids confusion and ambiguity. Causes of action accrue when claimants are on notice of their injury and have the opportunity to seek a judicial remedy, when the injury occurs, or at the death of a promisor. *Quigley v. Bennett*, 227 S.W.3d 51, 58 (Tex. 2007); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003). Certainly, these accruals almost always occur prior to the filing of a lawsuit (otherwise the claim would not be ripe). Therefore, accepting the Court's position that a right to file a lawsuit is a vested right would, in effect, preclude the Legislature from taking any action to modify or restrict a cause of action for some lawsuits that had not even been filed yet. It would further lead to unnecessary uncertainty and confusion.

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[14] The causation question to the jury may have listed ten potential defendants, the number remaining at the time Crown Cork's partial summary judgment motion was granted.

[15] JUSTICE MEDINA argues that the final judgment rule is inappropriate because "it is the right to sue itself—the lawsuit—that is being taken away, not the final outcome." ___ S.W.3d ___ (Medina, J., concurring). On the contrary, the Robinsons sued Crown Cork. There were pleadings, discovery, and motion practice. Crown Cork had to prove that it was entitled to the Chapter 149 defense, which it did through summary judgment. In fact, if Crown Cork's prior payout had been below Mundet's fair value, the Robinsons could recover against Crown Cork, but that question must be established in the lawsuit. To the extent there is an expectation to file and prosecute a cause of action (and not to recover on a claim), that expectation was satisfied in this case.

The Robinsons did not have a vested right in their accrued causes of action when Mr. Robinson was diagnosed with mesothelioma. At most, they had contingent belief that they might be able to recover against Crown Cork or the other defendants. At the time Mr. Robinson's cause of action accrued, the Robinsons had not taken any action in reliance on the law at the time, and they had no entitlement to the law as it existed. Even after they filed their action and received a partial summary judgment that Crown Cork was liable as a successor corporation, they had an unliquidated interest in a personal injury tort claim that was not recognized as a property right—vested or otherwise—at common law. The expectation further deteriorated when Mr. Robinson passed away, and Mrs. Robinson asserted new statutory survival and wrongful death claims. I would hold that, when the Legislature limited recovery for asbestos claims only against innocent successor corporations that had caused no injury to claimants, the Legislature did not deprive the Robinsons of a vested right of action against Crown Cork, and thus Chapter 149 is not unconstitutionally retroactive as applied to the Robinsons. The Robinsons are not foreclosed, however, from going forward with their claims against other entities, consistent with the Act's limitations on recovery.

2. Police Power Balancing

The Robinsons argue that there is no room for a balancing of interests in the retroactivity analysis. They contend that if a right is vested, it cannot be affected by retroactive legislation.[16]

[16] The Robinsons also argue that article I, section 29 of the Texas Bill of Rights, compels that result. I agree with the Court that section 29 does not determine whether and how the substantive portions of the Bill of Rights apply. ___ S.W.3d ___. Furthermore, section 29 is generally cited only for the proposition that courts have the power to declare laws unconstitutional. 1 BRADEN at 86–87, *cited in Oakley v. State*, 830 S.W.2d 107, 110–11 (Tex. Crim. App. 1992); *cf. Travelers Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1011 (Tex. 1934) (citing to section 29, among other things, to depart from the U.S. Supreme Court's view and declare unconstitutional a law impairing the obligation of contracts); *see also City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148–49 (Tex. 1995) ("Section 29 has been interpreted as follows: any provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void."); *Republican*

Regardless of whether the "vested rights" threshold exists, a balancing of interests and expectations is an integral part of retroactivity analysis in Texas jurisprudence, the jurisprudence of other states, and commentators and scholars in this area. Although the Court also balances interests, much in the same way I believe our jurisprudence demands that we balance interests pursuant to the state's police power, the Court's analysis overlooks a few critical points.

Courts carefully recognized that a retroactive law affecting vested rights may nonetheless be constitutional if the overriding public purpose of the act and the Legislature's legitimate exercise of its police power outweigh the interests or expectations of the affected party. *E.g.*, *Barshop*, 925 S.W.2d at 633–34. As Justice Oliver Wendell Holmes, Jr. recognized in the context of a takings suit based on a statute retroactively preventing a mining company exercising its contractual rights to mine coal under a house:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.

Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1920); *see also In re Marriage of Bouquet*, 546 P.2d 1371, 1376 (Cal. 1976) (noting that vested rights may be impaired when "reasonably necessary to the protection of the health, safety, morals, and general well being of the people"); *Phillips v. Curiale*, 608 A.2d 895, 902 (N.J. 1992); Hochman, 73 HARV. L. REV. at 697 (advocating the abrogation of the "vested rights" concept and instead analyzing U.S. Supreme Court jurisprudence

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Party of Tex. v. Dietz, 940 S.W.2d 86, 89–91 (Tex. 1997) (analyzing section 29 and holding that the Texas Bill of Rights protects against government, not private, conduct).

on retroactivity balancing the nature of the public interest served, the extent to which the statute modifies the asserted pre-enactment right, and the nature of the right which the statute alters).

In considering the balancing test to be applied this case, the court of appeals balanced the proper exercise of the police power (weighing presumably not only the validity of the exercise, but the importance as well) against the "detrimental impact on plaintiffs such as the Robinsons," noting that the statute was narrowly tailored to protect the most innocent corporations but still "leaving the pool of potential [asbestos] defendants as large as possible . . . ." 251 S.W.3d at 532–33. The Court, on the other hand, balances: (1) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; (2) the nature of the prior right impaired by the statute; and (3) the extent of the impairment. ___ S.W.3d ___. Using this test, the Court determines that Chapter 149 is unconstitutionally retroactive as applied to the Robinsons.

The Court asserts that what "constitutes an impairment of vested rights is too much in the eye of the beholder to serve as a test for unconstitutional retroactivity. . . [and there is] a deep division over whether a retroactive restriction on a cause of action impairs vested rights. " __ S.W.3d ___. So the Court vanquishes the vested rights jurisprudence because it is too hard to decide and it believes some cases applying it in the past were inconsistent. What areas of jurisprudence that span two centuries are not subject to the same criticisms? No one who has raised children doubts the statement that bathing a baby is challenging and risky and can be a tough chore, but it must be done. The Court throws out the baby it once embraced along with the bath water. It will come as no surprise that the new balancing test the Court establishes for evaluating retroactive legislation will be fraught with at least as many similar challenges, but have no precedents for guidance. The

balancing test in Texas retroactivity jurisprudence is, candidly, a new baby in new bath water. Certainly, there are limits imposed by the Constitution on legislative power (as well as executive and judicial authority), but as Justice Scalia insightfully explained about a balancing test under the Commerce Clause of the U.S. Constitution:

> The problem is that courts are less well suited than Congress to perform this kind of balancing in every case. The burdens and the benefits are always incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines. Here, on one end of the scale (the burden side) there rests a certain degree of suppression of interstate competition in borrowing; and on the other (the benefits side) a certain degree of facilitation of municipal borrowing. Of course you cannot decide which interest "outweighs" the other without deciding which interest is more important to you. And that will always be the case. I would abandon the . . . balancing enterprise [used in dormant commerce clause cases] altogether. . . .

Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 359 (2008) (Scalia, J., concurring in part) (emphasis added).

Assuming that the Robinsons' accrued but unliquidated cause of action for personal injury is a vested right under the Retroactivity Clause, I consider whether the Legislature's exercise of its general police power outweighs the private interests at issue.

a. The Balancing Test to be Applied

We have not had the opportunity to fully discuss the contours of the police power exception vis-a-vis a retroactivity challenge. In *Barshop v. Medina Underground Water Conservation District*, we upheld the Edwards Aquifer Act against a retroactivity challenge where landowners above the Edwards Aquifer argued that the Act affected their vested right to withdraw unlimited amounts of water from the Aquifer. 925 S.W.2d 618, 634 (Tex. 1996). Without deciding whether rights to

groundwater were vested rights, we stated that because the authority was "required for the effective control of the [aquifer] to protect . . . life, . . . water supplies, the operation of existing industries, and the economic development of the state" and the aquifer itself was "vital to the general economy and welfare of this state," that the Retroactivity Clause in the Texas Constitution does not "absolutely bar the Legislature from enacting such statutes." *Id.* (quoting Act of May 30, 1993, 73d Leg., R.S., ch. 626 §§ 1.01, 1.06(a), 1993 Tex. Gen. Laws 2355, *amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Sess. Law Serv. 2505). In *In re A.V.,* we upheld retroactive application of a statute allowing the termination of parental rights for those who are incarcerated for an extended period of time because the state has a duty to protect the safety and welfare of its children, and "[t]his 'valid exercise of the police power by the Legislature to safeguard the public safety and welfare' is a recognized exception to the unconstitutionality of retroactive laws." 113 S.W.3d 355, 361 (Tex. 2003) (quoting *Barshop*, 925 S.W.2d at 633–34). In *Lebohm v. City of Galveston*, we struck down a statute providing the City of Galveston a complete defense for injury caused by defective roads, streets, sidewalks, or other public places within the city limits, noting that "[n]o broad public policy or general welfare considerations are advanced to justify the charter provision as a reasonable exercise of police power [and w]e can think of none that could be advanced inasmuch as the operational effect of the provision extends only to the city limits . . . ." 275 S.W.2d 951, 955 (Tex. 1955).

Other states, however, have created a fuller rubric for examining the balance between the police power and the prohibition against retroactive laws. Each formulation seems to balance the nature of the public interest articulated by the Legislature, the extent to which the statute modifies

or abrogates the vested right, the nature of the right the statute alters, and the fairness of the application of the new statute.[17] The Robinsons' retroactivity challenge is an as-applied challenge, and thus the Robinsons must demonstrate that the statute is unconstitutional as it operates in practice against them. *See Tex. Mun. League*, 74 S.W.3d at 381. Therefore, it is appropriate to balance the expectations the Robinsons lost with the enactment of Chapter 149 against the degree of harm sought to be protected by the legislative enactment.

When considering the application of the police power, this case is a close one. It does not involve the potential shortage of water for millions of people, *Barshop*, 925 S.W.2d at 634, and it does not involve the state's duty as *parens patriae* to children, *In re A.V.*, 113 S.W.3d at 361. But there are five reasons that Chapter 149 was a legitimate exercise of the police power, as applied to the Robinsons. The first three demonstrate that the Robinsons' expectations in the continued state

[17] *E.g.*, *Phillips*, 608 A.2d at 902 (articulating a similar test balancing: "(1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modifies or abrogates the asserted right, and (3) the nature of the right that the statute alters" and discussing whether the application of the statute would result in "manifest injustice"); *Estate of DeWitt*, 54 P.3d at 855 (balancing the vested right against public health and safety concerns, the state's police powers to regulate certain practices, and other public policy concerns, so long as there is a rational relationship between the government interest that is asserted and the retroactive legislation); *Marriage of Bouquet*, 546 P.2d at 1376 (examining "the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions"); *Reed v. Brunson*, 527 So. 2d 102, 115–16 (Ala. 1988) (eliminating co-employee lawsuits, while noting that "[i]t is certainly within the police power of the legislature to act to enhance the economic welfare of the citizens of this state [by eliminating the common law cause of action]. . . in an attempt to eradicate or ameliorate what it perceives to be a social evil"); *Mergenthaler v. Asbestos Corp. of Am.*, 534 A.2d 272, 276–77 (Del. Super. Ct. 1987) (noting that the determination of retroactivity "rests on subtle judgments concerning the fairness of applying the new statute" and noting that the considerations of vested rights "may be moderated or overcome if the statute is in furtherance of the general police power for concerns of public, health, morals, safety, or general welfare" and holding retroactive application of workers' compensation benefits to asbestos claimants who were exposed prior to coverage was not unconstitutionally retroactive).

of the law, as-applied, are low. The second two demonstrate that the Legislature's exercise of the police power was rational, justifiable, and reasonably limited.

First, at common law, Mr. Robinson's claims were not "property," were not assignable, and were extinguished when he passed away. It is only by statute that wrongful death claims continue to exist. The Legislature has broad authority to modify rights it creates by statute. "When a right or remedy is dependent on a statute, the unqualified repeal of that statue operates to deprive the party of all such rights that have not become vested or reduced to final judgment," and "all suits filed in reliance on the statute must cease . . . ." *Quick v. City of Austin*, 7 S.W.3d 109, 128 (Tex. 1998). This Court has further held that "[i]t is generally conceded that a right of action given by a statute may be taken away at any time, even after it has accrued and proceedings have been commenced to enforce it." *Nat'l Carloading Corp. v. Phoenix-El Paso Exp.*, 176 S.W.2d 564, 568 (Tex. 1944). Even assuming the Robinsons' acts of filing a lawsuit and receiving partial summary judgment resulted in some vested expectation, the Robinsons' claims, based in common law negligence and products liability, may continue only because of the statutory rights of survival, wrongful death, and successor liability through corporate merger. Accordingly, the Legislature retained discretion to modify the nature of their rights through Chapter 149's restriction on the amount of total damages recoverable against Crown Cork.

Second, Chapter 149 does not interfere with a claim sounding in contract or a claim for an injury to real or personal property, which was protected much more stringently at common law. *E.g.*, *Landgraf*, 511 U.S. at 271 (noting that the "largest category of cases in which [the Supreme Court of the United States has] applied the presumption against statutory retroactivity has involved new

provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance"). The Robinsons did not have an established relationship with Crown Cork (or even Mundet) with predetermined expectations that may have vested upon the occurrence of a contractual condition. Until this litigation, it is unlikely that the Robinsons even knew that Crown Cork was a successor to Mundet, or that Mundet manufactured asbestos products used in the ships on which Mr. Robinson was stationed. This weakens the expectancy the Robinsons may have had in their cause of action.

Third, Chapter 149, as applied, does not deprive the Robinsons of their cause of action against Crown Cork, and it does not deprive the Robinsons of real and substantial remedies for their alleged wrongs. The Robinsons sued twenty other defendants in this case and recovered approximately $850,000 from a number of the defendants for their injuries. They alleged that "[e]ach exposure to [asbestos-containing products] cause and/or contributed to Plaintiffs' injuries . . ." and "[t]he actions of each and every Defendant are a producing and proximate cause of Plaintiffs' injuries and damages." Thus, the Robinsons lost only the right to recover against Mundet/Crown Cork, which had reached its maximum payout under Chapter 149. But the statute did not impair their right to seek substantial recoveries against other defendants, which were involved in the business of asbestos insulation for the same injuries to Mr. Robinson. There is no vested right in a remedy, and the Legislature may retroactively modify remedial laws, affect a court's jurisdiction, or provide alternative procedures or remedies. *See Tex. Mun. Power Agency v. Pub. Utils. Comm'n*, 253 S.W.3d 184, 198 (Tex. 2007); *David McDavid Nissan*, 84 S.W.3d at 219; *Ex*

parte Abell, 613 S.W.2d at 260; *Mellinger*, 3 S.W. at 254.[18] This case is a multi-defendant lawsuit where it is difficult to determine which asbestos products were the cause of Mr. Robinson's injuries.

Chapter 149 does not deprive the Robinsons of any cause of action or prohibit their right to sue any party. It simply cuts off recovery against innocent defendants at the point that the defendants have paid out for asbestos-related liabilities the fair market value of the assets of the company acquired. Importantly, Chapter 149 does not make any defendants immune from suit. Chapter 149 limits the remedy under prescribed circumstances. It is not disputed that if, for instance, Mundet's assets, acquired by Crown Cork, had a fair market value of $1 billion, Crown Cork could still be liable for damages in this suit. But because Crown Cork's asbestos-related liability payments exceeded the asset value of Mundet, it had reached the statutory limit for its liabilities as successor to Mundet. Even assuming for the sake of argument that the removal of recovery against one defendant in such a suit is not merely a change in remedy but a deprivation of a right, in this case the infringement was not a complete bar to all recovery for the wrongs alleged. Accordingly, the Robinsons were able to proceed against other defendants for the same claims based on admittedly the same injury.

Fourth, the Legislature rationally drew Chapter 149 to address a problem it perceived as very important—the effects on the Texas economy and employment because of the bankruptcy of

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[18] Courts have repeatedly recognized that a statute depriving a court of jurisdiction to hear a dispute does not implicate a vested right. *David McDavid Nissan*, 84 S.W.3d at 220; *In re A.D.*, 73 S.W.3d 244, 249 (Tex. 2002); *see also Landgraf*, 511 U.S. at 274 (recognizing that statutes that confer or oust jurisdiction are regularly applied retroactively). If the mere right to sue were the constitutionally protected interest, then the Robinsons would have it, and those whose claims were no longer justiciable in a court of competent jurisdiction would not. Therefore, the right protected by the Retroactivity Clause must truly be focused on the substance of the claim—the actual recovery—rather than the right to get to a recovery.

companies that never manufactured, sold, or distributed asbestos-containing products. The asbestos litigation "crisis" had been well recognized in academic journals and even court decisions at the time the Legislature debated and enacted House Bill 4. *E.g.*, Orszag, 44 S. TEX. L. REV. at 1078–81; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) ("'The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.'" (quoting Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States*, at 2–3 (Mar. 1991))); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 203–04 (O'Neill, J., dissenting) (recognizing the crisis and noting that "the solution to these problems is legislative, not judicial"); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 1, 4–9 (2001) (describing the "ever-expanding" crisis, and the filing of claims "[o]ver $20 billion and thirty bankruptcies later"). Others examined the potential for unfairness when a larger corporation's assets became susceptible to the stress of asbestos liability from a long-since acquired subsidiary. As stated by one commentator:

> [I]n asbestos litigation, courts have cast aside the theory behind the [successor liability] doctrine. Instead of limiting the successor corporation's liability to the market value of the acquired corporation, or even to that value plus any profits generated by the acquisition, courts have allowed successors to be subjected to limitless liability[, which is a] runaway application of the successor liability doctrine.

Mark H. Reeves, Note, *Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis*, 56 VAND. L. REV. 1949, 1972–73 (2003); *see also, e.g.,* Lester Brickman, *The Asbestos Litigation Crisis: Is there a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1831–33 (1992) (recognizing that the asbestos litigators invoked successor liability laws "so as to reach into the deeper pockets of the companies that bought far smaller entities that manufactured asbestos-containing materials regardless of the culpability of the purchasing companies").

The Statement of Legislative Intent filed by Representative Nixon recognized an "unfairness" existing in corporate merger law where a "larger successor can easily be bankrupted by the asbestos-related liabilities it innocently received from a much smaller predecessor with which it merged may [sic] decades ago." H.J. of Tex., 78th Leg., R.S. 6042, 6043 (2003) (HB 4 Statement of Legislative Intent). The Statement also recognized that "Corporations actually in the asbestos business and their successors through merger have been financially drained by decades of litigation. As a result, nearly 70 such corporations have sought protection through bankruptcy. The cost in jobs and pension benefits, to cite just two examples, has been substantial." *Id.* at 6044. These findings were recognized in the House floor during debate, and were codified into the omnibus statute two years later that reformulated the method in which asbestos claims are litigated in Texas. *See* Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1 (b)–(h), 2005 Tex. Gen. Laws 169, 169–70 (codified at TEX. CIV. PRAC. & REM. CODE §§ 90.001–.012). Protection of Texas's economy and jobs is certainly a rational basis for enacting legislation, and here there is a sufficient reason for the Legislature to enact the statute that it did.

Finally, the class of persons protected by the legislation has a rational relation to the legislative purpose of the legislation. The Legislature chose to relieve liability on "innocent successors," companies that did not manufacture or sell asbestos, but rather acquired a company that did. And the Legislature mediated the perceived unfairness not by foreclosing a remedy altogether, but merely limiting the remedy to the fair value of the acquired company's assets. TEX. CIV. PRAC. & REM. CODE §§ 149.001, .003. In this case, that is exactly what happened. Crown Cork's total liabilities for the asbestos sold and manufactured by Mundet far exceeded Mundet's present-day fair value. Had Mundet never been acquired by Crown Cork, its payouts for asbestos liability would have exceeded its value as a going concern, it likely would have been bankrupt, and, almost certainly, no money would have remained to pay the Robinsons' claims if they obtained a judgment against it. *See In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 302–06 (E.D.N.Y. 2002) (discussing the factual and procedural background of the bankruptcy of the Manville Corporation, the establishment of the Manville Trust following its bankruptcy to pay asbestos claims, and its reformation once it was discovered that the trust was "deeply insolvent" and that beneficiaries would not be able to be paid in full, or even paid at all). Crown Cork chose to acquire Mundet through a statutory merger and not through an asset purchase, but it remains the purview of the Legislature to modify the legal effect of continuing liability of such mergers in Texas to avoid the ruin of businesses possessing assets that had nothing to do with asbestos production or manufacture. Importantly, the legislation restricts neither the right nor the remedy of plaintiffs who prove that Crown Cork itself caused them injury; it only addresses imputed successor liability.

In short, for the reasons articulated above, the Robinsons' interest in their accrued, but unliquidated cause of action, is low. Their vested expectancy, if any, is minimal. Their right of recovery for the injuries complained of was not foreclosed. And their relation to Crown Cork was attenuated. The public interest in the legislation, and its retroactivity, is moderate. The Legislature acted in response to a known litigation crisis and acted with a reasonable and narrowly tailored response based on the current climate. Individuals may or may not personally believe in the wisdom of the particular legislation, but it is not our province to second-guess legislation because we do not agree with its policy. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003).

b. A Critique of the Court's Test

Although I disagree with the Court's analytical framework in arriving at its three-factor balancing test and the unfoundedly rigorous legal standards it applies, I do not wholesale disagree with the categories it has set up to determine whether a retrospective law is unconstitutionally retroactive. However, the Court's application of the law to the facts in this case creates more difficulties for the Legislature and the courts of our state in reviewing retroactive laws, and creates significant and unnecessary impediments to the Legislature's ability to correct law and make beneficial legislative changes in the future.

First, I disagree with the "compelling reason" standard applied by the Court. Nothing in our precedent, or any case law, requires such a heightened review of retroactive legislation. The Court repeatedly mentions the heavy presumption against retroactive legislation, but the presumption falls away in this case. The presumption is removed when a legislature "itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable

price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272–73. Not only did the Legislature "consider the potential unfairness" in this case, it voted to apply Chapter 149 retroactively by a supermajority. The Court's point that we should view fully retroactive legislation with skepticism is well taken; however, the presumption against retroactivity is unnecessary when the Legislature expressly concludes that the statute is to be applied retroactively. *Id.*; *accord Lockheed Corp. v. Spink*, 517 U.S. 883, 896–97 (1996) ("[When] the temporal effect of a statute is manifest on its face, 'there is no need to resort to judicial default rules,' and inquiry is at an end." (quoting *Landgraf*, 511 U.S. at 280)); *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1281–82 (11th Cir. 2005) ("[The] presumption and analysis, however, are unwarranted when Congress states its unambiguous intention that the statute apply retroactively to pre-enactment conduct . . . ."). Because it is for the Legislature to initially determine whether the benefits of retroactive legislation outweigh the detriments (at least to the statute as a whole), we are not commanded to review that decision to determine whether their justification was "compelling."

Second, the Court's evaluation of the Robinsons' interest seems to be focused on its pretrial evaluation of not only the existence of the Robinsons' claims, but their strength. The Court argues that the Robinsons' claims have "a substantial basis in fact" and that their claims are "mature tort[s], [such that] recovery is more predictable." ___ S.W.3d ___. I would not require courts in this state to evaluate plaintiffs' claims or defendants' defenses, under the Retroactivity Clause on whether the parties are likely to win or their claims have a "substantial basis in fact." As any experienced lawyer will acknowledge, the strength of a claim and the likelihood of success in litigation may be separate and independent things. This consideration is unwieldy, suggesting that the Legislature can enact

retroactive legislation affecting substantive rights so long as there is a chance that it will not matter, at the end of the day.

Third, the statute does not affect settled expectations to the degree alleged by the Court. The Court alleges that the statute will affect the recovery "to which the Robinsons are entitled," once again presuming that the Robinsons' claims against Crown Cork will be successful. ___ S.W.3d ___. As discussed above, the Robinsons had no pre-tort contact with Crown Cork, and had no settled expectation that Mundet would be acquired by a richer company able to pay for Mundet's debts.

Fourth, the Court penalizes the Legislature because the legislation does not contain expressed "findings to justify Chapter 149." ___S.W.3d___. The Court does not consider the well-known facts about the asbestos crisis, Crown Cork's financial stake, subsequently codified legislative findings, or the possibility that other businesses may be subjected to financial ruin, as these facts were not included in the actual statutory language in House Bill 4. While I agree that such statutory findings are most helpful in determining legislative intent, *United States v. Lopez*, 514 U.S. 549, 562–63 (1995) (concerning the Commerce Clause), I am aware of no Texas case that requires them. And, in fact, if the Legislature were to be so required for every bill in which their police power may be challenged, certainly the legislative process would be significantly burdened. Rational basis review does not require the Legislature to provide any particular purpose; the law will be upheld "if there is any conceivable state of facts which would support it." *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 509 (1937). The law may be valid even if the Legislature did not consider the valid

purposes, but so long as the purpose "may have been considered to be true." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (citations omitted).

Thus, I believe it is imprudent to abandon our vested rights jurisprudence, and as applied, the Robinsons' do not have vested rights in their causes of action against Crown Cork. Even if the Robinsons' claims are vested rights, I would hold that, on balance, the Legislature's exercise of police power outweighs the Robinsons' rights, and thus Chapter 149 does not violate article I, section 16 of the Texas Constitution.

B. Special Law

Because the Court determines that Chapter 149 is unconstitutionally retroactive as applied to the Robinsons, it does not address the Robinsons' second argument, that Chapter 149 is an unconstitutional "special law." I would hold that it is not.

Article III, section 56(b) of the Texas Constitution provides that "where a general law can be made applicable, no local or special law shall be enacted." TEX. CONST. art. III, § 56(b). A "special law" is a statute that "relates to *particular* persons or things of a class," rather than the class as a whole. *Clark v. Finley*, 54 S.W. 343, 345 (Tex. 1899) (emphasis added), *cited in Lucas v. United States*, 757 S.W.2d 687, 700 (Tex. 1988); *see also Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 456 (Tex. 2000) (defining a "special law" as one that "impermissibly distinguishes between groups on some basis other than geography" (citing *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997))). The prohibition on special laws was added to the Texas Constitution of 1876 as one of many practical answers to the prevalent abuse of legislative and executive power that occurred in Texas following the Reconstruction. A.J. Thomas, Jr. & Ann

Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 915 (1957). In one session of the post-Reconstruction legislature five hundred special laws were passed. *Id.* Section 56 was thus seen to prevent "logrolling,"[19] to ensure against the granting of special privileges, and to prevent lawmakers from trading votes "for the advancement of personal rather than public interest." *Miller v. El Paso Cnty.*, 150 S.W.2d 1000, 1001 (1941); *Sheldon*, 22 S.W.3d at 456.

In the early twentieth century, the Court developed a test for reviewing whether a law providing a privilege to a particular class is in actuality a veiled attempt to provide a privilege to a particular member of the class. *See Sheldon*, 22 S.W.3d at 450–51; *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996); *Robinson v. Hill*, 507 S.W.2d 521, 525 (Tex. 1974); R.H.O, Recent Case, *Statutes—Special Laws—Reasonableness of Classification*, 11 TEX. L. REV. 134, 134–35 (1932) (collecting cases describing the legal standard for review of a special law). The Court first determines whether there is a reasonable basis for the classification made by the law, and then determines whether the law operates equally on all within the class. *Rodriguez v. Gonzales*, 227 S.W.2d 791, 793 (1950); *Sheldon*, 22 S.W.3d at 451. Only if the law fails both tests is it a special law and unconstitutional.

The determination of a "reasonable basis" for the classification is not an invitation for the Court to engage in weighing the relative pros and cons of a particular policy choice made by the Legislature. As stated by this Court over 100 years ago:

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[19] "Logrolling" has been defined by our Courts of Appeals as "the inclusion in a bill of several subjects having no connection with each other in order to create a combination of various interests in support of the whole bill," *Skillern v. State*, 890 S.W.2d 849, 861 (Tex. App—Austin 1994, no writ) (citations omitted), and "trading votes to advance personal rather than public interests," *Diaz v. State*, 68 S.W.3d 680, 684 (Tex. App.—El Paso 2000, pet. denied).

> Now, we do not propose to be led off into any extended discussion as to what is a proper class for the application of a general law. The tendency of the recent decisions upon the subject, as it seems to us, is to drift into refinements that are rather more specious than profitable. . . . To what class or classes of persons or things a statute should apply is, as a general rule, a legislative question. When the intent of the legislature is clear, the policy of the law is a matter which does not concern the courts.

Clark, 54 S.W. at 345–46. We do not analyze the Legislature's classification to determine whether the classification is a good or bad idea. *See Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968). Rather we analyze to ensure that the classification is not made to "evade the prohibition of the constitution as to special laws by making a law applicable to a pretended class, which is, in fact no class . . . ." *Clark*, 54 S.W. at 345. We presume the statute is valid, and "a mere difference of opinion" between the Court and the Legislature will not be sufficient to overcome the presumption of validity. *Smith*, 426 S.W.2d at 831.

The *Rodriguez* test's two-part structure provides the framework to determine whether a class is a "pretended class." The first part of the test examines the delineated class vis-a-vis the purpose of the legislation. *Rodriguez*, 227 S.W.2d at 793. For example, if the purpose of the law is to provide tax relief to businesses in the sports entertainment industry, but the tax relief is given only to businesses belonging to or supporting teams in leagues or conferences with "National" in their name but not with leagues or conferences with "American" in their name, the classification would likely have no rational relation to the purpose of the statute.

The second part of the test examines whether similarly situated parties are treated similarly under the classification, or whether the classification makes an irrational category considering the intent of the statute. *See, e.g.*, *Rodriguez*, 227 S.W.2d at 794 (holding that statute setting out special

procedures for collecting delinquent taxes on parcels of land greater than 1,000 acres situated in counties bordering Mexico and whose title emanated from the King of Spain as an unconstitutional special law, as there was "no substantial difference in the situation or circumstance of border counties relating to suits for delinquent taxes"); *Miller*, 150 S.W.2d at 1002–03 (holding as unconstitutional a statute providing an economic development tax only in counties meeting population requirements, due to the fact that the statute's classification was not distinct in any substantial manner from other counties in the state). Back to the example, the tax relief statute above would likely be unconstitutional, as its effect is to provide relief to the Houston Astros and the Dallas Cowboys and the businesses that support them (as the Astros are a member of the National League, and the Cowboys are a member of the National Football Conference), but would not provide relief to supporters of the Houston Texans and the Texas Rangers (as the Texans are a member of the American Football Conference and the Rangers are a member of the American League). The classification is a "pretended class" because the classification has no relation to the purpose of the law and treats similarly situated teams differently. Although the Court does not defer to the Legislature to determine whether a law is general or special, it does defer to the Legislature's policy choices and presumes that law is constitutional. *See Smith*, 426 S.W.2d at 831; *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003) ("Our role here, however, is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent.").

In this case, the purpose of the law has been clearly expressed by the Legislature—to eliminate the unfairness created when a corporation merged with a smaller corporation that had

previously been engaged in the manufacture or sale of asbestos is exposed to asbestos liability exceeding the value of the acquired corporation, and to save such a corporation from bankruptcy. H.J. of Tex., 78th Leg., R.S. 6042, 6043 (2003) (HB 4 Statement of Legislative Intent). To address concerns in the Legislature, the measure was restricted in three ways. First, the original transfer of liabilities had to occur prior to May 13, 1968. This was the date in which the American Conference of Governmental Industrial Hygienists first adopted a change in the recommended threshold limit for asbestos in the air of a workplace. Second, to get the benefit of the legislation, the acquiring corporation could not continue in the asbestos business. Third, if the successor continued to control a premises after the merger, the successor would continue to be liable for any asbestos-related premises liabilities it received from the predecessor for injuries caused on those premises. *Id.* at 6043–44.

The Robinsons attack these limitations as pretexts to limit relief just to Crown Cork. However, it is clear that, regardless of the wisdom of the classifications, the classifications are rationally related to the objective of the bill. The act sought to protect "innocent" successor corporations. To define the most "innocent," the Legislature chose to limit mergers occurring prior to May 13, 1968. The Robinsons claim that this date was chosen arbitrarily and that the dangers of asbestos in the workplace were known prior to the ACGIH's modification. However, this is the date decided upon by the Legislature, and it has a rational relationship to the legislation—the Legislature could have, no doubt, chosen any number of cutoff dates to decide which successor corporations are the most "innocent," and while others may disagree as to the appropriateness of the date, such would merely be a "difference of opinion," and insufficient basis for overturning the statute. *Smith*, 426

S.W.2d at 831; *see also Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415, 420–22 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (discussing, in the context of the basis for a punitive damages award "scientists' knowledge of the risk to refinery workers" of asbestos, and noting studies originating in the 1940s, 1950s, 1960s, and 1970s). Similarly, the second and third limitations also seek to limit protection to those businesses that were not involved with the manufacture or distribution of asbestos, or those that actually had asbestos on the premises. This is also a rational distinction: The Legislature sought to protect those businesses that had nothing to do with asbestos prior to a merger, had nothing to do with asbestos after the merger, and had no asbestos on its premises. The classifications are rational.

The Robinsons also argue that the law is a "special law" because it created a class of one—evidenced by (a) the fact that Crown Cork did not identify any other businesses to which the law applied, (b) Crown Cork's lobbying for the law in Texas and other states, and (c) statements by members of the Legislature that they were addressing "the Crown Cork and Seal Issue."

The Robinsons cite to *Miller's* statement that classification "must be broad enough to include a substantial class . . ." to mean that it is the burden of the proponent of the law to prove that the law must apply to more than one person. *Miller*, 150 S.W.2d at 1001. On the contrary, the size of the class, itself, is not determinative. While courts must be more exacting in reviewing a law that appears only to apply to one party, a "substantial" class does not equate to a class with thousands, hundreds, or even dozens of members. There are no doubt many Texas laws that apply to a small subset of the population; rather, a "substantial" class is one that has substance—a real class of persons or entities, as opposed to a "pretended" class created as a pretext.

The Robinsons' evidence of pretext is no evidence at all. The Robinsons' bare argument that Crown Cork is a "class of one" is insufficient. First, it is not Crown Cork's, but the Robinsons' burden to demonstrate that the law is a special law. Second, even if the Robinsons could show that the law currently applied only to Crown Cork, that alone would not fulfill the burden that the law was special. As discussed above, the Robinsons must show that the classifications made by the Legislature were not rationally related to the objective of the law, and the Robinsons must show that the legislation has treated a similarly situated successor company differently from Crown. They have done neither.

The only other evidence the Robinsons provide is evidence of legislative history. The Robinsons argue that the law is special because Crown Cork lobbied for the act and that at least one legislator called the Act the "Crown Cork issue" in a committee hearing. This evidence is also unavailing. First, as a beneficiary of this law, Crown Cork would certainly lobby for its enactment. But then again, public interest groups, individuals, and businesses regularly lobby for legislation that affects them directly or as an industry, and lobbyists regularly draft legislation for legislators. *See, e.g.*, Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 583, 587, 591 (2002) (noting a number of responses by legislative aides that lobbyists regularly draft the text of bills debated in the Senate Judiciary Committee and discussing an account by a legislative aide where a companion bill was "negotiated and drafted by lobbyists and introduced with only 'minor changes'"). Many involved in the "sausage

making"[20] task of developing law use lobbyists to draft the text of bills because lobbyists provide valuable information and perspective on the bills being introduced. *Id.* at 583. Cognizant as I am of the need to avoid the gifts given by the Legislature to favored individuals, the Robinsons must come up with more evidence than the mere fact that Crown Cork was involved in the passing, or even the drafting, of the act in question.

Likewise, the Robinsons' evidence of Senator Ratliff's statement is also not evidence of House Bill 4's "special law" status. The senator described Article 17 as "the Crown Cork and Seal asbestos issue." First, the statement is no evidence because, as this Court has repeatedly stated, a single statement by a single legislator does not evidence legislative intent and does not determine legislative intent. *E.g.*, *AT & T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 528–29 (Tex. 2006); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993). Second, to countenance this statement as even "persuasive authority as might be given the comments of any learned scholar of the subject," *De La Lastra*, 852 S.W.2d at 923, would be to do a disservice to the legislative process. Countless laws are either championed by a particular person or entity or arise out of the circumstances that will be or have been experienced by an individual or a business.[21]

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[20] "Laws, like sausages, cease to inspire respect in proportion as we know how they are made." John Godfrey Saxe, *as quoted in* THE YALE BOOK OF QUOTATIONS 86 (2006). This quotation has previously been attributed to Otto von Bismarck. *See id.*; *In re Graham*, 104 So. 2d 16, 18 (Fla. 1958).

[21] No one could claim that the Brady Handgun Violence Prevention Act of 1993, 18 U.S.C. § 921–22, advanced by former White House Press Secretary James Brady and his wife Sarah, or the proliferation of Megan's Laws, *e.g.*, N.J. STAT. § 2C:7-1 to 11, dealing with sex offender registration throughout the country, named after Megan Kanka, a minor who was sexually assaulted in New Jersey, or even the Copyright Term Extension Act, which was sometimes known as the "Mickey Mouse Act," because Disney lobbied extensively for the act and because the act prevented the original Mickey Mouse cartoon "Steamboat Willy" from entering the public domain, *see* Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 VA. J.L. & TECH, no. 4, Spring 2004, at 3 n.2, would be special laws merely because an individual, or even Disney, lobbied for them so strenuously that the bill

In sum, the Robinsons meet neither of the factors in the *Rodriguez* test. The Robinsons have not shown that the Legislator's classifications are irrational or not related to the objective of the statute, nor have they shown that the Legislature has created a "pretended" class by excluding similarly situated entities.

III. CONCLUSION

I would hold that Chapter 149 is not an unconstitutional special law, and is not unconstitutionally retroactive as applied to the Robinsons because the law limited available remedies and did not destroy the Robinsons' vested rights. I therefore respectfully dissent.

_____

Dale Wainwright
Justice

OPINION DELIVERED: October 22, 2010

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was eventually named for them.

IN THE SUPREME COURT OF TEXAS

NO. 06-0714

BARBARA ROBINSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOHN ROBINSON, DECEASED, PETITIONER,

v.

CROWN CORK & SEAL COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR TO MUNDET CORK CORPORATION, RESPONDENT

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

Argued February 7, 2008

JUSTICE MEDINA filed a concurring opinion.

I join the Court's opinion because I agree that a retroactive law is presumptively "unconstitutional without a compelling justification that does not greatly upset settled expectations" and that no such justification exists here. ___ S.W.3d ___, ___. I further agree that the "constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power[.]" *Id*. at ___. And finally, I agree that Chapter 149 here violates article I, section 16 of the Texas Constitution because it operates to retroactively abolish the Robinsons' vested property rights, or in the words of the Court—"significantly impacts a substantial interest the Robinsons have in a well-

recognized common-law cause of action." ___ S.W.3d at ___. I write separately because I do not share the Court's disdain for traditional vested rights analysis nor the dissent's view of that analysis.

I

I begin, as the Court does, with the twin goals served by the Retroactivity Clause: (1) it protects individuals against legislative enactments that unfairly deprive them of legitimate expectations, *Owens Corning v. Carter*, 997 S.W.2d 560, 572 (Tex. 1999), and (2) it ensures that legislative enactments do not single out individuals for preferential or arbitrary treatment. *See In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (upholding law against retroactivity challenge because "the State [was] not pursuing a retributive or punitive aim"); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 284–85 & n.20 (1994). As the United States Supreme Court has observed, retroactive lawmaking creates special opportunities for rewarding favored constituencies at the expense of disfavored ones. *Landgraf*, 511 U.S. at 266–67.

When determining whether a statute violates the Retroactivity Clause, vested rights analysis poses three related questions. First, does the claimant have a vested right affected by the statute? Second, does the retroactive statute impair that vested right? And finally, does a compelling public interest justify impairment through the state's police power? *See In re A.V.*, 113 S.W.3d at 361; *Barshop v. Medina Cnty. Underground Water Conserv. Dist.*, 925 S.W.2d 618, 633–34 (Tex. 1996).

Concluding that vested rights analysis was "difficult" and "inconsistent," the court of appeals declined to address whether the Robinsons had a vested right in their accrued tort claim or whether Chapter 149 intruded upon that right. 251 S.W.3d 520, 526. The court concluded instead that, regardless of whether Chapter 149 implicated vested rights, the law could be upheld as a reasonable

exercise of the police power. *Id*. at 534 (citing *Barshop*, 925 S.W.2d at 633–34). Taking much the same tack, the Court begins with the last question but correctly rejects the court of appeals' rational basis analysis as the appropriate constitutional standard. Along the way, the Court grapples with the nature of the underlying property interest and its impairment, ultimately concluding that the Robinsons possessed a substantial interest in a well-founded claim (dare I say a vested property right) that Chapter 149 retroactively impaired. Although the Court is reluctant to use the term "vested rights," preferring instead to speak of "settled expectations," I believe we are talking about the same thing.

II

Whether a right may be regarded as vested depends on considerations of "fair notice," "reasonable reliance," and "settled expectations." *Owens Corning*, 997 S.W.2d at 572– 73; *see also McCain v. Yost*, 284 S.W.2d 898, 900 (Tex. 1955). Because the parties agree that Robinson's claim has accrued, *see Pustejovsky v. Rapid-Am Corp.*, 35 S.W.3d 643, 653 (Tex. 2000), the first question is whether or not that accrued tort claim is a vested right. I conclude that it is.

While we have never invalidated a statute on the grounds that it retroactively abrogated an accrued cause of action, we have noted on several occasions that accrued causes of action enjoy constitutional protection under article I, section 16. To be sure, no one has a vested right in a "mere expectation . . . based upon an anticipated continuance of the present general laws." *Ex parte Abell*, 613 S.W.2d 255, 261 (Tex. 1981). At the same time, the Retroactivity Clause

> must be held to protect every right, even though not strictly a right of property, which may accrue under existing laws prior to the passage of any act which, if permitted a retroactive effect, would take away the right. A right has been well defined to be a

> well founded claim and a well founded claim means nothing more nor less than a claim recognized or secured by law. . . . [A] right, in a legal sense, exists when in consequence of given facts the law declares that one person is entitled to enforce against another a claim, or to resist the enforcement of a claim urged by another.

Mellinger v. City of Houston, 3 S.W. 249, 253 (Tex. 1887); *see also Owens Corning*, 997 S.W.2d at 572–73 (observing that "[c]onsiderations of fair notice, reasonable reliance, and settled expectations play a prominent role" when determining rights entitled to constitutional protection); *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916) (observing that a vested common law right of action is a property right that the legislation at issue did not affect).

We have also held that the Legislature may affect remedies for accrued causes of action, so long as the remedy is not entirely taken away. *See, e.g., City of Tyler v. Likes*, 962 S.W.2d 489, 502–03 (Tex. 1997); *Phil H. Pierce Co. v. Watkins*, 263 S.W. 905, 907 (Tex. 1924) (orig. proceeding); *see also DeCordova v. City of Galveston*, 4 Tex. 470, 477–78 (1849) (explaining the remedial exception and endorsing a New Hampshire decision affording protection to accrued causes of action). If Texas law afforded no constitutional protection to accrued causes of action, there would be no need to permit the Legislature to modify attendant remedies, nor any need to bar the Legislature from stripping a plaintiff of all remedy.

Not all courts agree with this analysis, however. Several federal courts suggest that a plaintiff has no vested right in an accrued tort claim until the claim is pursued to final judgment.[1] The

[1] *Compare Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (holding that a plaintiff has no vested right in a tort claim until the claim is pursued to final judgment); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 335 (4th Cir. 1997); *Lunsford v. Price*, 885 F.2d 236, 240–41 (5th Cir. 1989); *Symens v. SmithKline Beecham Corp.*, 152 F.3d 1050, 1056 n.3 (8th Cir. 1998); *Grimesy v. Huff*, 876 F.2d 738, 744 (9th Cir. 1989); *Salmon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991); *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989), *with Davis v. Blige*, 505 F.3d 90, 103 (2d Cir. 2007) (holding that a plaintiff has a vested right in an accrued

majority of jurisdictions, however, appear to afford constitutional protection to accrued tort claims without a final-judgment requirement.

For example, the Kansas Supreme Court has rejected the notion that a property right in an accrued tort claim should not vest before final judgment. *Resolution Trust Corp. v. Fleischer*, 892 P.2d 497, 500–06 (Kan. 1995). The court noted some disagreement about vested rights, particularly in the federal courts, but suggested that "the apparent conflicting holdings [were] not as divergent as they initially appear[ed]." *Id.* at 503. Instead, the court observed that the outcome in decisions espousing a final-judgment requirement could generally be explained by other factors, such as: "(1) the nature of the rights at stake (e.g., procedural, substantive, remedial), (2) how the rights were affected (e.g., were the rights partially or completely abolished by the legislation; was any substitute remedy provided), and (3) the nature and strength of the public interest furthered by the legislation." *Id.* The court then noted that most of the federal cases favoring a final-judgment requirement involved issues of federal preemption and the substitution of a federal remedy for the common law claim, while others involved either the clarification of defects in an existing ambiguous statute or retroactive legislation aimed at urgent problems of great public interest. *See Id.* (citing cases). In short, the cases generally turned on factors other than the existence of a final judgment.

The United States Supreme Court has hesitated to apply the due process clause in this area. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 332 (1986) (rejecting reasoning that would superimpose the Fourteenth Amendment as a "font of tort law"); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (same);

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patent infringement claim); *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 968 (6th Cir. 2004); *Hoyt Metal Co. v. Atwood*, 289 F. 453, 454–55 (7th Cir. 1923);*De Rodulfa v. United States*, 461 F.2d 1240, 1257 (D.C. Cir. 1972).

but see Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (considering it "settled" that "a cause of action is a species of property"). Notions of comity and federalism may explain this hesitancy in part, particularly when state enactments are under review. David Richards & Chris Riley, *Symposium on the Texas Constitution: a Coherent Due-Course-of-Law Doctrine*, 68 TEX. L. REV. 1649, 1666 (1990). But these considerations do not similarly encumber state courts. Moreover, our state Constitution, unlike its federal counterpart, includes an independent anti-retroactivity provision, and Texas's Retroactivity Clause goes beyond federal guarantees of property and due process. *Ex parte Abell*, 613 S.W.2d at 260. As we explained in *Mellinger*:

> It can not be presumed that in adopting a Constitution which contained a declaration "that no retroactive law shall be made," that it was intended to protect thereby only such rights as were protected by other declarations of the Constitution which forbade the making of ex post facto laws, laws impairing the obligation of contracts, or laws which would deprive a citizen of life, liberty, property, privileges or immunities, otherwise than by due course of the law of the land. . . .

3 S.W. at 252; *see also* Richards & Riley, 68 TEX. L. REV. at 1650 (noting that drafters of our 1836 Constitution held "a distinctly Jacksonian" concept of democracy and a "wariness of governmental authority"). And finally, every state whose constitution includes an independent anti-retroactivity provision concludes that accrued causes of action are vested rights.[2]

Though a plaintiff's ultimate right to recover is contingent upon success at trial, a plaintiff may nonetheless have a "settled expectation" that, once wronged, he or she will be able to pursue

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[2] *See DeCordova*, 4 Tex. 476–77 (looking to the decisions of other states whose constitutions contain anti-retroactivity provisions); *see also Denver, S.P. & P.R. Co. v. Woodward*, 4 Colo. 162, 164-65 (Colo. 1878); *Synalloy Corp. v. Newton,* 326 S.E.2d 470, 472 (Ga. 1985); *Bryant v. City of Blackfoot,* 48 P.3d 636, 642 (Idaho 2002); *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 769–72 (Mo. 2007); *Shea v. North-Butte Mining Co.,* 179 P. 499, 503 (Mont. 1919); *Groch v. Gen. Motors Corp.*, 883 N.E.2d 377, 408 (Ohio 2008); *Mills v. Wong*, 155 S.W.3d 916, 921 (Tenn. 2005).

a claim against his wrongdoer under the substantive laws as they existed at the time his or her cause of action accrued. *Mellinger*, 3 S.W. at 253; *see also Likes*, 962 S.W.2d at 502 (indicating that retrospective law that entirely eliminates pending cause of action would be "unconstitutionally retroactive"). A plaintiff thus has a property interest in an accrued cause of action which the Texas Constitution protects like other property. *Subaru of Am. v. David McDavid Nissan, Inc.,* 84 S.W.3d 212, 219 (Tex. 2002).

III

The dissent, however, prefers the minority view that a property interest in an accrued cause of action not vest before final judgment is rendered. According to the dissent, no reasonable litigant has a "'settled expectation' of achieving monetary recovery" before judgment. ___ S.W.3d ____, ____ (Wainwright, J. dissenting). And as to this case, the dissent submits that the "Robinsons' expectation in the continued state of law [was] low" because of "numerous contingencies" and their failure to take "any action in reliance on the law at the time." ___ S.W.3d ____, ____, ___ (Wainwright, J. dissenting). In the dissent's view, the Robinsons' pending tort claims were nothing more than a valueless contingent interest in an uncertain future judgment. I disagree for several reasons.

First, I reject the notion that an accrued cause of action has no value apart from a judgment and is not itself a protected property interest. An accrued cause of action is clearly property under Texas law. *See* TEX. PROP. CODE § 12.014. It has value, even if that value is not always easy to measure. Ownership and control is vested in the holder of the claim, and those interests can generally be sold or assigned. *Int'l Proteins Corp. v. Ralston-Purina Co.,* 744 S.W.2d 932, 934

(Tex. 1988); *see PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 106 (Tex. 2004) (tracing development of modern law allowing transfer of choses in action); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 707 (Tex. 1996) (noting that "[p]racticalities of the modern world have made free alienation of choses in action the general rule").

Further, an accrued cause of action is "constitutional" property, a vested property right, because the holder has a legitimate expectation that the claim will be recognized by state law. *See* Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U.L. REV. 277, 302 (1988); *see also Logan,* 455 U.S. at 428 (considering it "settled" that "a cause of action is a species of property"). The dissent's preoccupation with final judgments is misguided because the relevant expectations here involve the cause of action, not some future judgment. It is the right to sue itself—the lawsuit—that is being taken away, not the final outcome.

Once a lawsuit is filed, subsequent action by the sovereign interferes not with possible or potential rights that might accrue in the future, but with existing expectations and rights that have accrued—that have "vested"—and that constitute a present property interest. As one legal scholar explains: "a cause of action might be thought of as an entitlement to employ the state's adjudicatory machinery which can only be denied for cause, cause being the failure to establish the elements of the cause of action or to comply with reasonable procedural requirements." Beermann, 68 B.U.L. REV. at 305 n.121 (citing *Logan*, 455 U.S. 422). Other authorities share the same view:

> Determining whether vested rights exist implicates whether the property owner has a "legitimate claim of entitlement." . . . Clearly, the plaintiff has no "entitlement" to the damages sought, or to any form of successful resolution of the lawsuit, as he

> might lose on the merits or because of procedural aspects of the case. But just as clearly, the plaintiff's interest in the lawsuit itself should qualify as an "entitlement that may be terminated only for cause" that should warrant constitutional protection.

Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373, 401 (Spring 2009) (footnotes omitted); *see* also *Resolution Trust Corp.*, 892 P.2d at 502 (holding accrued tort claim to be vested property right and rejecting similar final-judgment argument because it "fails to recognize the distinction between a right of action and a right of recovery").

Finally, even if some manner of affirmative act is, as the dissent suggests, a necessary part of the "settled expectations" test, it is clearly established here. Contrary to the dissent's characterization, the Robinsons were not idle while Crown Cork labored to undo their accrued claim. The Robinsons filed suit, litigated their claim for several months, and obtained a partial summary judgment. Only after that did the Legislature enact Chapter 149, taking away the Robinsons' summary judgment and their underlying cause of action. Although the Robinsons had not yet obtained a final judgment (and thus had no vested property right in that non-existent judgment), they did possess a vested property right in their pending cause of action that included the right to prosecute the claim. *See Washington-Southern Navigation Co. v. Baltimore & Philadelphia S.B. Co.*, 263 U.S. 629, 635 (1924) ("The right of a citizen of the United States to sue in a court having jurisdiction of the parties and of the cause of action includes the right to prosecute his claim to judgment.").

Although I emphatically disagree with the dissent's view that an accrued cause of action is too indefinite, and its owner's expectations too insignificant, to warrant constitutional protection,

I readily concede that "no one has a vested right . . . or a property right, in a mere rule of law." ___ S.W.3d at ____ (Wainwright, J. dissenting) (quoting *Middleton*, 185 S.W. at 560). The continuation of a rule of law in the abstract, however, is very different from the preservation of a claim that has already accrued under that law. Although a "person has no property, no vested interest, in any rule of the common law," nevertheless, "[r]ights of property which have been created by the common law cannot be taken away without due process." *Munn v. Illinois,* 94 U.S. 113, 134 (1877).

The distinction is the difference between the prospective or retroactive application of a law. Prospective laws that diminish or eliminate future causes of action (or defenses) do not ordinarily implicate vested property rights. However, where "a law changes the legal consequences of past actions, it interferes with vested rights, and courts have found that property . . . is implicated." Olivia A. Radin, *Rights as Property*, 104 COLUM. L. REV. 1315, 1331 (2004). A cause of action vests upon the occurrence of an injury, and that "vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference." *Pritchard v. Norton,* 106 U.S. 124, 132 (1882).

Our opinion in *Ex parte Abell*, which the dissent quotes at length, is to the same effect. ___ S.W.3d at ___ (Wainwright, J. dissenting) (quoting *Ex parte Abell*, 613 S.W.2d at 261). *Abell* restates the rule from *Mellinger* that the Legislature can declare prospectively that the state of facts that once created a claim, no longer will; but once "the state of facts which the law declares shall give a right comes into existence," the right is "fixed" or "vested," and the Legislature cannot retroactively undo what has already accrued. *Abell*, 613 S.W.2d at 261 (quoting *Mellinger*, 3 S.W. at 253).

The dissent accepts the rule, but only to a point. It acknowledges that a defense of repose vests upon accrual and cannot thereafter be rescinded by the Legislature:

> . . . the Legislature cannot resurrect causes of action that have already been extinguished by retroactively lengthening the statute of limitations. *E.g. Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 & n.12 (Tex. 1999); *Wilson v. Work*, 62 S.W.2d 490, 490–91 (Tex. 1933) (per curiam). . . . In other words, when the statute extinguished a cause of action, a defendant received a vested right of repose barring the extinguished claim.

__ S.W.3d at ____ (Wainwright, J. dissenting). But the dissent refuses to extend similar protection to an accrued claim. I see no basis for limiting the Retroactivity Clause to defensive claims. *See* 1 GEORGE D. BRADEN, ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 58 (1977) (observing that the "prohibition concerning 'retroactive laws' seems to spring from a general suspicion regarding all retroactive laws").

Rights acquired under existing law, whether defensive or offensive, are treated similarly under the Texas Constitution. Thus, once a statute of limitations has run or a cause of action has accrued, retroactive legislation that either revives an extinguished claim, or bars an existing one, affects a vested property right. The Retroactivity Clause applies in either instance. *See Mellinger*, 3 S.W. at 253 (observing that Retroactivity Clause applies both to vested claims and defenses). I would therefore conclude that the Robinsons' accrued claims are vested rights to which the protection of article I, section 16 may apply.

IV

Crown Cork argues, however, that even if a plaintiff has a vested right in an accrued tort claim, Chapter 149 does not intrude upon the Robinsons' vested rights for several reasons. First,

Crown Cork argues that Chapter 149 does not infringe on this right because the statute merely works a change to procedure or remedy. It is well established that a party has no vested right in a remedy or rule of procedure. *Subaru,* 84 S.W.3d at 219. The lines that divide substance from procedure or remedy, however, are notoriously difficult to draw. *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648–49 (Tex. 1971). But we need not parse these "superfine" distinctions here, *Langever v. Miller*, 76 S.W.2d 1025, 1029 (Tex. 1934), because, whether regarded as remedial or substantive, Chapter 149 entirely eliminates the Robinsons' remedy for Mundet's torts. *See Likes*, 962 S.W.2d at 502–03; *Phil H. Pierce Co.*, 263 S.W. at 907; *DeCordova*, 4 Tex. at 479–80. Though it is conceivable that Robinson may establish that one of the other defendants in the original action is jointly and severally liable for all of her damages, Robinson has a separate cause of action against each of these defendants that might properly be tried and determined as if it were the only claim in controversy. *See Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733–34 (Tex. 1984). Chapter 149 extinguishes this separate action in its entirety, releasing Crown Cork from its obligation assumed under the merger agreement to pay for Mundet's torts. *See Sam Bassett Lumber Co. v. City of Houston*, 198 S.W.2d 879, 882 (Tex. 1947) (distinguishing permissible changes to statutes of limitations from enactments releasing or extinguishing a debt).

Crown Cork also argues that Chapter 149 does not intrude on the Robinsons' vested rights because it affects vicarious liability. In *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.), the court of appeals upheld a law retroactively repealing the statutory vicarious liability of some parents for the torts of their minor children. Though *Aetna* described vicarious liability as "remedial," it did not hold that the Legislature might

alter vicarious liabilities at will without running afoul of the Retroactivity or Contract Clauses. *Aetna* merely held that statutory causes of action do not generally give rise to vested rights. *Id.* at 285 (citing *Dickson v. Navarro Levee Imp. Dist.*, 139 S.W.2d 257, 259 (Tex. 1940)). Unlike the parents' vicarious liability for the torts of their children, successor liability is not purely statutory. Successor liability, at least when it attends a formal merger, instead arises from the contractual merger agreement and from the plaintiff's underlying tort or contract claim, and was recognized at common law. *See Tex. & P. R. Co. v. Murphy*, 46 Tex. 356, 360 (1876); *Stephenson v. Tex. & P. R. Co.*, 42 Tex. 162, 167–68 (1874); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 877–78 (Mich. 1976) ("Most of [the rules of successor liability] may fairly be said to have arisen from case law"). Though successor liability is now governed by statute, the corporations law is a shield to common law liability, not a legislatively created right within the meaning of *Dickson*.

Crown Cork next argues that Chapter 149 does not intrude on the Robinsons' vested rights because it is akin to a borrowing statute or choice of law rule mandating that Texas, rather than Pennsylvania or New York, law apply to determine corporate successor liability in asbestos cases. In *Owens Corning*, we held that a plaintiff had no vested right in a borrowing statute that permitted out-of-state plaintiffs to file stale out-of-state claims in Texas courts under Texas' more permissive statute of limitations. 997 S.W.2d at 571–73. But Chapter 149 represents not only a choice of law rule but also a change to Texas' substantive law of successor liability. *Cf. id.* at 573. Before the passage of Chapter 149, no matter which state's law applied, Crown Cork would have faced liability for Mundet's torts. TEX. BUS. ORG. CODE § 10.008(a)(3)–(4); TEX BUS. CORP. ACT § 5.06(3); N.Y. BUS. CORP. LAW § 906; 15 PA. CONS. STAT. § 1929. Indeed, Pennsylvania has already invalidated

a statute providing protections virtually identical to those found in Chapter 149. *See Ieropoli v. AC&S Corp.*, 842 A.2d 919, 921 (Pa. 2004).

Finally, Crown Cork cites *Owens Corning* to argue that Chapter 149 does not interfere with vested rights because Robinson had no legitimate expectation that Mundet would merge with a much larger corporation and because it is not inequitable to relieve Crown Cork of wholly unexpected and innocently acquired asbestos liabilities. 997 S.W.2d at 572–73. In approving the borrowing statute at issue in *Owens Corning*, we noted that it was not inequitable to require a plaintiff bringing an out-of-state claim to satisfy the statute of limitations provided by the law supplying the cause of action: "a plaintiff should not be able to gain greater rights than he would have in the state where the cause of action arose and where he lives simply by bringing suit in Texas." *Id.* at 573. But Chapter 149 goes much further and "creates an immunity where none existed before." *Id.* To be sure, Crown Cork probably did not expect the merger with Mundet to entail such extensive liability, and Robinson could hardly have a settled expectation that Mundet would be acquired by a much larger corporation. But it is not inequitable to require Crown Cork to pay for Mundet's torts because when two corporations formally merge, the law regards them as one. Though this rule may permit plaintiffs to recover where they otherwise would not, "[i]n substance, if not in form, the post-transfer entity distributed the defective products and should be held responsible for them." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 & cmt. b.

Thus, I conclude that the Robinsons' accrued tort claim here is a vested right that Chapter 149 has retroactively abrogated. But this is not the end of the analysis. As the Court observes, "the constitutional prohibition against retroactive laws does not insulate every vested right from

impairment" and a compelling public interest may justify impairment, although "the heavy presumption against retroactive laws" makes instances of this quite rare. ___ S.W.3d at ___.

In fact, we have only twice recognized legislative interests of sufficient import to override vested private rights: *Barshop,* 925 S.W.2d 618, and *In re A.V.,* 113 S.W.3d 355. At issue in *Barshop* was a statute regulating water use in the Edwards Aquifer basin. Before the enactment of the law, property owners were permitted, under the rule of capture, to extract as much water as they desired from the aquifer. Concerned that the rule of capture discouraged water conservation, the Legislature authorized local water districts to regulate water use through a permitting scheme that allocated use permits on the basis of historical use. Without conducting a vested rights analysis, we held that the Legislature's interest in water conservation trumped whatever interest landowners had in the continued existence of the rule of capture because "[c]onservation of water has always been a paramount concern in Texas, especially in times, like today, of devastating drought." *Barshop,* 925 S.W.2d at 626.

In *In re A.V.*, 113 S.W.3d 355, we held that the Legislature could permissibly enact a statute terminating parental rights on the basis of a parent's future imprisonment for prior criminal convictions. Though we found that the provision did not intrude upon vested rights, we explained that, even if it had, the Legislature's interest in protecting "the safety and welfare of its children" trumped any individual interest in retaining parental rights while unable to care for the child. *Id.* at 361.

In contrast to the public interest at issue in those cases, the interest protected here is essentially a private economic one. As the Court observes, "the legislative record is fairly clear that

chapter 149 was enacted to help only Crown and no one else." ___ S.W.3d at ___. The Legislature certainly has a valid interest in protecting Crown Cork's shareholders and pensioners, and in promoting business in the state. The Legislature also has a legitimate interest in protecting defendants from excessive liability. But the Legislature's interest in protecting the financial well-being of a favored defendant is not on par with the public interest in the avoidance of catastrophic drought or the protection of child welfare. *Cf. Barshop*, 925 S.W.2d at 626; *In re A.V.*, 113 S.W.3d at 361. Private economic interests will generally not justify intrusions into the vested private rights of others. *See, e.g., Travelers Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1011 –12 (Tex. 1934) (holding that the interests of homeowners during the Great Depression did not justify interference with private mortgage contract rights); *Lucas v. United States*, 757 S.W.2d 687, 701 (Tex. 1988) (holding that it was "simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."). Moreover, the Legislature's interest in protecting "innocent" defendants does not justify its assumption here of the judiciary's role of adjusting private obligations incurred under existing law. *See Landgraf*, 511 U.S. at 267 n.20 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513–14 (1989) (Stevens, J., concurring in part and concurring in the judgment)). As with the takings clause, one of the purposes of the prohibition on retroactive lawmaking is to ensure that the burdens of governance do not fall unfairly on a small number of citizens. *See id.* (citing THE FEDERALIST No. 44 (James Madison)). The legislative interest asserted here is simply insufficient to justify an intrusion into the Robinsons' vested rights, and thus I agree with the Court that the innocent successor provisions of Chapter 149 cannot be justified as a valid exercise of the police power and is, as applied here, prohibited under the Retroactivity Clause. TEX. CONST. art. I, § 16.

David M. Medina
Justice

Opinion Delivered: October 22, 2010

IN THE SUPREME COURT OF TEXAS

NO. 06-0714

BARBARA ROBINSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOHN ROBINSON, DECEASED, PETITIONER,

v.

CROWN CORK & SEAL COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR TO MUNDET CORK CORPORATION, RESPONDENT

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

Argued February 7, 2008

JUSTICE WILLETT, joined by JUSTICE LEHRMANN, concurring.

Litigants in our adversarial system are hard-wired for certitude, adept at insisting the law "clearly" or "plainly" favors their side or, as here, labeling the controlling analysis "straightforward and simple." If only. Today's case is both complex and consequential, and fiendishly so. The facts are compelling; the law is unclear; and the stakes are high, not just for these parties but also for our constitutional architecture that both confers and constrains governmental power. I concur that chapter 149 is an invalid exercise of legislative police power that cannot surmount our Constitution's ban on retroactive laws. But I write separately to stress that this case, at heart, implicates issues far beyond whether Barbara Robinson can sue Crown Cork & Seal.

Every case that reaches this Court concerns real people buffeted by real problems in the real world. *This* dispute, however, possesses a transcendent quality, touching not only these parties but also building-block constitutional principles that belong to all Texans. In that sense, it affords a whetstone on which to sharpen our thinking on some bedrock notions of government and how the Texas Constitution assigns democratic responsibilities. More to the point, it teaches a vital lesson about diminished liberty stemming from government overreaching: The Legislature's police power cannot go unpoliced.

The Texas Constitution looks unkindly on retroactive laws, but as a constitutional matter, retroactive is not always retrograde.

While it is axiomatic that the Legislature, through budgeting and lawmaking, has primacy in setting State policy, that power, though unrivaled, is not unlimited. One constraint is the Texas Constitution's Bill of Rights, including article I, section 16's prohibition against retroactive laws.[1]

Retroactive legislation is disfavored because, as the Father of the U.S. Constitution explains, citizens deserve protection from the "fluctuating policy" of the legislature.[2] Robinson's position takes James Madison one leap further: Disfavored actually means disallowed, and "the police power may not be used to deprive citizens of their property retroactively by eliminating their vested rights in accrued claims." Robinson insists our Bill of Rights, including the Retroactivity Clause, is impregnable in this regard given this mandate from article I, section 29:

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[1] Tex. Const. art. I, § 16.

[2] THE FEDERALIST No. 44 (James Madison).

> To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government . . . and all laws contrary thereto . . . shall be void.[3]

This admonition naturally commands judicial respect, but it cannot bear the weight Robinson places on it. We long ago crossed the Rubicon of declaring the Retroactivity Clause non-absolute (despite article I, section 29's seeming absolutism), recognizing that some retroactive laws "may be proper or necessary, as the case may be."[4] Specifically — and this is one facet of retroactive-law analysis where a controlling principle (if not its application) is uncomplicated — such laws are constitutionally permissible if they are a "valid exercise of the police power by the Legislature to safeguard the public safety and welfare."[5] Retroactivity in and of itself is not fatal,[6] and nothing in the Bill of Rights handcuffs the Legislature from confronting urgent state priorities.

The notion that article I, section 29 hermetically seals off the Bill of Rights from all legislative attention invites myriad absurdities.[7] The "all laws contrary . . . shall be void" language may be facially inviolable, similar to the federal Bill of Rights' "Congress shall make no law"

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[3] Tex. Const. art. I, § 29.

[4] *DeCordova v. City of Galveston*, 4 Tex. 470, 479 (1849).

[5] *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 633-34 (Tex. 1996). *See also In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (citing *Barshop*, 925 S.W.2d at 633-34).

[6] *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971) ("Mere retroactivity is not sufficient to invalidate a statute."). As we put it more recently, "not all statutes that apply retroactively are constitutionally prohibited." *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002).

[7] Our Bill of Rights also says "no law shall ever be passed curtailing the liberty of speech or of the press," Tex. Const. art. I, § 8, but it is fundamental that such unequivocal language must yield to reasonable limits.

language, but it must accommodate legislation at the edges. The practical challenge for judges is to set that perimeter, and to do so in a principled, no-favorites fashion.

House Bill 4 was enacted against a backdrop of urgency, but with legislative police power, unfettered must never be unfretted.

As litigants often discover, in the Legislature a deal is sometimes a raw deal. But unfair does not always equal unconstitutional; even vested rights can be impinged if lawmakers have a good-enough reason.

Both the U.S. Supreme Court and this Court have lamented the "'elephantine mass of asbestos cases' lodged in state and federal courts,"[8] branding it a "crisis"[9] that "defies customary judicial administration."[10] In response, the bipartisan civil-justice reforms enacted in 2003's House Bill 4 effected a sea change in the Texas tort landscape;[11] likewise the omnibus asbestos-litigation reforms enacted in 2005's Senate Bill 15.[12] Both measures sought to address perceived flaws in

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[8] *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 166 (2003) (*quoting Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)); *see In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998) ("Our state trial courts have gained considerable experience in managing the thousands of claims asserted in asbestos litigation.").

[9] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997); *In re GlobalSanteFe Corp.*, 275 S.W.3d 477, 482 (Tex. 2008).

[10] *Ayers*, 538 U.S. at 166; *see also CSR Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996) ("[T]he state expends a large amount of its limited judicial resources resolving these massive [asbestos] controversies. Under these circumstances, a trial on the merits would further overtax the state's judicial resources."). At least recently, Texas led the nation in asbestos-related litigation. Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1(e), 2005 Tex. Gen. Laws 169. The 2005 Legislature that enacted SB 15's extensive reforms for handling asbestos and silica cases included findings in the statutory text describing in detail how the "crush of asbestos litigation has been costly to employers, employees, litigants, and the court system." *Id.* § 1(g).

[11] Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 1.01-23.03, 2003 Tex. Gen. Laws 847.

[12] Act of May 16, 2005, 79th Leg., R.S., ch. 97, §§ 1-12, 2005 Tex. Gen. Laws 169.

asbestos-related litigation — HB 4 by limiting so-called "innocent successor" liability (immediately and retroactively),[13] and SB 15 via more sweeping reforms for asbestos and silica claims.[14]

In upholding a retroactive water regulation in *Barshop*, we expressly relied on formal and extensive findings that the Legislature made part of the statutory text itself: "Based on these legislative findings, we conclude that the Act is necessary to safeguard the public welfare of the citizens of this state. Accordingly, the retroactive effect of the statute does not render it unconstitutional."[15] Chapter 149's enacted text includes no such findings. Instead, Crown Cork relies on the legislative record, contending it amply underscores an urgent public need: protecting imperiled-but-nonculpable companies in order to safeguard the livelihoods of endangered-but-innocent employees, pensioners, and local economies.[16]

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[13] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 17.01, 2003 Tex. Gen. Laws 847, 892 (codified at TEX. CIV. PRAC. & REM. CODE § 149.003(a)).

[14] Act of May 16, 2005, 79th Leg., R.S., ch. 97, §§ 1-12, 2005 Tex. Gen. Laws 169. SB 15 was not immediately effective, unlike HB 4's successor-liability provision, but most of SB 15's provisions were quasi-retroactive, affecting pending claims that had not yet begun trial. *See id.* §§ 2, 9, 12.

[15] *Barshop*, 925 S.W.2d at 634.

[16] Though rummaging around in legislative minutiae for extratextual clues is an exercise prone to contrivance and manipulation, *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 469–75 (Tex. 2009) (Willett, J., concurring in part and in the judgment); *AIC Mgmt. v. Crews*, 246 S.W.3d 640, 649–50 (Tex. 2008) (Willett, J., concurring), I am mindful in today's narrow police-power context that the U.S. Supreme Court (including its most ardent legislative-history skeptics) has assessed a statute's constitutionality under the Commerce Clause by seeking "even congressional committee findings," *United States v. Lopez*, 514 U.S. 549, 562 (1995) (citing *Preseault v. ICC*, 494 U.S. 1, 17 (1990)). It merits mention, though, that chapter 149's legislative history illustrates the sort of cherry-picking that often taints such forays. As the Court notes, a comment in the Senate chamber describes the law as an "agreed arrangement" involving "Crown Cork and Seal," while a "statement of legislative intent" inserted by the House sponsor discusses the liabilities of "a corporation" without mentioning Crown Cork at all. ___ S.W.3d. ___.

Nobody disputes "the authority of the Legislature to make reasoned adjustments in the legal system."[17] But lawmakers aiming to statutorily prescribe what is constitutionally proscribed must make a convincing case. As the Court carefully explains, the sparse record underlying chapter 149 falls short of what must be shown before someone is made to surrender a constitutional right.

This case concerns high-stakes issues far beyond chapter 149, principally how the Texas Constitution allocates governing power.

Today's case is not merely about whether chapter 149 singled out Barbara Robinson and unconstitutionally snuffed out her pending action against a lone corporation. Distilled down, it is also a case about how Texans govern themselves.

Delimiting the outer edge of police-power constitutionality has bedeviled Texas courts for over a century. The broader issue of a citizen's relationship with the State has confounded for centuries longer.

- From 1651: "For in a way beset with those that contend on one side for too great Liberty, and on the other side for too much Authority, 'tis hard to passe between the points of both unwounded."[18]

- From 1851: "It is much easier to perceive and realize the existence and sources of [the police power] than to mark its boundaries, or prescribe limits to its exercise."[19]

- From 1907: The question whether a law can stand as a valid exercise of the police power "may be involved in mists as to what police power means, or where its boundaries may terminate. It has been said that police power is limited to enactments having reference to the comfort, safety, or the welfare

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[17] *Owens Corning v. Carter*, 997 S.W.2d 560, 574 (Tex. 1999).

[18] THOMAS HOBBES, LEVIATHAN xiii (A.R. Waller ed., Cambridge Univ. Press 1904) (1651).

[19] *Commonwealth v. Alger*, 61 Mass. 53, 85 (Mass. 1851).

> of society, and usually it applies to the exigencies involving the public health, safety, or morals."[20]

Gauzy definitions such as these — and laments over such imprecision — offer scant comfort in this enterprise. The issue is elemental, but not elementary. Fortunately, we are not entirely without guidance.

Appropriately weighty principles guide our course. First, we recognize that police power draws from the credo that "the needs of the many outweigh the needs of the few." Second, while this maxim rings utilitarian and Dickensian (not to mention Vulcan[21]), it is cabined by something contrarian and Texan: distrust of intrusive government and a belief that police power is justified only by urgency, not expediency. That is, there must exist a societal peril that makes collective action imperative: "The police power is founded in public necessity, and only public necessity can justify its exercise."[22] Third, whether the surrender of constitutional guarantees is necessary is a legislative call in terms of desirability but a judicial one in terms of constitutionality. The political branches decide if laws pass; courts decide if laws pass muster. The Capitol is the center of policymaking gravity, but the Constitution exerts the strongest pull, and police power must bow to constitutional commands: "as broad as [police power] may be, and as comprehensive as some legislation has

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[20] *Jordan v. State*, 103 S.W. 633, 634 (Tex. Crim. App. 1907).

[21] *See* STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982). The film references several works of classic literature, none more prominently than *A Tale of Two Cities*. Spock gives Admiral Kirk an antique copy as a birthday present, and the film itself is bookended with the book's opening and closing passages. Most memorable, of course, is Spock's famous line from his moment of sacrifice: "Don't grieve, Admiral. It is logical. The needs of the many outweigh . . ." to which Kirk replies, "the needs of the few."

[22] *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921).

sought to make it, still it is subsidiary and subordinate to the Constitution."[23] Fourth, because the Constitution claims our highest allegiance, a police-power action that burdens a guarantee like the Retroactivity Clause must make a convincing case.[24] Finally, while police power naturally operates to abridge private rights, our Constitution, being inclined to freedom, requires that such encroachments be as slight as possible: "Private rights are never to be sacrificed to a greater extent than necessary."[25]

If judicial review means anything, it is that judicial restraint does not allow everything. Yes, courts must respect democratically enacted decisions; popular sovereignty matters. But the Texas Constitution's insistence on limited government also matters, and that vision of enumerated powers and personal liberty becomes quaint once courts (perhaps owing to an off-kilter grasp of "judicial activism") decide the Legislature has limitless power to declare its actions justified by police power. At that constitutional tipping point, adjudication more resembles abdication.

Whatever the police power's amorphous boundaries, we know these two things: (1) the Legislature may ask for private sacrifice, and receive it — provided the private rights sacrificed are outweighed in public good, burdened as little as possible, and amply justified on public-necessity grounds; and (2) the Legislature's police power is not infinitely elastic, able to extinguish constitutional liberties with nonchalance. Texans long ago and since have embraced constitutional,

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[23] *Jordan*, 103 S.W. at 634.

[24] *See Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283, 286 (Tex. 2010) (an exercise of legislative police power "is not sustained when it is arbitrary or unreasonable") (footnote, citation omitted).

[25] *Spann*, 253 S.W. at 515.

meaning limited, government. The judiciary thus has a superseding obligation to disapprove certain encroachments on liberty, no matter the legislative vote-count. Put another way, judicial review sometimes means thwarting today's majority from thwarting yesterday's supermajority — the one that ratified our solemn Constitution.[26]

Legislative police power is not constitutional carte blanche to regulate all spheres of everyday life; preeminence does not equal omnipotence.

The Texas Bill of Rights — enshrined to recognize and establish "the general, great and essential principles of liberty and free government"[27] — declares an emphatic "no" to myriad government undertakings: no religious test for office, no double jeopardy, no self-incrimination, no curtailment of free speech, etc. It is, like its federal counterpart, irrefutably framed in proscription. And, like its federal counterpart, its limitations are not exception-free; desperate times permit desperate measures (to a point). But we should steadfastly resist defining desperation down. Exceptions to constitutional guarantees are real but also rare, just like modern citations to *Marbury v. Madison*: "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."[28]

The "danger that liberty should be undervalued" necessarily implicates "the adjustment of the boundaries between it and social control."[29] There must remain judicially enforceable constraints

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[26] *See* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 143 (2002).

[27] Tex. Const. art. I.

[28] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

[29] JOHN STUART MILL, *On Liberty*, *in* THE BASIC WRITINGS OF JOHN STUART MILL: ON LIBERTY, THE SUBJECTION OF WOMEN, AND UTILITARIANISM 3, 58 (The Modern Library 2002) (2d ed. 1863).

on legislative actions that are irreconcilable with constitutional commands. If legislators come to believe that police power is an ever-present constitutional trump card they can play whenever it suits them, overreaching is inexorable.

To be sure, constitutional analysis is nuanced and not prone to doctrinaire absolutes. It is easy to say the sovereign's shield must never become a sledgehammer, but it is more difficult — and every bit as important — to discern the moment at which it threatens to become a scalpel, carving quietly yet critically away at cherished rights.

It merits repeating that this Court and the U.S. Supreme Court have long permitted legislative bodies to burden constitutional freedoms upon a strong public-welfare showing. The reason chapter 149 offends the Retroactivity Clause is because it lacks that showing. Indeed, if chapter 149's meager record were sufficient, there would be scant defense against future police-power incursions — incursions that, while ostensibly well-meaning, shrink the sphere of protected liberty and erode bit by bit the notion of limited government. "Experience is the oracle of truth,"[30] wrote Madison, and history teaches this is a ratchet that clicks only one way.

Robinson's case provides a real and important reminder of the limits of legislative power and the scope of judicial review. But after her case has come and gone, I hope what Edmund Burke

[30] THE FEDERALIST No. 20 (James Madison).

called a "fierce spirit of liberty"[31] will help steer a course with senses heightened to constitutional guardrails.

Police power is an attribute of sovereignty, but sovereignty ultimately rests in "the people of the State of Texas."[32]

The Texas Constitution places limits on government encroachments, and does so on purpose. Our Bill of Rights is not mere hortatory fluff; it is a purposeful check on government power. Everyday Texans, and the courts that serve them, must remain vigilant, lest we permit boundless police power, often couched in soaring prose, to abridge our Constitution's enduring "principles of liberty and free government."[33] As Justice Brandeis warned in his now-celebrated *Olmstead* dissent: "Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent."[34]

Shortly after the Federal Constitution was approved in September 1787, Thomas Jefferson wrote James Madison from Paris, advocating a Bill of Rights and also voicing confidence that the people would be the best sentries against overreaching government: "[I am] convinced that on their

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[31] EDMUND BURKE, *Speech on Moving His Resolutions for Conciliation with the Colonies, Mar. 22, 1775*, *in* EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 189 (Peter J. Stanlis ed., 2009) ("In this character of the Americans a love of freedom is the predominating feature which marks and distinguishes the whole: and as an ardent is always a jealous affection, your colonies become suspicious, restive, and untractable, whenever they see the least attempt to wrest from them by force, or shuffle from them by chicane, what they think the only advantage worth living for. This fierce spirit of liberty is stronger in the English colonies, probably, than in any other people of the earth . . . .").

[32] Tex. Const. pmbl.

[33] Tex. Const. art. I.

[34] *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967). Or, as 18th-century philosopher David Hume cautioned, "It is seldom that liberty of any kind is lost all at once." Rather, suppression "must steal in upon [people] by degrees, and must disguise itself in a thousand shapes in order to be received." David Hume, *Of the Liberty of the Press* 1, 262 n.4, *in* HUME: POLITICAL ESSAYS (Knud Haakonssen ed., Cambridge Univ. Press 1994) (1741).

good senses we may rely with the most security for the preservation of a due degree of liberty."[35] Jefferson was right. We are our own best lookouts against invasions, however well-intentioned, that siphon our "due degree of liberty" — siphoning that often occurs subtly, with such drop-by-drop gentleness as to be imperceptible.

To be sure, Members of the Texas Legislature have sworn to "preserve, protect, and defend the Constitution and laws of the United States and of this State,"[36] and they doubtless believe their enactments honor basic constitutional guarantees. I never second-guess the Legislature's motives and goodwill (and have never needed to); we are blessed with 181 lawmakers who serve Texas with full hearts.[37] But where the Constitution is concerned, the judiciary's role as referee — confined yet consequential — must leaven big-heartedness with tough-mindedness.

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Summing up: Judges are properly deferential to legislative judgments in most matters, but at some epochal point, when police power becomes a convenient talisman waved to short-circuit our constitutional design, deference devolves into dereliction. The Legislature's policymaking power

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[35] Letter from Thomas Jefferson to James Madison, Paris (1787), *in* THE JEFFERSON CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 277 (John P. Foley ed., 1900).

[36] Tex. Const. art. XVI, § 1.

[37] My dissenting colleagues' meticulous analysis shows that today's difficult case has several moving pieces, each seemingly weightier and more perplexing than the one before. This is "a Supreme Court case" in every sense and one that has occupied our attention for a long time, arriving at the Court before our two newest Justices. So reasonable judicial minds can certainly differ (and on this Court they frequently do). But an important point must be made: There is a profound difference between an activist judge and an engaged judge. I am honored to serve with none of the former and eight of the latter. Nothing in this concurrence should be distorted into criticism of either lawmakers who passed chapter 149 or judges who passed upon it. My cautions today about unconstrained police power are entirely forward-looking, speaking to what *can* happen if judges, while not activist are also not properly active, instead preferring to leave police power unpoliced, thus inviting the other branches to flex ever-broader powers. My concerns are less centered on this case than on future ones.

may be vast, but absent a convincing public-welfare showing, its police power cannot be allowed to uproot liberties enshrined in our Constitution.

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Don R. Willett
Justice

OPINION DELIVERED: October 22, 2010

IN THE SUPREME COURT OF TEXAS

NO. 06-0752

WILLIAM H. NEALON, M.D., AND ERIC M. WALSER, M.D., PETITIONERS,

v.

HARRY WILLIAMS, RESPONDENT

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

PER CURIAM

Respondent Harry Williams sued petitioners Dr. William H. Nealon and Dr. Eric M. Walser, faculty members at the University of Texas Medical Branch at Galveston, on health care liability claims after his pancreas was injured during a diagnostic procedure of his bile ducts. Nealon and Walser moved to dismiss the suit under section 101.106(f) of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.106(f), claiming that the suit was based on conduct within the general scope of their employment and that the cause of action could have been brought against UTMB. Williams responded and argued that the statute violates the Open Courts provision of the Texas Constitution, TEX. CONST. art. I, § 13.

The trial court dismissed the action and Williams appealed both issues. The court of appeals reversed the trial court's judgment on the first issue, without reaching the second, and remanded the case for further proceedings. 199 S.W.3d 462, 467 (Tex. App.–Houston [1st Dist.] 2006). The court

of appeals held that the doctors did not show that Williams' claim could have been brought against UTMB under the Act, a requirement of section 101.106(f). *Id.* at 466.

While this case has been pending on appeal, we have decided *Franka v. Velasquez*, ___ S.W.3d ___ (Tex. 2011), holding that, for purposes of section 101.106(f), a tort action is brought "under" the Texas Tort Claims Act, even if the government has not waived its immunity for such actions. ___ S.W.3d at ___. In light of *Franka*, we grant Nealon's and Walser's petition for review, and without hearing oral argument, reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings. TEX. R. APP. P. 59.1.

Opinion delivered: January 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 07-0131

JOHN CHRISTOPHER FRANKA, M.D., AND NAGAKRISHNA REDDY, M.D., PETITIONERS,

v.

STACEY VELASQUEZ AND SARAGOSA ALANIZ, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILD, SARAGOSA MARIO ALANIZ, RESPONDENTS

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

Argued September 10, 2008

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

JUSTICE MEDINA filed a dissent, in which JUSTICE LEHRMANN joined.

JUSTICE GUZMAN did not participate in the decision.

Section 101.106(f) of the Texas Tort Claims Act provides that a suit against a government employee acting within the general scope of his employment must be dismissed "if it could have been brought under this chapter [that is, under the Act] against the governmental unit".[1] The court of appeals construed the quoted clause to mean that, to be entitled to dismissal, the employee must

[1] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

establish that governmental immunity from suit has been waived by the Act.[2] But as we stated in *Mission Consolidated Independent School District v. Garcia*: "we have never interpreted 'under this chapter' to only encompass tort claims for which the Tort Claims Act waives immunity."[3] Rather, "all [common-law] tort theories alleged against a governmental unit . . . are assumed to be 'under [the Tort Claims Act]' for purposes of section 101.106."[4] Accordingly, we reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

I

Dr. John Christopher Franka and Dr. Nagakrishna Reddy, petitioners here, delivered S.M.A, the son of Stacey Velasquez and Saragosa Alaniz, respondents, at University Hospital, a public teaching hospital owned and operated by the Bexar County Hospital District, doing business as the University Health System.[5] The Hospital is staffed with medical faculty, residents, and students of the University of Texas Health Science Center at San Antonio.[6] Franka was a faculty member employed by the Health Science Center, and Reddy was a resident in the Center's program.

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[2] 216 S.W.3d 409, 413 (Tex. App.–San Antonio 2006) ("a trial court . . . is not permitted to dismiss employees from a lawsuit under section 101.106(f) if a fact issue exists with regard to whether the governmental unit's immunity is waived").

[3] 253 S.W.3d 653, 658 (Tex. 2008) (citing *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 640 (Tex. 2004), *Dallas Cnty. Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 344 (Tex. 1998), and *Newman v. Obersteller,* 960 S.W.2d 621, 622-623 (Tex. 1997)).

[4] *Mission*, 253 S.W.3d at 659 (citing *Newman,* 960 S.W.2d at 622).

[5] The District does business as the University Health System. Its history is summarized on the System's website at http://www.universityhealthsystem.com/about-university-health-system/our-history/.

[6] *See Murk v. Scheele*, 120 S.W.3d 865, 866 (Tex. 2003) (per curiam) ("University Hospital [is] a public teaching hospital for indigent patients that is owned and operated by the Bexar County Health District and staffed with medical faculty, residents, and students of the University of Texas Health Science Center . . . .").

S.M.A.'s fetal heart rate had slowed, and Franka and Reddy thought it best to attempt a vaginal delivery facilitated by a vacuum extractor, an instrument that attaches to the top of a baby's head, helping move it through the birth canal. The head appeared and the extractor was removed, but delivery of the baby's front shoulder was obstructed, a relatively infrequent but well-recognized obstetric emergency known as shoulder dystocia. Franka and Reddy tried to free the baby's shoulder with their hands, but just as it appeared, Reddy heard a snap that she knew meant a bone had broken. The baby's left clavicle was fractured, and he suffered injury to his brachial plexus, requiring surgery several months later.

Velasquez and Alaniz, individually and on behalf of S.M.A., sued Franka and Reddy but not the Center (or the District or Hospital). Franka moved to dismiss the action under section 101.106(f) of the Texas Tort Claims Act, which states:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.[7]

In their response, plaintiffs acknowledged that Franka was employed by a governmental unit, the Center, and that their suit was based on conduct within the general scope of his employment. But, they argued, to invoke section 101.106(f), Franka had the burden of proving that suit "could have been brought under" the Act, and to discharge that burden, he had to offer evidence that the Center's

[7] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

immunity was waived by the Act. The only basis for such a waiver, they continued, was that their injuries were "caused by a condition or use of tangible personal . . . property" under section 101.021 of the Act,[8] and "[n]othing appears in this record to implicate the use or misuse of tangible personal property in causing the orthopaedic and neurological injuries to baby [S.M.A.]." Plaintiffs suggested that the Center stipulate that its immunity from suit was waived. Failing that, they urged that Franka's motion be denied.

Apparently the trial court never ruled on Franka's motion. More than a year passed, and defendants each filed a motion for summary judgment based on section 101.106(f), differing only as to the circumstances of their employment. Each argued that "suit against [them] could have been brought against the [Center] because the conduct of [defendants] on which the allegations are based involved the use of tangible property, namely the vacuum extractor". Each attached an affidavit stating that S.M.A.'s "treatment included the use of tangible property, including a vacuum extractor." And each requested the court to order that "unless [plaintiffs] substitute [the Center] as the defendant, the case will be dismissed in thirty days." Plaintiffs responded that defendants had failed to establish that suit could have been brought against the Center because there was "no evidence that the condition or use of tangible property, the vacuum extractor, was the instrumentality of the harm, and therefore no waiver of immunity". Plaintiffs also argued that defendants had not established that they were government employees as defined by the Act.

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[8] *Id*. § 101.021 ("A governmental unit in the state is liable for . . . personal injury . . . caused by the wrongful act or omission or the negligence of an employee acting within the scope of his employment . . . by a condition or use of tangible personal . . . property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.").

The trial court denied defendants' motions, and they appealed.[9] The court of appeals affirmed, holding that a government employee is not entitled to dismissal under section 101.106(f) until he has established that his employer's immunity from suit has been waived by the Act.[10] In its view, the argument that

> the raising of a fact issue as to whether the suit "could have been brought under this chapter against the governmental unit" should be sufficient to enable a trial court to dismiss employees under section 101.106(f) . . . is untenable in view of its potential result. If the employees were dismissed and immunity was ultimately held not to have been waived, the plaintiffs would be left without a remedy. Just as a plea to the jurisdiction cannot be granted, thereby resulting in the dismissal of a lawsuit, when a fact issue exists, a trial court also is not permitted to dismiss employees from a lawsuit under section 101.106(f) if a fact issue exists with regard to whether the

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[9] Plaintiffs have not questioned the court of appeals' jurisdiction over this interlocutory appeal. "A person may appeal from an interlocutory order of a district court, county court at law, or county court 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). For two reasons, we think defendants' motions for summary judgment were based on an assertion of immunity.

First, in *Newman v. Obersteller*, we held that section 51.014(a) allowed a school district employee to appeal the denial of his motion for summary judgment seeking dismissal under former section 101.106 because "section 101.106 is an immunity statute." 960 S.W.2d 621, 623 (Tex. 1997). At that time, section 101.106 provided simply: "A judgment in an action or settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim." Act of May 17, 1985, 69th Leg. R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3305, recodifying former TEX. REV. CIV. STAT. ANN. art. 6252-19, § 12(a), Act of May 14, 1969, 61st Leg., R.S., ch. 292, § 12(a), 1969 Tex. Gen. Laws 874, 877 ("The judgment or settlement in an action or claim under this Act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of a unit of government whose act or omission gave rise to the claim."). We reasoned that the phrase, "bars any action", was "an unequivocal grant of immunity", and that allowing an interlocutory appeal from a refusal to enforce the bar "protects public officials asserting an immunity defense from the litigation process." *Newman*, 960 S.W.2d at 622. The phrase is not used in current section 101.106(f), but four other subsections speak of a bar from suit or recovery, and we think the character of the statute as one conferring immunity remains unchanged. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(a)-(d).

Second, section 101.106(f) states that a suit to which it applies "is considered to be against the employee in the employee's official capacity only." *Id.* § 101.106(f). We have held that "[w]ith the limited *ultra vires* exception . . . , governmental immunity protects government officers sued in their official capacities to the extent that it protects their employers." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 380 (Tex. 2009). By moving for summary judgment on section 101.106(f), defendants were asserting claims of governmental immunity.

[10] 216 S.W.3d 409, 413 (Tex. App.–San Antonio 2006).

> governmental unit's immunity is waived. When such a fact issue exists, the employees have failed to establish that the suit "could have been [brought] under this chapter against the governmental unit."[11]

We granted defendants' petition for review.[12]

II

A threshold issue is whether Franka and Reddy are "employee[s] of a governmental unit" to whom section 101.106(f) applies. In this Court, plaintiffs do not contest Franka's employee status[13] because section 101.001(2) of the Act defines an employee as "a person . . . in the paid service of a governmental unit . . . [but not] an independent contractor . . . or a person who performs tasks the

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[11] *Id*. (internal citation omitted).

[12] 51 Tex. Sup. Ct. J. 771 (Apr. 18, 2008). We have jurisdiction of this interlocutory appeal because the court of appeals' decision conflicts with *Harris Cnty. v. Sykes*, 136 S.W.3d 635 (Tex. 2004), *Dallas Cnty. Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339 (Tex. 1998), and *Newman v. Obersteller,* 960 S.W.2d 621, 622-623 (Tex. 1997), the cases that provided the basis for our decision in *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653 (Tex. 2008). *See* TEX. GOV'T CODE § 22.001(a)(2) ("The supreme court has appellate jurisdiction . . . extending to all questions of law arising in . . . a case in which one of the courts of appeals holds differently from a prior decision of . . . the supreme court on a question of law material to a decision of the case . . . ."); *id*. § 22.001(e) ("For purposes of Subsection (a)(2), 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."); *see also City of San Antonio v. Ytuarte*, 229 S.W.3d 318, 319 (Tex. 2007) (per curiam) ("In 2003, the Legislature redefined and broadened our conflicts jurisdiction to eliminate the previous requirement that the rulings in the two cases be 'so far upon the same state of facts that the decision of one case [was] necessarily conclusive of the decision in the other.' *Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex. 1998).").

[13] Respondents' Brief on the Merits 8 ("Velasquez/Alaniz do not contest, for the purpose of this appeal, that UTHSC is a "Governmental Unit" . . . [or] that Dr. Franka was an employee of UTHSC but do contest Dr. Reddy's alleged employee status.").

details of which the governmental unit does not have the legal right to control."[14] The Center is a governmental unit,[15] and Franka was a paid member of its faculty.[16]

Reddy, however, was a resident under a three-party "Graduate Medical Education Agreement", in which she, the Center, and the District, also a governmental unit,[17] agreed that the District would compensate her but would have no legal right to control the details of her work.[18]

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[14] TEX. CIV. PRAC. & REM. CODE § 101.001(2).

[15] *See id.* § 101.001(3) ("'Governmental unit' means . . . (B) a political subdivision of this state, . . . and (D) any . . . institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution."); *see also Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 354 & n.5 (Tex. 2004) (holding that University of Texas Southwestern Medical Center at Dallas, part of University of Texas System, of which University of Texas Southwestern Medical Center at San Antonio is another part, TEX. EDUC. CODE § 65.02(a)(7), is a governmental unit under the Tort Claims Act).

[16] *See Murk v. Scheele*, 120 S.W.3d 865, 867 (Tex. 2003) (per curiam) (a UT Health Science Center faculty member, practicing at the District's hospital but paid by the Center and subject to its regimens and review, was the Center's "employee" for purposes of the Tort Claims Act, even though he was required to exercise some independent medical judgment and not every detail of his work was controlled by the Center).

[17] *See* TEX. CIV. PRAC. & REM. CODE § 101.001(3), *supra* note 15; *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009) (citing *Martinez v. Val Verde Cnty. Hosp. Dist.*, 140 S.W.3d 370, 371 (Tex. 2004)); *cf. Bexar Cnty. Hosp. Dist. v. Crosby*, 327 S.W.2d 445, 446 (1959) (describing the Bexar County Hospital District as "a political subdivision of the State" created under the constitutional and statutory provisions at issue in the District's declaratory judgment suit against other governmental entities (see TEX. CONST. art. IX, §4 and Act of May 26, 1953, 53rd Leg., R.S., ch. 266, 1953 Tex. Gen. Laws 691, codified formerly as TEX. REV. CIV. STAT. ANN. art. 4494n and now as TEX. HEALTH & SAFETY CODE §§ 281.001-124)); *see also, e.g.*, TEX. GOV'T CODE §§ 403.1041(5), 534.002(1)(A); TEX. HEALTH & SAFETY CODE §§ 241.003(6), 285.072 (a contractor managing or operating a hospital under contract with a hospital district is considered a governmental unit for purposes of Chapters 101 (the Tort Claims Act), 102, and 108 of the Civil Practices and Remedies Code); and TEX. LOC. GOV'T CODE §§ 271.003(4); 271.009(1); 271.091(1), 271.111(10), and 271.151 (contract claims against local governmental entities) (3)(C).

[18] Specifically, the agreement stated: "The parties [*i.e.*, the Center, Reddy, and the District] understand that the Resident [*i.e.*, Reddy] performs tasks, namely the practice of medicine, the details of which the [District] does not have legal right to control and no such control is assumed by this Agreement." *Cf. Murk v. Scheele,* 120 S.W.3d 865, 867 (Tex. 2003) (per curiam) ("The Act's definition of 'employee' does not require that a governmental unit control *every* detail of a person's work. . . . [A] physician [in the "paid service" of a governmental unit and] whose practice is controlled by [that] governmental unit is not precluded from being an 'employee' within the meaning of the Act simply because he or she must exercise some independent medical judgment.").

Because Reddy was not both paid by and subject to the legal control of the same governmental unit,[19] she states that she "does not claim to be a § 101.001(2) employee."[20]

Instead, Reddy argues that section 312.007(a) of the Texas Health & Safety Code makes her a government employee for purposes of section 101.106(f) of the Act. Section 312.007(a) states:

> **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** . . . **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.[21]

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[19] Although Reddy does not assert that the Center had the legal right to control her work, the agreement provided that the Center would "establish and maintain an organized educational program, which provides guidance and supervision of the Resident, facilitating the Resident's professional and personal development while ensuring safe and appropriate care for the patients, in accordance with the institutional policies and procedures of the [Accreditation Council for Graduate Medical Education]." The agreement further provided that the Center would "evaluate the Resident on a regular basis to assess the Resident's level of advancement, practice privileges, duty hour schedule, and the nature of supervision necessary by attending teaching staff." *Cf. St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 542-544 (Tex. 2003) (plurality op.); *id.* at 544 (O'Neill, J., joined by Phillips, C.J., concurring) (concluding that the evidence did not show that a resident was under the control of the sponsoring hospital).

[20] Petitioners' Reply to Respondents' Brief on the Merits 4; *id*. at 6 ("As a result of this unique three-party arrangement, residents could not be deemed an employee of either entity under the Tort Claims Act's general definition of 'employee' as a person who is both paid by and subject to the control of a governmental entity."). We express no opinion on the validity of Reddy's reasoning.

[21] TEX. HEALTH & SAFETY CODE § 312.007(a) (emphasis added); *see also* (b) ("A judgment in an action or settlement of a claim against a medical and dental unit, supported medical or dental school, or coordinating entity under Chapter 101, Civil Practice and Remedies Code, bars any action involving the same subject matter by the claimant against a director, trustee, officer, intern, resident, fellow, faculty member, or other associated health care professional or employee of the 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 the claim was asserted as provided under Section 101.106, Civil Practice and Remedies Code.").

Reddy was a resident of a "medical unit".[22] Recently, in *Klein v. Hernandez*, we held that a resident covered by this section is a government employee for purposes of determining liability under the Act.[23] Since a liability determination may depend on whether the defendant is immune, we agree with Reddy that section 312.007(a), if applicable, would make her a government employee under section 101.106(f).

But plaintiffs argue that Reddy has failed to show that section 312.007(a) applies in this case. Section 312.003 states:

> This chapter [including section 312.007] applies only if a medical and dental unit and a supported medical or dental school agree, either directly or through a coordinating entity, to provide or cause to be provided medical, dental, or other patient care or services or to perform or cause to be performed medical, dental, or clinical education, training, or research activities in a coordinated or cooperative manner in a public hospital.[24]

Reddy acknowledges that the applicability of section 312.007(a) is conditioned on the existence of an agreement prescribed by section 312.003, and she argues that the "Graduate Medical Education Agreement" is such an agreement on its face. But the agreement does not include a supported medical or dental school, and even if that is not required, as one court has held,[25] an issue we do not

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[22] Section 312.002(4) of the Texas Health & Safety Code provides that "[i]n this chapter: . . . '[m]edical and dental unit' has the meaning assigned by Section 61.003, Education Code." Section 61.003(5) of the Texas Education Code, in turn, defines "medical and dental unit" to include the University of Texas Medical School at San Antonio, where Reddy had her residency, which is part of the Center, *id*. § 65.02(a)(10) ("The University of Texas System is composed of . . . The University of Texas Health Science Center at San Antonio, including . . . The University of Texas Medical School at San Antonio . . . .").

[23] 315 S.W.3d 1, 8 (Tex. 2010).

[24] TEX. HEALTH & SAFETY CODE § 312.003.

[25] *See Bustillos v. Jacobs*, 190 S.W.3d 728, 735 (Tex. App.–San Antonio 2005, no pet.) (holding that an agreement by "a medical or dental unit" to provide medical training and patient care in a public hospital is sufficient to satisfy section 312.003, without joinder of "a supported medical or dental school").

decide, there is nothing in the record to indicate whether or how the agreement furthers the purpose of chapter 312, which is

> to authorize coordination and cooperation between medical and dental units, supported medical or dental schools, and public hospitals and to remove impediments to that coordination and cooperation in order to:
>
> (1) enhance the education of students, interns, residents, and fellows attending a medical and dental unit or a supported medical or dental school;
>
> (2) enhance patient care; and
>
> (3) avoid any waste of public money.[26]

Further, section 312.004 authorizes medical and dental units, medical and dental schools, coordinating entities, and public hospitals to contract among themselves for, among other things, "the clinical education of . . . residents",[27] but section 312.005(a) provides that "[t]o be effective, a contract under Section 312.004 must be submitted to the [Texas Board of Health]."[28] Reddy argues that an agreement that satisfies section 312.003 need not be made under section 312.004, and therefore need not be approved by the Texas Board of Health, but she cites no authority, and nothing in the statutory text supports her argument. The record does not reflect whether the "Graduate

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[26] TEX. HEALTH & SAFETY CODE § 312.001(b).

[27] *Id.* § 312.004(c) ("A medical and dental unit, a supported medical or dental school, and a coordinating entity may contract with the owner or operator of a public hospital for the clinical education of students, interns, residents, and fellows enrolled at the unit or school."); *see also id.* § 312.004(a) ("Medical and dental units, supported medical or dental schools, coordinating entities, and public hospitals may make and perform contracts among each other for the coordinated or cooperative clinical education of the students, interns, residents, and fellows enrolled at the units or schools.").

[28] *Id.* § 312.005(a).

Medical Education Agreement", or even the program it facilitated, was approved by the Board; for all we know, the program could have been disapproved by the Board.

In sum, we cannot determine from the summary judgment record that Reddy established as a matter of law that she was an employee of a governmental unit for purposes of section 101.l06(f).

III

Franka, to whom section 101.106(f) does apply, was entitled to dismissal only if the plaintiffs' suit "could have been brought under [the Act] against [the Center]".[29] The court of appeals held that the plaintiffs' suit could not have been brought under the Act unless, as a matter of law, the Act waived the Center's immunity from suit.[30] We disagree. We begin by reviewing our cases, which firmly establish the rule that any tort claim against the government is brought "under" the Act for purposes of section 101.106, even if the Act does not waive immunity. Next, we show that to except section 101.106(f) from this rule would be inconsistent with other provisions of the Act and would create disparities in its operation. We then consider the practical problems that would result from the court of appeals' construction. Finally, we consider the policies that underlie the statute as we construe it.

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[29] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

[30] 216 S.W.3d 409, 412 (Tex. App.–San Antonio 2006).

A

We first considered whether a suit for which the Act has not waived immunity is nevertheless "under" the Act for purposes of section 101.106 in *Newman v. Obersteller*.[31] At that time, section 101.106 stated simply:

> A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim.[32]

A high school student and his parents sued his coach and the school district for intentional infliction of emotional distress,[33] alleging that the coach and other school employees had berated, harassed, and intimidated him, once locking him in a locker room by himself.[34] The trial court dismissed the case against the school district based on its assertion of immunity, presumably because the Act does not waive immunity for intentional torts,[35] but refused to dismiss the case against the coach.[36] The court of appeals dismissed the coach's interlocutory appeal for want of jurisdiction, holding that section 101.106 was not a grant of immunity to government employees, the denial of which was

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[31] 960 S.W.2d 621, 622 (Tex. 1997).

[32] Act of May 17, 1985, 69th Leg. R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3305, recodifying former TEX. REV. CIV. STAT. ANN. art. 6252-19, § 12(a), Act of May 14, 1969, 61st Leg., R.S., ch. 292, § 12(a), 1969 Tex. Gen. Laws 874, 877 ("The judgment or settlement in an action or claim under this Act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of a unit of government whose act or omission gave rise to the claim.").

[33] *Newman*, 960 S.W.2d at 622.

[34] *Newman v. Obersteller*, 915 S.W.2d 198, 203 (Tex. App.–Corpus Christi 1996), *rev'd*, 960 S.W.2d 621 (Tex. 1997).

[35] TEX. CIV. PRAC. & REM. CODE § 101.057(2) ("This chapter does not apply to a claim . . . arising out of assault, battery, false imprisonment, or any other intentional tort . . . .").

[36] *Newman*, 960 S.W.2d at 622.

subject to interlocutory appeal, but merely a procedural limitation.[37] We reversed, holding that the statute's "bar" of an action against a government employee in effect conferred immunity on the employee.[38] We also rendered judgment against the plaintiffs, holding that the dismissal of their claim against the school district barred their action against the coach.[39] The rule of *Newman* is that a tort claim against the government is "under" the Act even though the Act does not waive immunity from suit.

We followed the rule in *Dallas County Mental Health and Mental Retardation v. Bossley*[40] and again in *Harris County v. Sykes*.[41] In *Bossley*, the plaintiffs sued a mental health treatment facility and its employees for allowing their son to escape, resulting in his death.[42] The trial court dismissed the case, holding that the facility was immune from suit and that suit against the employees was consequently barred by section 101.106, but the court of appeals reversed.[43] We held that the trial court was correct.[44] In *Sykes*, the plaintiff sued the county and its jailor, alleging that while incarcerated in the county jail, he had negligently been assigned a bed near an inmate with

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[37] *Newman*, 915 S.W.2d at 200-201.

[38] *Newman*, 960 S.W.2d at 622.

[39] *Id.* at 623.

[40] 968 S.W.2d 339, 343-344 (Tex. 1998).

[41] 136 S.W.3d 635, 640 (Tex. 2004).

[42] *Bossley*, 968 S.W.2d at 340-341.

[43] *Id*. at 341.

[44] *Id*. at 343-344.

tuberculosis.[45] The trial court dismissed the case as the trial court in *Bossley* had done, but the court of appeals reversed with respect to the jailor.[46] We held that the dismissal of the county barred suit against the jailor.[47]

We elaborated on the rule in *Mission Consolidated Independent School District v. Garcia*,[48] construing a new version of section 101.106, completely revised and greatly expanded in 2003 by House Bill 4, a comprehensive tort reform measure.[49] The revised provision—in which "under this chapter" is used in subsections, (a), (c), (e), and (f)—reads as follows:

> (a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.
>
> (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.
>
> (c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.
>
> (d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.

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[45] *Sykes*, 136 S.W.3d at 637.

[46] *Id*. at 637-638.

[47] *Id*. at 640-641.

[48] 253 S.W.3d 653, 658 (Tex. 2008).

[49] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 11.05, 2003 Tex. Gen. Laws 847, 886.

> (e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.
>
> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.[50]

In *Mission*, three former employees of the school district sued the district and its superintendent: the district for wrongful termination in violation of the Texas Commission on Human Rights Act,[51] both the district and superintendent for intentional infliction of emotional distress, and the superintendent for defamation, fraud, and negligent misrepresentation.[52] The district sought dismissal under section 101.106(b), asserting that the plaintiffs' suit against the superintendent barred suit against it on the same claims without its consent.[53] The trial court refused to dismiss the case against the district, and the court of appeals affirmed.[54]

The plaintiffs argued that because they had sued both the district and the superintendent, section 101.106(e) applied, rather than 101.106(b), and because the Act did not waive the district's immunity from suit on either of their claims against it, those claims were not "under" the Act, and

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[50] TEX. CIV. PRAC. & REM. CODE § 101.106.

[51] TEX. LAB. CODE §§ 21.001-21.556.

[52] 253 S.W.3d at 655.

[53] *Id*.

[54] *Id.*

therefore dismissal of the superintendent was not required.[55] We concluded that the plaintiffs' argument misconstrued subsection (e), and that correctly construed, the end result under either subsection (b) or (e) would be the same. We analyzed subsection (e) as follows:

> The court of appeals reasoned that none of Garcia's claims were brought "under this chapter" because they did not fit within the Tort Claims Act's waiver, and therefore section 101.106(e) did not apply. However, we have never interpreted "under this chapter" to only encompass tort claims for which the Tort Claims Act waives immunity. To the contrary, in *Newman v. Obersteller,* we held that former section 101.106's limiting phrase "under this chapter" operated to bar an intentional tort claim against an employee after a final judgment on a claim involving the same subject matter had been rendered against the governmental unit, even though the Act by its terms expressly excluded intentional torts from the scope of the Act's immunity waiver. *See also, e.g., Sykes,* 136 S.W.3d at 640 (applying section 101.106 to bar the plaintiff's claim against a governmental employee even though immunity was not waived under the Tort Claims Act for suit against the governmental unit); *Dallas County Mental Health & Mental Retardation v. Bossley,* 968 S.W.2d 339, 344 (Tex. 1998) (dismissing suit against employee when both the employee and the governmental unit were sued based on negligence theories that were not within the Act's limited waiver). Although these cases construed the prior version of section 101.106, there is nothing in the amended version that would indicate a narrower application of the phrase "under this chapter" was intended. Because the Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be "under [the Tort Claims Act]" for purposes of section 101.106. *See Newman,* 960 S.W.2d at 622.
>
> Having concluded that Garcia's tort claims are not excluded from section 101.106(e)'s application, we examine subsection (e)'s effect if it were applied to this case. Under subsection (e), Dyer would be entitled to dismissal of Garcia's suit against him upon the ISD's filing of a motion. The ISD has not sought Dyer's dismissal, however, and Dyer has not sought his own dismissal under subsection (f). But if the ISD had obtained Dyer's dismissal from the suit under subsection (e), all of Garcia's tort claims against the ISD would be barred because, as we have said, all tort theories of recovery alleged against a governmental unit are presumed to be "under the [Tort Claims Act]." Garcia's suit under the TCHRA, however, is not "a

[55] *Id.* at 658.

> suit filed under this chapter" and would not come within subsection (e)'s purview because the Tort Claims Act expressly provides that the remedies it authorizes "are in addition to any other legal remedies," and the TCHRA provides a statutory remedy for unlawful discrimination. *Id.* § 101.003. Claims against the government brought pursuant to waivers of sovereign immunity that exist apart from the Tort Claims Act are not brought "under [the Tort Claims Act]." In sum, if subsection (e) were applied to Garcia's suit and Dyer was dismissed, the only claim against the ISD that would survive would be Garcia's TCHRA claim.[56]

Likewise, only the TCHRA claim survived under section 101.106(b). Because subsection (b) does not contain the "under this chapter" limitation, any suit against a government employee bars suit "against the governmental unit regarding the same subject matter unless the governmental unit consents".[57] While the school district had not itself consented to be sued by the plaintiffs, the TCHRA provided consent for wrongful termination claims, because "the government conveys its consent to suit . . . through the Constitution and state laws."[58] "Thus," we concluded, "the Legislature, on behalf of the [school district], has consented to suits brought under the TCHRA, provided the procedures outlined in the statute have been met."[59]

The rule that a tort suit against the government, as distinct from a statutory claim, is brought "under" the Act for purposes of section 101.106, even though the Act does not waive immunity, is firmly grounded in our cases. More importantly, as *Mission* illustrates, with the 2003 revisions to

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[56] *Id*. at 658-659 (footnote and some citations omitted).

[57] *Id*. at 659-660.

[58] *Id*. at 660.

[59] *Id*.

section 101.106, the rule has become necessary for harmonizing the several subsections of the statute.

B

Although we have not applied the same rule to section 101.106(f) before today, the statutory text suggests we should. The revised statute lifts the phrase "under this chapter" from the prior statute and repeats it four times. The prior statute referred to "an action or settlement of a claim under this chapter". The current version refers to "[t]he filing of a suit under this chapter" in subsection (a), "[t]he settlement of a claim arising under this chapter" in subsection (c), "a suit . . . filed under this chapter" in subsection (e), and "a suit [that] . . . could have been brought under this chapter" in subsection (f).[60] The text gives no hint that any these references has a different meaning; to the contrary, the repetition strongly suggests that the meaning throughout is the same.

Two other sections of the Act also make plain that suits brought "under" the Act include those for which immunity is not waived. Section 101.103(a) requires the attorney general to "defend each action brought under this chapter".[61] One would hardly suppose that the attorney general would be relieved of this responsibility whenever he thought, as he regularly does, his client's immunity remained intact despite the plaintiff's allegations. Section 101.102, entitled "Commencement of Suit", provides that "[a] suit under this chapter shall be brought in state court in the county in which the cause of action or a part of the cause of action arises."[62] If this applies only to suits for which

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[60] TEX. CIV. PRAC. & REM. CODE § 101.106.

[61] *Id.* § 101.103(a).

[62] *Id.* § 101.102(a).

immunity is waived, can suits for which immunity is not waived, of which there are many, be brought anywhere? One would hardly think so. These examples serve to illustrate the obvious: that suit is brought under the Act when it is filed, not when waiver of immunity by the Act is established.

Construing subsection (f) as the court of appeals did in this case is not only inconsistent with *Mission* and the Act as a whole, it creates at least a disparity, if not an absurdity, in the statute's operation. If a plaintiff sues only a government employee and not the government, then under subsection (f), according to the court of appeals, the employee need not be dismissed unless a waiver of the government's immunity for the claim is established. But if a plaintiff sues both the government and its employee, then under subsection (e), according to *Mission*, the employee must be dismissed, even if the government's immunity is not waived. There is no reason why an employee should be entitled to dismissal if sued with the government but not if sued alone.

For consistency both within section 101.106 and throughout the Act, subsection (f) must be governed by the same rule *Mission* applied in construing subsection (e).

C

The court of appeals' construction of section 101.106(f) poses serious practical problems.

Requiring a government employee to prove that his employer's immunity from suit has been waived in order to obtain dismissal forces the parties to take unexpected positions with collateral risks. Ordinarily, one would expect a government employee to support his employer's assertion of immunity. Only a perverse statute would incentivize conflict between the two, and there is nothing to indicate that the Legislature had any such intent. The plaintiff, too, is forced into an awkward

position, arguing that immunity was not waived, and thereby cutting off that path to liability and recovery.

Moreover, the employee, the plaintiff, and the employer could all be whipsawed by the trial court's ruling that immunity was waived. Since the government was not a party to the case at the time, it would not be bound by the ruling and would be free to seek a redetermination and to appeal. Exhibit A in support of its arguments that immunity was not waived would be the plaintiff's own assertions. And in response, the plaintiff would cite the employee. The immunity issue would thus be encased in confusion and cynicism.

The predicament for the plaintiff would be even trickier. He would be required to decide within thirty days of the employee's motion to dismiss whether to acquiesce and sue the government instead. Nothing in section 101.106(f) requires the trial court to rule on whether immunity was waived, either before or after the thirty-day deadline. Even if the plaintiff obtained the trial court's ruling before having to decide whether to dismiss the employee, there would be no assurance that the ruling would be upheld on appeal, especially after the issue was relitigated with the government. If the plaintiff refuses to dismiss the employee, he risks being faced with the government's stipulation that immunity was waived, after the deadline for suing the government has run. If he dismisses the employee and sues the government, he has some advantage in being able to defend the government's assertion of immunity with its employee's contrary statements, but he may not be able to prove waiver, even with such statements. Thus, he will have traded a viable claim against the employee for a barred claim against the government.

Section 101.106(f) leaves the timing of a motion to dismiss to the employee. Delay poses an additional problem for the plaintiff. If he does not notify the government of his claim as required by section 101.101, believing that he has a stronger claim against the employee actor, the government may wait until after the six-month deadline for that notice and then stipulate that immunity was waived, leaving the plaintiff with no cause of action at all. To avoid this result, the plaintiff may notify the government of his claim, but his doing so may be taken as an indication of his position that immunity has been waived, undercutting any later argument that it was not.

These problems, though thorny, may not always occur and may not be insuperable when they do, but they arise at all only under the court of appeals' construction of section 101.106(f). They do not exist if subsection (f) is construed the same way *Mission* construed subsection (e). Properly construed, section 101.106(f)'s two conditions are met in almost every negligence suit against a government employee: he acted within the general scope of his employment,[63] and suit could have been brought under the Act — that is, his claim is in tort and not under another statute that independently waives immunity. In such cases, the suit "is considered to be against the employee in the employee's official capacity only",[64] and the plaintiff must promptly dismiss the employee and sue the government instead. No party is forced into awkward or conflicting positions. The immunity issue need not be determined until the governmental unit is in the suit and the issue can be fully addressed.

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[63] Whether an employee's intentional tort is within the scope of employment is a more complex issue. *See generally* RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006).

[64] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

This construction of section 101.106(f) does, however, foreclose suit against a government employee in his individual capacity if he was acting within the scope of employment. This changes, among other things, the rule in *Kassen v. Hatley*, which has allowed malpractice suits against physicians employed by the government, even though acting within the scope of employment.[65] Recovery for the negligence of a government physician acting in the course of employment would be limited to that afforded under the Act. At least one participant in the legislative process that resulted in the enactment of House Bill 4 has written that this change was precisely the intent of the revisions to section 101.106.[66] In any event, our construction of section 101.106 is compelled by its text and by the rule of *Mission*, *Sykes*, *Bossley*, and *Newman*.[67]

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[65] 887 S.W.2d 4, 11 (Tex. 1994).

[66] "Under prior law, many plaintiffs avoided the TTCA's cap on damages, notice provision, and case law interpreting use and misuse of tangible personal property by suing government employees individually. Texas case law had generally held that individual employees were not afforded the defenses and protections contained in the TTCA. Accordingly, by filing suit against the employee under other statutes, a plaintiff could circumvent the TTCA.

"Section 11.05 of H.B. 4 created a new 'Election of Remedies' section under the TTCA. The section effectively requires plaintiffs to sue the governmental unit rather than an employee of the governmental unit.

* * *

"The net effect of the various new provisions of the TTCA is that a plaintiff will only be able to pursue the governmental entity and not its employees. The amendment also solves the problems Texas courts faced in trying to determine if employees of governmental units were entitled to the defense of official immunity. . . .

"In *Kassen*, the Texas Supreme Court held that health care providers are entitled to official immunity if their acts are governmental in nature and not purely medical. The court's 1994 holding has forced lower courts to conduct a complicated analysis of each fact pattern in each case. Consequently, *Kassen* did not remove the threat of potential lawsuits against employees of a governmental unit. . . . H.B. 4 addressed those concerns by requiring that lawsuits be brought against the governmental unit instead of its employees. As a result, the need for determining if official immunity applies is eliminated."

Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. 169, 290-293 (2005) (footnotes omitted).

[67] Two courts of appeals appear to have recognized that *Mission* requires the construction of section 101.106(f) we adopt. *Castro v. McNabb*, 319 S.W.3d 721, 731-732 (Tex. App.–El Paso 2009, no pet.); *Kelemen v. Elliott*, 260 S.W.3d 518, 524 (Tex. App.–Houston [1st Dist.] 2008, no pet.). We disapprove the cases that have adopted a different

D

Our construction of section 101.106 is also consistent with the Legislature's purposes in enacting House Bill 4.

Under Texas law, a suit against a government employee in his official capacity is a suit against his government employer[68] with one exception: an action alleging that the employee acted *ultra vires*.[69] With that exception, an employee sued in his official capacity has the same

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construction. *See McFadden v. Oleskey*, No. 03-09-00187-CV, 2010 Tex. App. LEXIS 6806, at *24, 2010 WL 3271667, at *8 (Tex. App.–Austin Aug. 19, 2010, no pet.); *Illoh v. Carroll*, 321 S.W.3d 711, 716-717 (Tex. App.–Houston [14th Dist.] 2010, pet. filed); *Menefee v. Medlen*, 319 S.W.3d 868, 875-877 (Tex. App.–Fort Worth 2010, no pet.); *Reedy v. Pompa*, 310 S.W.3d 112, 119 (Tex. App.–Corpus Christi-Edinburg 2010) (petition granted Jan. 21, 2011); *Lieberman v. Romero*, No. 05-08-01636-CV, 2009 Tex. App. LEXIS 8414, at *4-5, 2009 WL 3595128, at *2 (Tex. App.–Dallas Nov. 3, 2009) (mem. op.) (petition granted Jan. 21, 2011); *Terry A. Leonard, P.A. v. Glenn*, 293 S.W.3d 669, 681-682 (Tex. App.–San Antonio 2009) (petition granted Jan. 21, 2011); *Escalante v. Rowan*, 251 S.W.3d 720, 727-729 (Tex. App.–Houston [14th Dist.] 2008) (petition granted Jan. 21, 2011); *Lanphier v. Avis*, 244 S.W.3d 596, 600 (Tex. App.–Texarkana 2008, pet. filed); *Hall v. Provost*, 232 S.W.3d 926, 928-929 (Tex. App.–Dallas 2007, no pet.); *Turner v. Zellers*, 232 S.W.3d 414, 417-419 (Tex. App.–Dallas 2007, no pet.); *Kanlic v. Meyer*, 230 S.W.3d 889, 893-894 (Tex. App.–El Paso 2007, pet. filed); *Clark v. Sell ex rel. Sell*, 228 S.W.3d 873, 874-875 (Tex. App.–Amarillo 2007) (petition granted Jan. 21, 2011); *Sheth v. Dearen*, 225 S.W.3d 828, 830 (Tex. App.–Houston [14th Dist.] 2007, no pet.); *Tex. Dep't of Agric. v. Calderon*, 221 S.W.3d 918, 922-923 (Tex. App.–Corpus Christi-Edinburg 2007, no pet.); *Walkup v. Borchardt*, No. 07-06-0040-CV, 2006 Tex. App. LEXIS 10333, at *1-2, 2006 WL 3455254, at *1 (Tex. App.–Amarillo Nov. 30, 2006, no pet.); *Tejada v. Rowe*, 207 S.W.3d 920, 925 (Tex. App.–Beaumont 2006, pet. filed); *Williams v. Nealon*, 199 S.W.3d 462, 466-467 (Tex. App.–Houston [1st Dist.] 2006) (petition granted Jan. 21, 2011); *Phillips v. Dafonte,* 187 S.W.3d 669, 676-677 (Tex. App.–Houston [14th Dist.] 2006, no pet.).

[68] *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007) ("It is fundamental that a suit against a state official is merely 'another way of pleading an action against the entity of which [the official] is an agent.' *Kentucky v. Graham,* 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (quoting *Monell v. Dep't of Social Servs. of City of New York,* 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)); *see also Tex. Dep't of Pub. Safety v. Petta,* 44 S.W.3d 575, 581 (Tex. 2001). A suit against a state official in his official capacity 'is *not* a suit against the official personally, for the real party in interest is the entity.' *Graham,* 473 U.S. at 166, 105 S.Ct. 3099 (emphasis in original). Such a suit actually seeks to impose liability against the governmental unit rather than on the individual specifically named and 'is, in all respects other than name, . . . a suit against the entity.' *Id.; see also Tex. Natural Res. Conservation Comm'n v. IT-Davy,* 74 S.W.3d 849, 855-56 (Tex. 2002).").

[69] *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372, 373 (Tex. 2009) ("[S]uits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money. To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act. . . . But the *ultra vires* rule is subject to important qualifications. Even if such a claim may be brought, the remedy may implicate immunity.").

governmental immunity, derivatively, as his government employer.[70] But public employees (like agents generally[71]) have always been individually liable for their own torts, even when committed in the course of employment,[72] and suit may be brought against a government employee in his individual capacity.[73] Generally, however, public employees may assert official immunity[74] "from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority."[75] Of course, determining whether actions and decisions are discretionary "is admittedly problematic".[76] Importantly, for government employees with medical responsibilities, we held in *Kassen* that government discretion does not include medical

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[70] *Id.* at 380 ("With the limited *ultra vires* exception . . . , governmental immunity protects government officers sued in their official capacities to the extent that it protects their employers."); *Koseoglu*, 233 S.W.3d at 844 ("When a state official files a plea to the jurisdiction, the official is invoking the sovereign immunity from suit held by the government itself.").

[71] *E.g. Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002); *Leonard v. Abbott*, 366 S.W.2d 925, 928-929 (Tex. 1963).

[72] *House v. Houston Waterworks Co.*, 31 S.W. 179, 181 (Tex. 1895) ("It is well settled that a public officer or other person who takes upon himself a public employment is liable to third persons in an action on the case for any injury occasioned by his own personal negligence or default in the discharge of his duties." (internal quotation marks and citation omitted)).

[73] *Heinrich*, 284 S.W.3d at 373 n.7 ("State officials may, of course, be sued in both their official and individual capacities.").

[74] *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422-424 (Tex. 2004) (discussing the history of official immunity in Texas law, noting that it has been accorded officials, law enforcement and emergency officers, and physicians, and holding that board of adjustment members can assert it). We have not held that every government employee may assert official immunity, but I am not aware of a case denying it.

[75] *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

[76] *Kassen v. Hatley*, 887 S.W.2d 4, 9 (Tex. 1994).

discretion.[77] Thus, official immunity does not protect a physician sued in his individual capacity from liability for medical decisions and actions.

Before the Tort Claims Act was passed in 1969, if suit against the government was barred by immunity, a plaintiff could sue and recover against a government employee-actor in his individual capacity even though, were he sued for the same conduct in his official capacity, he would be shielded by derived governmental immunity. The employee's official immunity would not bar suit or recovery if his conduct were non-discretionary, medical, or not done in good faith. Under the Act, a waiver of governmental immunity does not preclude an assertion of official immunity,[78] but a successful assertion of official immunity results in a waiver of governmental immunity.[79]

In waiving governmental immunity, the Legislature correspondingly sought to discourage or prevent recovery against an employee. As already discussed, the original enactment of the Act in 1969 contained a provision substantively identical to section 101.106 before its revision in 2003. That provision was strikingly similar to language in the 1949 Federal Tort Claims Act.[80] The federal provision was amended in 1961 to make the FTCA the exclusive remedy for motor vehicle accidents

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[77] *Id*. at 11-12.

[78] *DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995) ("Whether the Texas Tort Claims Act waives sovereign immunity in a given case does not affect whether the governmental employee may assert official immunity as a defense."); TEX. CIV. PRAC. & REM. CODE § 101.026 ("To the extent an employee has individual immunity from a tort claim for damages, it is not affected by this chapter.").

[79] *Dewitt*, 904 S.W.2d at 654 (section 101.121 of the TTCA "predicate[s] the governmental unit's respondeat superior liability upon the liability of its employee").

[80] 28 U.S.C. § 2676 ("The judgment in an action under [the Federal Tort Claims Act] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."). We noted the similarity in *Thomas v. Oldham*, 895 S.W.2d 352, 356 (Tex. 1995).

involving federal employees acting within the scope of their employment,[81] but through the years, judicial application of official immunity was not entirely uniform.[82] In 1988, the United States Supreme Court held in *Westfall v. Erwin* that for a federal employee to be immune from suit on a common law tort, he must show not only that he was acting within the scope of employment but also that he was performing a discretionary function.[83] Congress viewed the second requirement as exposing employees to unwarranted liability[84] and quickly passed the Federal Employees Liability Reform and Tort Compensation Act, commonly known as the Westfall Act, which provided immunity to all employees acting within the scope of employment,[85] "'return[ing] [them] to the

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[81] *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425 (U.S. 1995) (citing Pub. L. 87-258, § 1, 75 Stat. 539).

[82] *See, e.g.*, *Barr v. Matteo*, 360 U.S. 564, 574-575 (1959) (Justice Harlan, joined by Justices Frankfurter, Clark, and Whittaker, concluded that, under the circumstances in the record, the alleged libel could not be said to be an inappropriate exercise of discretion by an agency head; it would be unduly restrictive to hold a public statement of agency policy, on a matter of wide public interest, by a policy-making executive official, was not an action in the line of duty, and the "fact that the action was within outer perimeter of the petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice"), and *Poolman v. Nelson*, 802 F.2d 304, 308 & n.2 (8th Cir. 1986) (holding that a Farmers Home Administration county supervisor was immune from a would-be borrower's suit over alleged misrepresentations because those actions fell "within the outer perimeter" of the county supervisor's authority, citing, *inter alia*, *Barr*, 360 U.S. at 571).

[83] 484 U.S. 292, 296-297 (1988); *see also* H.R. REP. No. 100-700, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946 ("[I]n Westfall, the Supreme Court added an additional requirement for immunity when a Federal employee is sued in his personal capacity. Now, the Federal employee not only must have been acting within the scope of employment (the original standard), but also must have exercised governmental discretion in acting.").

[84] *See* H.R. REP. No. 100-700, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946 ("[N]early all actions against Federal employees in their personal capacity were unsuccessful because those employees were acting in the course and scope of employment, and therefore were immune from personal liability").

[85] 28 U.S.C. § 2679 ("(b)(1) The remedy against the United States provided by [the Federal Tort Claims Act] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred. (2) Paragraph (1) does not extend or apply to a civil

status they held prior to the *Westfall* decision.'"[86] The Westfall Act made whatever remedy the FTCA provided against the United States a claimant's exclusive remedy for a government employee's conduct in the scope of employment.

House Bill 4's revision of section 101.106 achieves the same end under Texas law as the Westfall Act does under federal law. As it affects government-employed physicians, it is generally consistent with the Legislature's concerns regarding health care costs, also expressed in the bill.[87] We recognize that the Open Courts provision of the Texas Constitution "prohibits the Legislature from unreasonably abrogating well-established common-law claims",[88] but restrictions on government employee liability have always been part of the tradeoff for the Act's waiver of immunity, expanding the government's own liability for its employees' conduct,[89] and thus "a reasonable exercise of the police power in the interest of the general welfare."[90] In any event, no constitutional challenge is made in this case.

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action against an employee of the Government — (A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.").

[86] *Gutierrez de Martinez*, 515 U.S. at 426 (quoting H.R. REP. No. 100-700, at 4 (1988)).

[87] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11, 2003 Tex. Gen. Laws 847, 884.

[88] *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 202 (Tex. 2002).

[89] *See Thomas v. Oldham*, 895 S.W.2d 352, 357-358 (Tex. 1995).

[90] *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995).

Accordingly, we hold that for section 101.106(f), suit "could have been brought" under the Act against the government regardless of whether the Act waives immunity from suit. We reverse the judgment of the court of appeals and remand to the trial court for further proceedings.

Nathan L. Hecht
Justice

Opinion delivered: January 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 07-0131

JOHN CHRISTOPHER FRANKA, M.D., AND NAGAKRISHNA REDDY, M.D., PETITIONERS,

v.

STACEY VELASQUEZ AND SARAGOSA ALANIZ, BOTH INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILD, SARAGOSA MARIO ALANIZ, RESPONDENTS

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

Argued September 10, 2008

JUSTICE MEDINA, joined by JUSTICE LEHRMANN, dissenting.

In *Kassen v. Hatley*, we held that government-employed medical personnel were not entitled to the defense of official immunity when sued individually for the negligent exercise of purely medical judgment. 887 S.W.2d 4, 11 (Tex. 1994). Recognizing that medical decisions were typically unrelated to governmental discretion, we concluded that public-sector patients should have the same rights as private-sector patients when only medical judgment was at issue. *Id.* 11–12. Today, the Court abandons that principle, not because *Kassen* was wrongly decided, but because the Legislature has amended section 101.106 of the Tort Claims Act. TEX. CIV. PRAC. & REM. CODE

§ 101.106. Because this amendment does not speak to the official immunity of physicians accused of malpractice and does not require that we abandon *Kassen*, I respectfully dissent.

I

The Texas Tort Claims Act[1], does not waive the state's immunity generally for the medical malpractice of its doctors. Instead, it waives the state's sovereign or governmental immunity for, among other things, personal injury "caused by a condition or use of tangible . . . property." TEX. CIV. PRAC. & REM. CODE § 101.021(2). Texas courts have struggled with the meaning and application of the quoted phrase since the Act's adoption over forty years ago. *See Texas Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 590 (Tex. 2001) (Hecht, J. concurring) (lamenting that judicial decisions "have done so little to infuse the Act's use-of-property standard with meaning that the task now appears hopeless"). Although the standard lacks clarity, it is clear that medical negligence will sometimes not involve the use of property. Consider the facts in this case.

The asserted medical malpractice concerns a brachial plexus injury to an infant during delivery. The brachial plexus is a network of nerves that conducts signals from the spine to the shoulder, arm, and hand. These nerves were allegedly damaged when one of the infant's shoulders became stuck during delivery and was accidently broken.

The parents' theory was that the doctors ignored numerous warning signs indicating the need for a Caesarean delivery. The parents supported their theory with an expert report that listed the risk

[1] The Tort Claims Act waives the state's sovereign immunity "for certain tort claim involving automobiles, premises defects, or the condition or use of property." *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 657 (Tex. 2007); *see also* TEX. CIV. PRAC. & REM. CODE §§ 101.001(3)(A)-(B), 101.021, 101.022, 101.025.

factors presented in the case. The report concluded that the doctors had "departed from the standard of care by failing to recognize that [the mother and fetus] demonstrated these six significant risk factors for the development of shoulder dystocia leading to an improper attempt at vaginal delivery rather than a Caesarean delivery that would have avoided the shoulder fracture and brachial plexus nerve injury sustained at birth."

The doctors moved to dismiss, contending that the parents should have sued their employer, UTHSC, rather than the doctors individually because a vacuum extractor was used during delivery. To invoke a waiver of governmental immunity conditioned upon a "use of property" there must be a causal link between the property's use and the patient's injury.[2] The court of appeals concluded that there was no such causal link here because neither the pleadings nor the evidence implicated the vacuum extractor as a cause of injury. 216 S.W.3d at 411-13. The court observed that the progress notes, the expert report, and the deposition testimony of the two doctors established that the vacuum extractor was used only to deliver the infant's head. *Id*. at 411. A number of additional maneuvers, involving only the doctors' hands, were used after that to deliver the infant's shoulders at which time the injury occurred. *Id*.

When a governmental employee causes injury, section 101.106 of the Tort Claims Act purports to give the injured person a choice of suing the government, or its employee, or both. TEX. CIV. PRAC.

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[2] *See Tex. Natural Resource & Conservation Comm'n v. White*, 46 S.W.3d. 864, 868, 869 (Tex. 2001) (property's use "must have actually caused the injury"); *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 344 (Tex. 1997) ("personal injury or death must be proximately caused by a condition or use of tangible personal or real property").

& REM. CODE § 101.106. I say purports because the Court holds that this provision is a sham; it does not actually provide the putative plaintiff any choice in the matter. The statute's title and text indicate, however, that the Court is wrong. The statute plainly puts the plaintiff to an election[3] at the time of filing suit with different consequences following the various choices.

Although not pertinent to this appeal, the statute also covers the consequences of a settlement or judgment. *Id.* § 101.106(c), (d). Before its amendment in 2003, section 101.106 applied exclusively to settlements and judgments and provided simply that a plaintiff could not sue the

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[3] § 101.106. **Election of Remedies**

(a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.

(b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.

(c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.

(d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.

(e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

(f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. CIV. PRAC. & REM. CODE § 101.106.

employee after a judgment or settlement with the government.[4] We characterized the employee's right under the former provision as an immunity from liability. *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 344 (Tex. 1997); *see also Newman v. Obersteller*, 960 S.W.2d 621, 622 (Tex. 1997). The 2003 amendments have expanded the statute's scope but have not changed its character. The statute continues to create immunity from liability but now includes decisions made at the time of filing suit in addition to settlements and judgments.

Under the current statute, a plaintiff who sues only the government is barred from subsequently suing the government's employee "regarding the same subject matter." TEX. CIV. PRAC. & REM. CODE § 101.106(a). The plaintiff may elect to sue both the government and its employee, but the statute grants the government the unconditional right to have its employee dismissed from the suit if the plaintiff makes that election. *Id*. § 101.106(e). If the plaintiff does not want to sue the government, the plaintiff may sue the employee individually in which case the statute bars the plaintiff from subsequently suing the government "regarding the same subject matter unless the governmental unit consents." *Id*. § 101.106(b). Even when the plaintiff sues the employee individually, the employee may obtain his or her dismissal under the conditions set out in section 101.106(f).

Subpart (f) provides that the employee shall be dismissed when the suit "is based on conduct within the general scope of that employee's employment and . . . could have been brought under this

[4] The former provision, titled, "Employees Not Liable after Settlement or Judgment," provided that "[a] judgment in an action or a settlement of a claim under [the Tort Claims Act] bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose action or omission gave rise to the claim." *See id*. § 101.106 (1997) (amended by Act of June 2, 2003, 78th Leg., RS, ch. 204, § 11.05, 2003 Tex. Gen. Laws 886).

chapter against the governmental unit." *Id.* § 101.106(f). There are therefore three conditions for the employee's dismissal under subpart (f): (1) the employee must have been employed by a governmental unit at the time of the incident; (2) the suit must be based on conduct within the scope of that employment; and (3) the plaintiff must have been able to bring the claim against the governmental employer under this chapter. "Under this chapter" refers to chapter 101 of the Civil Practice and Remedies Code, commonly known as the Texas Tort Claims Act. *Id.* § 101.002. Although there is some question about the employment of one of the doctors in this case, the question as to both doctors is whether the plaintiffs' medical malpractice action "could have been brought" against the governmental unit, UTHSC, under the Tort Claims Act.

II

The Court and I disagree about the meaning of the last condition—whether suit "could have been brought under this chapter against the governmental unit." I would hold that this condition refers to those tort claims for which the government has consented to suit under the Tort Claims Act. The Court attributes a broader meaning to the phrase, indicating that it includes all tort claims filed against a governmental employee individually without regard to whether the government has consented to be sued.

The Court reasons that because it is possible to sue the government for medical malpractice under the Tort Claims Act, albeit under limited circumstances, plaintiffs must sue the government, instead of their doctors individually, even when those limited circumstances do not exist. In the Court's view, the statute is not about giving the plaintiff the right to choose the appropriate defendant

but rather about making the government the defendant in all tort cases arising out of its employees' conduct. The Court finds it immaterial that the plaintiffs filed their tort claim against the doctors individually, did not seek to join the government, and presumably do not believe they have an actionable tort claim against the government because governmental immunity has not been waived as to their claim. By ignoring the plaintiffs' election and the reasons for it, the Court effectively reads the "could have been brought" condition out of the statute, holding instead that plaintiffs may sue only the government for the medical malpractice of its publicly-employed physicians. "Whatever merits this holding may have as a rule of law do not include fidelity to language and precedent." *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 14 (Tex. 2000) (Hecht, J. dissenting.)

The Attorney General, as Amicus Curiae in this case, shares my concern about the Court's construction of the statute. He appropriately notes that the phrase "could have been brought" is unique to subpart (f). In contrast, references to the filing of suit are made repeatedly throughout section 101.106. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 101.106 (a), (b), (e), (f). The Attorney General submits that the Legislature purposefully chose the term "brought" rather than "filed" to indicate a substantive distinction from the mere physical process reflected in the introductory clause of subpart (f) ("[i]f a suit is filed") and the similar use of the term "filing" or "filed" in subparts (a), (b), and (e). The Attorney General further submits that the Legislature intended for the phrase "could have been brought" to mean something different than could have been filed. To equate "brought" with "filed", argues the Amicus, is to render subpart (f)'s principle condition superfluous. Anyone can physically file a claim against the government, but not every claim filed against the government is actionable.

The Attorney General concludes that the "could have been brought" condition can only refer to actionable claims against the government, that is, tort claims for which the government has consented to be sued.

I agree that the phrase "could have been brought" refers to actionable claims against the government. Unlike the Court, I believe that the "Election of Remedies" provision puts the plaintiff to an election at the suit's outset as its title suggests. And although the statute seeks to shape that election, it does not prohibit plaintiffs from suing governmental employees in their individual capacity.

When a plaintiff elects to sue only the governmental employee as in this case, subparts (b) and (f) are implicated by the plaintiff's choice. TEX. CIV. PRAC. & REM. CODE §§ 101.106(b), (f). Subpart (b) binds the plaintiffs to their election and bars them from suing the government regarding the same subject matter. *Id*. §101.106(b). Subpart (b), however, excepts from its bar certain claims for which the government has given its consent, and subpart (f) explains the procedure to obtain this exception.

Under subpart (f), the plaintiff is given a limited time to reconsider its suit against the employee and decide anew whether the government should have been sued instead. If the government has consented to suit, the plaintiff is well-advised to substitute the government for two reasons. First, the plaintiff cannot prevail on its claim against the employee if the plaintiff's suit "could have been brought against" the government. *Id.* § 101.106(f). And second, the plaintiff cannot sue the

government under subpart (f)'s exception if the claim against the employee is not promptly dismissed.[5] *Id.*

Subpart (f)'s "could have been brought" condition refers back to subpart (b)'s requirement of government consent. A suit that "could have been brought" against the government then is one for which the government has consented to be sued. Together subparts (b) and (f) require proof of the government's consent to suit as a condition for the employee's dismissal.

The government consents to suit "through the Constitution and state laws." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008). The Tort Claims Act is one such law, providing consent for certain tort claims involving the operation of automobiles, the condition or use of property, and premises liability. TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.022. The government, however, has not specifically consented to be financially responsible for the medical malpractice of its doctors.

A publicly-employed doctor, who is sued individually for malpractice but seeks to obtain his or her dismissal under subpart (f), must therefore establish the government's consent to be sued for the specific conduct at issue. If this cannot be established, then the government has not consented to suit, and the plaintiff's claim against the employee individually must proceed. Subpart (b) requires nothing less. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(b) (describing the suit against the

[5] If the plaintiff does not dismiss the case against the employee within thirty days of the employee's motion under subpart (f), subpart (b) will bar any subsequent action against the government. TEX. CIV. PRAC. & REM. CODE § 101.106(b), (f).

employee as an "irrevocable election" that "immediately and forever bars" suit against the government unless it "consents").

The trial court therefore correctly denied the motion to dismiss because under the present record the doctors did not establish the government's consent.

III

The Court maintains, however, that requiring the doctors to prove the government's consent as a condition to dismissal under subpart (f) would be inconsistent with a recent case in which we applied another part of the statute. *See Mission Consol. Indep. Sch. Dist.*, 253 S.W.3d at 658-60 (applying § 101.106 (e)). I fail to see the inconsistency. *Mission* involved subpart (e), rather than (f), because the plaintiffs filed suit against the government and its employees. Because the respective subparts apply to distinctly different circumstances, there is no conflict.

In *Mission*, three terminated school district employees sued the district and its superintendent for wrongful termination and various common law claims that did not fit under the Tort Claims Act's limited waiver of immunity. *Id*. at 655. One issue in the case concerned the application of section 101.106(e). The court of appeals concluded that the section did not apply because none of the plaintiffs' claims fit within the Tort Claims Act's waiver of immunity. The court reasoned that none of the claims were, in the words of the statute,"under this chapter." *Id*. at 658.

We disagreed, observing that any tort claim against the government, even those for which immunity had not been waived, falls "under this chapter" because the Tort Claims Act is the only means to sue the government for a tort:

> Because the Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be "under [the Tort Claims Act]" for purposes of section 101.106.

Id. at 659. *Mission* then merely followed the rule that a tort claim against the government is "under" the Act even when the Act does not waive immunity.

This rule has never been extended to tort suits against government employees individually, but the Court submits that the circumstances are similar enough that it should be. I disagree. The circumstances are not similar, and the statute treats each situation differently.

Subpart (e) grants the government an unconditional right to have its employee dismissed from the suit when the plaintiff elects to sue both the government and its employee. Contrast that with the conditions attached to the employee's motion to dismiss under subpart (f). Clearly, the government's burden under (e) is much different.

When a plaintiff sues both the government and its employees under (e), the employees have been joined in their official capacity as a matter of law, and the government has the right to have them dismissed. When government employees are sued individually under subpart (f), however, their status is a question of fact. In this instance, the employees themselves must establish their official capacity by proving, among other things, that suit could have been brought against their employer. If the employees cannot carry this burden, the suit against them in their individual capacity must proceed. In contrast, subpart (e) imposes no burden on the government to demonstrate that suit could have been

brought against it under the Tort Claims Act for a simple reason: the plaintiff has already brought suit against the government.

The statute therefore treats employees sued individually differently than it does employees sued together with the government. The Tort Claims Act applies as a legal matter under subpart (e) because the government has been sued, but its application under subpart (f) depends on factual proof. The burden of that proof must fall on the employee, the party who must move to dismiss the case under subpart (f).

The statute carefully distinguishes between suits against the government and suits against government employees individually. When referring to suits filed or brought against the government the statute inserts the phrase "under this chapter" but when referring to suits against the employee individually the phrase is omitted. *Compare* TEX. CIV. PRAC. & REM. CODE §§ 101.106(a),[6] (c),[7] & (e)[8] *with id.* §§ 101.106(b),[9] (d),[10] & (f).[11] Although "under this chapter" appears in subpart (f) when referring to the possibility of a suit against the government, the phrase is not used to describe the suit actually filed against the employee individually. *See id.* § 101.106(f) ("If suit is filed against an

[6] "The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election . . ."

[7] "The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee . . ."

[8] "If a suit is filed under this chapter against both a governmental unit and any of its employees . . ."

[9] "The filing of a suit against any employee of a governmental unit constitutes an irrevocable election . . ."

[10] "A judgment against an employee of a governmental unit shall immediately and forever bar . . ."

[11] "If a suit is filed against an employee of a governmental unit based on conduct . . ."

employee of a governmental unit based on conduct . . . and if it could have been brought under this chapter against the governmental unit . . .”). Suits against government employees individually are not “under this chapter” because a plaintiff does not need the government’s consent to seek a personal liability judgment against an individual. Because subparts (e) and (f) apply under different circumstances, our decision in *Mission* is in my view not particularly relevant to the decision in this case.

IV

I further disagree with the Court’s principal assumption that the 2003 amendments were intended to overrule our decision in *Kassen v. Hatley*. The case has no apparent connection to these amendments. *Kassen* is not mentioned in any floor debate, bill analysis, or other piece of legislative history. Ordinarily when the Legislature intends for legislation to supercede one of our decisions, it will at least mention the object of its disagreement with us.

The only support the Court can muster for its unfounded assumption is a law review article, published two years after the amendment and authored by a private party, whom the Court generously describes as a “participant in the legislative process.” ___ S.W.3d at ___. We have repeatedly expressed “our consistent view that ‘[e]xplanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended.’” *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 444 (Tex. 2009) (quoting *In re Doe*, 19 S.W.3d 346, 352 (Tex. 2000) (citations and quotations omitted). In this particular case, the supposition of a private observer apparently carries more weight. If the Legislature intended for this

legislation to prohibit medical malpractice claims against publicly-employed physicians, it has done a masterful job of concealing that intent.

Because the law review article, on which the Court relies, is not particularly convincing, the Court offers another purpose for the legislation. The Court suggests that the 2003 amendment may have been intended to conform the Texas Tort Claims Act to the Federal Tort Claims Act. More specifically, the Court imagines that the 2003 amendment to section 101.106, commonly known as the "Election of Remedies" provision, is Texas' version of the Federal Employees Liability Reform and Tort Compensation Act, commonly known as the Westfall Act. Again, evidence to support its thesis is non-existent.

One need only compare the language of the respective bills to reveal the utter folly of this notion. The Westfall Act provides that the remedy provided by the Federal Tort Claims Act for injury, property loss, or death "resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is *exclusive* of any other civil action" and expressly "*preclude[s]*" any other action "relating to the same subject matter against the employee or the employee's estate." *See* ___ S.W.3d at ___ n.69 (quoting the Westfall Act, 28 U.S.C. § 2679(b)(1) (emphasis added). In contrast to the exclusive and preclusive nature of the Westfall Act, section 101.106 ostensibly provides a choice of remedies.

In lieu of examining section 101.106's language, the Court assumes that the Texas Tort Claims Act should be like the federal act. There are, however, significant differences between the two. For instance, the Federal Tort Claims Act does not condition the waiver of governmental immunity on the

use of automobiles or the condition or use of real or personal property, as does Texas, but instead broadly permits persons to sue the United States in federal court for money damages

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). The federal act thus generally waives governmental immunity for the negligence of its employees, which would include medical malpractice. There is no possibility for the disconnect between the doctor's liability and that of the government employer as under Texas law. This difference reasonably explains why our Legislature chose, when amending our Act, to require proof of the government's consent as a condition for the dismissal of the plaintiff's otherwise actionable, common law claim against the doctor individually.

Enamored more with the federal act than our own, the Court has chosen to conform section 101.106 to the federal scheme. Instead of six subparts, dealing with different combinations of defendants and the possibilities of settlement or judgment, the Court concludes that the Legislature intended simply this: If suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment, the suit shall be dismissed on the employee's motion and the governmental unit substituted as the defendant. Because the Westfall Act precludes suit against government employees, the Court concludes our now misnamed election-of-remedies provision should do the same.

Section 101.106's language reveals, however, that our Legislature did not intend to mimic the Westfall Act. While the Legislature intended to encourage suits against the government in lieu of actions against government employees, section 101.106 does not compel it. Instead, it requires that plaintiffs choose their defendants wisely or suffer the consequences. Subpart (f) is the centerpiece of the scheme, creating a new immunity or "official capacity" defense for employees who can establish that the government should be, or should have been, the defendant.

This "official capacity" defense should not be confused with the common law doctrine of official immunity. Official capacity as used in this statute is shorthand for the conduct of a government employee meeting section 101.106(f)'s conditions: a suit "based on conduct within the general scope of that employee's employment [that] could have been brought . . . against the governmental unit[.]" TEX. CIV. PRAC. & REM. CODE § 101.106(f). Official immunity, on the other hand, "protects government officers from personal liability in performing discretionary duties in good faith within the scope of their authority." *Kassen*, 887 S.W.2d at 8. Government medical personnel, such as the doctors here, enjoy immunity from liability when exercising their governmental discretion, but this immunity does not extend to medical discretion. *Id.* at 11–12. The exercise of medical discretion, however, does not disqualify doctors from being employees of a governmental unit for purposes of the "official capacity" defense extended under section 101.106(f). *Murk v. Scheele,* 120 S.W.3d 865, 867 (Tex. 2003) (per curiam).

To establish this defense, the doctors had to prove that: (1) the suit against them was "based on conduct within the general scope of that employee's employment" and (2) the suit "could have been

brought under [the Tort Claims Act] against the governmental unit[.]" TEX. CIV. PRAC. & REM. CODE § 101.106(f). Substituting the federal scheme for our Legislature's, the Court reads the "could have been brought" condition out of the statute or, in the words of our Attorney General, renders the condition "superfluous."

Statutory language should not be read as pointless if it is reasonably susceptible of another construction. *City of LaPorte v. Barfield,* 898 S.W.2d 288, 292 (Tex. 1995). Moreover, when construing a statute, we are to consider the law's objective and the consequences of a particular construction. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637,642 (Tex. 2004) (citing TEX. GOV'T CODE § 311.023(1), (5)). Consider the consequences of the Court's interpretation—that "could have been brought" refers to nothing more than the physical act of filing suit.

Under that view, the statute nonsensically requires the plaintiff to bring a claim over which the court lacks subject matter jurisdiction. *See, e.g., Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004) (noting that sovereign immunity "defeats a trial court's subject matter jurisdiction unless the state expressly consents to suit"). That suit "could" actually be brought against the government implies a legal possibility, but it is not possible to sue the government without its consent. Worse yet, the claimant is compelled to dismiss an actionable medical malpractice claim against his or her doctor for the non-existent claim against the government. If this were to occur, one might reasonably question the constitutionality of subpart (f), as applied, under our Open Courts provision. TEX. CONST. art. I § 13. We presume, however, that the Legislature intended to comply with the state and federal constitutions, TEX. GOV'T CODE § 311.021(1), and "we are obligated to avoid constitutional problems

if possible." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004). The Court's opinion ignores these rules of statutory construction.

V

Finally, the Court justifies its misconstruction of the statute by suggesting that it would create perverse incentives, conflicts of interest, or opportunities for gamesmanship if the employee were required to establish the government's consent to be sued as a condition for dismissal. As to its gamesmanship charge, the Court suggests that the government might be able to defeat the plaintiff's claim against its employee by merely stipulating to the waiver of governmental immunity after it is too late for the plaintiff to sue under the Tort Claims Act. This is hardly a legitimate concern. The state's immunity is waived "through the Constitution and state laws," not by the stipulations of its functionaries. *See Mission*, 253 S.W.3d at 660. Even if UTHSC were willing to stipulate that the doctor's use of the vacuum extractor caused the infant's brachial plexus injury, a court would not be required to accept its self-serving declaration as fact. That the Court would even consider this a possibility underscores its misunderstanding of the statute and its imagined "perverse" effects.

What could possibly be more perverse than the Court's application of this statute? Under the Court's view, the plaintiffs must give up their common law medical malpractice claim against the doctors for a new suit against the government, a suit which in all likelihood will be dismissed for want of jurisdiction. Since the plaintiffs have not pled a cognizable claim under the Tort Claims Act, why would the government not file a plea to the jurisdiction?

Contrary to the Court's concern, section 101.106 does not foster conflict between the government and its employee because it compels the plaintiff to choose the defendant at the beginning of the case. The plaintiff may sue the government, the government's employee, or both with different consequences attaching to the various elections. When the plaintiff chooses to sue only the employee, subpart (b) bars the plaintiff from suing the governmental unit "regarding the same subject matter unless the governmental unit consents." TEX. CIV. PRAC. & REM. CODE § 101.106(b). Although ostensibly barred under (b), subpart (f) reopens the issue of the government's consent, providing a new opportunity for the plaintiff to sue the government. *Id.* § 101.106(f). Subpart (f) therefore gives the plaintiff a second chance to sue the government, but it only gives the plaintiff thirty days to make that decision.[12] *Id.*

The plaintiffs here have elected to stand on their suit against the doctors and thus are now barred from suing the government. *Id.* § 101.106(b). If the doctors can prove that the Tort Claims Act would have waived the government's immunity but for the plaintiffs election to sue them individually (that suit "could have been brought . . . against the governmental unit"), the doctors will establish their right to be dismissed, but not their employer's liability. *Id.* § 101.106(f). The Court's imagined conflict of interest does not exist because subpart (b) "bars any suit or recovery by the plaintiff against the governmental unit[.]" *Id.* § 101.106(b). Under these circumstances, section 101.106(f) merely provides the employees with an immunity from liability under its "official capacity" defense.

[12] Under § 101.106(b), a plaintiff who sues an employee cannot thereafter sue the governmental employer without its consent. The government consents to its substitution as defendant under § 101.106(f) but that consent terminates 30 days after the filing of the employee's motion to dismiss.

The Court and I agree that the employee may establish a defense or immunity under section 101.106's terms, but we disagree on what those terms entail. In the Court's view, all that is required for the employee's dismissal under subpart (f) is proof of the doctors' employment status and conduct within the scope of that employment. One of the doctors has supplied this proof so I am somewhat puzzled by the Court's decision to remand the claim against him for further proceedings. The statute gives the plaintiff only thirty days to dismiss the employee and substitute the government. Since the time for suing the government has passed, and the plaintiff cannot, according to the Court, sue the employee, what remains to be done? All that occurs to me is that a remand affords the plaintiffs an opportunity to raise any constitutional questions regarding the application of this statute before dismissal. I agree they should have that opportunity, but they would not need it, if the Court merely applied section 101.106 according to its terms.

* * * * *

I recognize that it is our responsibility to accept the Legislature's intent even when that intent is to overrule one of our previous opinions. *Leos v. State Emp. Workers' Comp. Div.*, 734 S.W.2d 341, 343 (Tex. 1987). But we should not loosely ascribe such intent to legislation simply to avoid questions of *stare decisis*. If a majority of the Court now feels that the distinction drawn in *Kassen* between government and medical discretion was in error, we should address the matter directly rather than engage in a distortion of legislative intent.

When we construe a statute, our primary goal is to ascertain and give effect to the Legislature's intent. *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009). When we can, we rely on the primary

source of that intent, the language of the statute. *Phillips v. Bramlett*, 288 S.W.3d 876, 880 (Tex. 2009). The statutory text, title and design of section 101.106 plainly put the plaintiff to an election of remedies. Because the Court's interpretation takes that election away, requiring the plaintiff to sue only the government, I respectfully dissent. I would affirm the court of appeals' judgment.

_____

David M. Medina
Justice

OPINION DELIVERED: January 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 07-0284

CITY OF DALLAS, PETITIONER,

v.

KENNETH E. ALBERT ET AL., RESPONDENTS

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

Argued December 17, 2009

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE LEHRMANN joined, and in which CHIEF JUSTICE JEFFERSON and JUSTICE HECHT joined except to Part II-B.

JUSTICE HECHT filed an opinion concurring in part and dissenting in part, in which CHIEF JUSTICE JEFFERSON joined.

JUSTICE WILLETT filed a dissenting opinion.

This appeal involves a pay dispute between the City of Dallas and many of its police officers and firefighters. Pursuant to a referendum approved by the voters, the City adopted an ordinance addressing the pay of "each sworn police officer and fire fighter and rescue officer employed by the City of Dallas." Claiming the City did not properly pay them according to the ordinance, some firefighters and police officers (collectively, the Officers) sued the City. They sought both a declaratory judgment construing the ordinance and damages for breach of contract. The City counterclaimed, alleging that if the Officers had not been paid correctly, they had been overpaid instead of underpaid and the City was entitled to reimbursement for the overpayments. The City

eventually sought dismissal of the Officers' claims on the basis of governmental immunity, then later dismissed its counterclaim. The trial court denied the City's immunity claim and this interlocutory appeal followed. During the pendency of the appeal, the Legislature amended the Local Government Code to provide for a limited, retroactive waiver of certain local governmental entities' immunity from suit.

The main issues before us involve governmental immunity from suit. We will address the issues in the order that the court of appeals did: (1) what is the effect on the City's immunity of its filing, then non-suiting, the counterclaim; (2) what is the effect, if any, of the Legislature's retroactive waiver of immunity; (3) whether the City has immunity from the Officers' declaratory judgment action; and (4) whether the City lacks immunity from suit because the pay ordinance was adopted by referendum. We conclude that (1) by nonsuiting its counterclaim the City did not reinstate complete immunity from the Officers' pending claims; (2) the case must be remanded for the trial court to consider whether, by amending the Local Government Code, the Legislature waived the City's immunity; (3) the City has immunity from the declaratory judgment action; and (4) the ordinance having been adopted by referendum did not result in waiver or abrogation of the City's immunity.

I. Background

Pursuant to a referendum that voters passed, the City of Dallas adopted an ordinance in 1979 addressing pay for police officers, firefighters, and rescue workers. *See* TEX. LOC. GOV'T CODE

§ 9.005(a), (b). The ordinance provided for a 15% pay raise and that "the current percentage pay differential between grades in the sworn ranks of [the Officers] shall be maintained."[1]

A dispute arose between the City and the Officers over whether the ordinance provided for a one-time pay raise or whether it provided for a one-time pay raise and also required the percentage pay differential to be maintained indefinitely so that if higher-ranking Officers received raises, lower-ranking Officers also received raises in order to maintain the differential. In 1994, the Officers sued the City.

The Officers sought both a declaratory judgment interpreting the ordinance and damages for breach of contract. Regarding their damages claim, the Officers argued that (1) the ordinance amended their employment contracts and the City was contractually bound to maintain the percentage pay differential after its adoption; and (2) the City breached the Officers' contracts by raising the pay of higher-ranking Officers without also raising the pay of lower-ranking Officers to maintain the percentage pay differential required by the ordinance. The Officers sought money damages for back pay and benefits as well as interest.

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[1] The ordinance, in relevant part, states:

> Be it ordained that: (1) From and after October 1, 1978, each sworn police officer and fire fighter and rescue officer employed by the City of Dallas, shall receive a raise in salary in an amount equal to not less than 15% of the base salary of a City of Dallas sworn police officer or fire fighter and rescue officer with three years service computed on the pay level in effect for sworn police Officers and fire fighters and rescue Officers of the City of Dallas with three years service in effect in the fiscal year beginning October, 1977; (2) The current percentage pay differential between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force shall be maintained; and (3) Employment benefits and assignment pay shall be maintained at levels of not less than those in effect for the fiscal year beginning October, 1977.

Dallas, Tex., Ordinance 16084 (Jan. 22, 1979).

The City responded to the Officers' suit, then some time later filed a counterclaim to recover alleged overpayments to the Officers. The City asserted that if the pay raises were improper, then any raises given because the City misconstrued the ordinance were void and the Officers who received the raises must repay them. Later, the City filed a plea to the jurisdiction based on governmental immunity from suit. The Officers countered that the City's immunity had been expressly waived by Local Government Code Section 51.075 (stating a municipality "may plead and be impleaded in any court") and Chapter II of the Dallas City Charter (stating the City may "sue and be sued" and "implead and be impleaded in all courts"). *See* TEX. LOC. GOV'T CODE § 51.075; DALLAS CITY CHARTER ch. II, § 1(2), (3) (Aug. 1999).

The trial court denied the City's plea to the jurisdiction, and the City filed an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(8). While the City's appeal was pending, Texas sovereign immunity[2] law was both clarified and modified.

On the judicial front, we issued our first opinion in *Reata Construction Corp. v. City of Dallas*, 47 TEX. SUP. CT. J. 408 (Tex. 2004) (*Reata I*). We held that the City waived immunity from suit by asserting claims for affirmative relief in a lawsuit. *Id.* at 410. After *Reata I* issued, the City nonsuited its counterclaim. Then, on rehearing, we withdrew the *Reata I* opinion and substituted a new opinion. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). In the new opinion we held that a governmental entity does not have immunity from suit for monetary claims against it that are "germane to, connected with, and properly defensive to" affirmative claims made

[2] The State's immunity is referred to as sovereign immunity, while that of political subdivisions of the State is referred to as governmental immunity. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). For ease of reference we will generally use the term "governmental immunity."

by the entity, to the extent the claims against the entity offset the entity's claims. *Id.* at 378. The same day we decided *Reata*, we also decided *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006). In *Tooke*, we held that the phrases "sue and be sued" and "plead and be impleaded" do not constitute clear and unambiguous waivers of governmental immunity. *Id.* at 342.

Further, while the case was pending at the court of appeals, the Legislature enacted Texas Local Government Code Sections 271.151– .160. *See* Act of May 23, 2005, 79th Leg., R.S., ch. 604, § 1, 2005 Tex. Gen. Laws 1548, 1548. Those provisions waive some local government entities' immunity from suit for certain contract claims. *See* TEX. LOC. GOV'T CODE § 271.152. The waiver of immunity is retroactive—it applies to claims based on contracts executed before the statute's effective date, so long as governmental immunity has not been previously waived with respect to the claims. Act of May 23, 2005, 79th Leg., R.S., ch. 604, § 2, 2005 Tex. Gen. Laws 1548, 1549.

In light of the judicial and legislative proceedings that took place after the trial court made its rulings, the court of appeals affirmed in part, reversed in part, and remanded the case for reconsideration by the trial court. 214 S.W.3d 631, 638. Regarding immunity, the court of appeals held that under *Reata* the City did not have complete immunity once it filed a counterclaim for damages, but after it nonsuited the counterclaim it was immune from all the Officers' breach of contract claims. *Id.* at 635. The court reasoned that the City's nonsuit of its counterclaim reinstated the City's immunity from suit because the Officers' claims were no longer germane to, connected with, or properly defensive to anything the City was asserting, and the City was not making monetary claims against the Officers so the Officers' damages claims could not be offsets to claims of the City. *Id.* at 635-36. The court of appeals remanded the case for the trial court to consider

whether the Legislature retroactively waived the City's immunity through Local Government Code Sections 271.151–.160. *Id.* at 636-37. Regarding the declaratory judgment action, the court of appeals determined that the Officers' action could proceed, but cautioned that money damages could not be recovered under the guise of declaratory relief. *Id.* at 637. Finally, the court of appeals held that the adopting of the ordinance by means of referendum did not preclude the City's having immunity from the Officers' claims. *Id.* at 637-38.

The parties filed cross-petitions for review, which we granted.[3]

II. Discussion

A. Governmental Immunity

Governmental immunity is a common law doctrine. *City of Galveston v. State*, 217 S.W.3d 466, 471 (Tex. 2007). Its boundaries are established by the judiciary, but we have consistently held that waivers of it are the prerogative of the Legislature. *Id.* Governmental immunity is comprised of immunity from both suit and liability. *See Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Immunity from liability protects entities from judgments while immunity from suit deprives courts of jurisdiction over suits against entities unless the Legislature has expressly consented:

> [I]mmunity from suit bars an action against the state unless the state expressly consents to the suit. The party suing the governmental entity must establish the state's consent, which may be alleged either by reference to a statute or to express

[3] We consolidated four petitions, *City of Dallas v. Albert* (No. 07-0284), *City of Dallas v. Barber* (No. 07-0285), *City of Dallas v. Arredondo* (No. 07-0286), and *City of Dallas v. Willis* (No. 07-0287). We separately consolidated two other petitions, *City of Dallas v. Martin* (No. 07-0288), and *City of Dallas v. Parker* (No. 07-0289). The Court heard oral argument on all six petitions at the same time. The State of Texas submitted an amicus curiae brief.

> legislative permission. Since as early as 1847, the law in Texas has been that absent the state's consent to suit, a trial court lacks subject matter jurisdiction.

Id. at 638 (citations omitted); *see Hosner v. DeYoung*, 1 Tex. 764, 769 (Tex. 1847).[4] In *Reata*, we concluded that immunity from suit as to a money damages claim does not completely deprive a trial court of jurisdiction over a governmental entity such as the City when the entity asserts an affirmative claim for monetary relief in a lawsuit:

> where the governmental entity has joined into the litigation process by asserting its own affirmative claims for monetary relief, we see no ill befalling the governmental entity or hampering of its governmental functions by allowing adverse parties to assert, as an offset, claims germane to, connected with, and properly defensive to those asserted by the governmental entity. *And, our decisions that immunity from suit does not bar claims against the governmental entity if the claims are connected to, germane to, and defensive to the claims asserted by the entity, in effect, modified the common-law immunity doctrine and, to an extent, abrogated immunity of the entity that filed suit.*

Id. at 376-77 (emphasis added). Referencing prior decisions dealing with the subject, including *Catalina Dev., Inc. v. Cnty. of El Paso*, 121 S.W.3d 704, 705-06 (Tex. 2003), in which we discussed the possibility that a governmental entity might waive its immunity by conduct, we stated what may have been less than clearly articulated in those opinions: the common law doctrine of governmental immunity had been in a limited manner modified and abrogated for governmental entities that file affirmative litigation claims. *Id.* at 375-77.

Although litigation actions of governmental entities underlay our decisions in *Reata* and similar cases, we did not hold that those actions effected waivers of immunity; rather, they were factors we considered in defining the contours of immunity. In other words, we have not, in *Reata*

[4] When we refer to immunity, we will be referring to immunity from suit unless otherwise stated.

or other decisions, altered the principles that (1) the boundaries of sovereign immunity are determined by the judiciary, *City of Galveston*, 217 S.W.3d at 471, and (2) waivers of sovereign immunity or consent to sue governmental entities must generally be found in actions of the Legislature. *See id.* at 468 ("We take as our starting point the premise that in Texas a governmental unit is immune from tort liability unless the Legislature has waived immunity.") (quoting *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998)); *Harris Cnty. v. Dillard*, 883 S.W.2d 166, 168 (Tex. 1994) ("We have repeatedly held that the extent of waiver of governmental immunity is a matter for the Legislature to determine.") (citations omitted).

Turning to the issues before us, we first address the City's counterclaim and nonsuit.[5]

B. The Counterclaim and Nonsuit

1. Effects

The City urges, and the court of appeals held, that the City's nonsuit of its counterclaim reinstated the City's immunity from suit. The Officers disagree, and so do we.

Pursuant to our opinion in *Reata*, the City's filing of a counterclaim for affirmative relief resulted in each officer having two possible categories of damages claims pending. The first category consisted of claims that would offset, in whole or in part, any recovery by the City and that were germane to, connected with, and properly defensive to the City's claims. The second category consisted of (1) claims for amounts over and above the amount that would offset the City's claim

[5] Without intending to indicate an opinion on the matter, we acknowledge that on remand the trial court may determine that amendments to the Local Government Code have waived the City's immunity from suit. If that occurs, some of our discussion may not be necessary to resolution of the issues. Nevertheless, because this case has been pending for so long we address the issues to give the courts below and the parties guidance.

but were nevertheless germane to, connected with, and properly defensive to the City's claims; and (2) claims that simply were not germane to, connected with, or properly defensive to the City's claim. The City had immunity from suit as to both types of claims in the second category, but it did not have immunity from suit as to claims in the first category. Because the City did not have immunity from suit as to claims in the first category once it filed its counterclaim, it could not either "reinstate" such immunity, or, put differently, in effect create it, by nonsuiting.

Once a governmental entity has asserted an affirmative claim for monetary relief, it must participate in the litigation process as an ordinary litigant as to that claim. *Reata*, 197 S.W.3d at 377. And when a governmental entity asserts affirmative claims for monetary recovery, whether by filing suit or by counterclaim, the trial court acquires jurisdiction over the entity's claims and certain offsetting, defensive claims asserted against the entity. *Id.* That is not because the entity effected a change in its immunity by filing a claim, but because the judiciary has abrogated the entity's common law immunity from suit as to certain offsetting claims. *Id.*

Under litigation rules applicable to ordinary litigants, and thus to the City once it filed its counterclaim, the City was entitled to nonsuit its counterclaims. *See* TEX. R. CIV. P. 162 (providing that a party may nonsuit a claim at any time before all its evidence is introduced at trial except for rebuttal evidence). If a claim is timely nonsuited, the controversy as to that claim is extinguished, the merits become moot, and jurisdiction as to the claim is lost. *See Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010); *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex. 2006) (per curiam). But a nonsuit is not allowed to prejudice the right of an adverse party to be heard on a pending claim for affirmative relief. TEX.

R. CIV. P. 162; *see Villafani v. Trejo*, 251 S.W.3d 466, 469 (Tex. 2008). Because the Officers had affirmative claims pending when the City nonsuited its counterclaim, the trial court retained jurisdiction over the Officers' claims to the extent it had acquired it. *See Villafani*, 251 S.W.3d at 469.

The money damage claim of each officer is based on allegations that under a proper interpretation of the pay ordinance the officer has been underpaid. The City's counterclaim alleged that under a proper interpretation of the ordinance if any officer had not been paid correctly then the officer had been overpaid and the City was entitled to recover the amount of overpayment. Both the City and the Officers cannot be correct, unless at some time an officer was underpaid and at another time the same officer was overpaid. And each of the officer's claims is independent. That is, if one officer was underpaid and another overpaid, the claims would not be combined so that the City would owe a net amount to the two officers together or so that the two officers together would owe the City a net amount.

The Officers' claims clearly were germane to—that is, relevant to[6]—and connected with the City's counterclaim: they were both based on the question of pay for the Officers' employment. Also, the Officers' claims were properly defensive to the City's counterclaim because a finding that an officer had been underpaid would at least inferentially rebut the City's claim that the officer had been paid correctly or overpaid for the particular period for which the underpayment was made. *See Dillard v. Tex. Elec. Co-op.*, 157 S.W.3d 429, 430 (Tex. 2005) ("An inferential rebuttal defense operates to rebut an essential element of the plaintiff's case by proof of other facts."); *Select Ins. Co.*

[6] *See* BLACK'S LAW DICTIONARY 756 (9th ed. 2009).

v. Boucher, 561 S.W.2d 474, 477 (Tex. 1978) ("The basic characteristic of an inferential rebuttal is that it presents a contrary or inconsistent theory from the claim relied upon for recovery."). On the other hand, once the City nonsuited its counterclaim the Officers' claims could not offset any recovery by the City. So although the trial court had jurisdiction over the Officers' claims that would have been offsets to the City's counterclaim, after its nonsuit the City would not have a recovery for the Officers' claims to offset. Nor could the Officers recover any judgment for damages against the City if the City was immune from suit as to the Officers' damages claims apart from the claims over which the trial court had jurisdiction because of their offsetting nature *vis-a-vis* the City's counterclaim. But even though the Officers could not recover judgment for damages against the City based on the trial court's limited jurisdiction resulting from the City's counterclaim, the City's nonsuit did not reinstate, or more aptly, create, immunity for the City. Rather, it put the Officers in the posture of other similarly situated claimants: they could not prevail on their breach of contract claims because they could not recover a judgment for damages and the City was not pursuing a claim for damages to which an offset would apply. *See Intercontinental Grp. P'ship v. KB Home Lone Star LLC*, 295 S.W.3d 650, 655 (Tex. 2009) (holding that a jury finding of "0" damages on a contract claim requires rendition of a take-nothing judgment when damages is the only relief sought).

2. Response to the Dissent

The dissent says that the character of the Officers' claims was changed because "the assertion of the [City's] counterclaim gives the plaintiff's claim a different character; it becomes defensive and offsetting, when it was not before." ___ S.W.3d ___, ___ (Hecht, J., dissenting). We

disagree. The nature of the Officers' claims did not change; the defensive, offsetting claims were the same as the claims that exceeded amounts that would offset the City's counterclaims. The dissent's approach would result in the City's action of nonsuiting its counterclaim effectively creating immunity for itself as to the Officers' claims that were defensive and offsetting, thus depriving the trial court of jurisdiction over those claims. For two primary reasons we decline to adopt that position.

First, to the extent the trial court had jurisdiction over the Officers' claims, the jurisdiction did not attach because the City's actions either changed the nature or character of the offsetting claims or somehow abrogated its immunity from suit. Jurisdiction attached because this Court has altered the boundaries of immunity from suit: governmental entities do not have immunity from offsetting claims germane to, connected to, and properly defensive to monetary claims by the entities. The City could not reinstate or create something it did not have. Allowing the City to create immunity for itself by saying that nonsuiting a counterclaim changes the character of the Officers' claims would substantively clothe the City with the power to deprive the trial court of jurisdiction by its actions. Just as the City generally cannot waive immunity from suit by its actions, it cannot create immunity by its actions.

Second, there is no need to alter established principles in this area of the law when applying established principles addresses the issue. Under established principles and rules, the end result of the City's nonsuit is the same regardless of whether the nonsuit results in the Officers' claims being disposed of by a plea to the jurisdiction or another proceeding such as by motion for summary judgment. Summary judgment might take a little longer to obtain and result in more attorney's fees

and effort by the City than would a plea to the jurisdiction, but the City made the choice to expend time and assets on litigation when it filed its counterclaim. And a governmental entity in the City's position will effectively continue to have the option of having its immunity from suit determined by interlocutory appeal. The entity still has immunity from suit as to claims in the second category outlined above. Once the entity asserts that it has such immunity, the trial court's ruling on the question will ordinarily remain subject to interlocutory appeal. The dissent's proposed course would create uncertainty and litigation over whether, and if so, when and how an entity's conduct in some manner resulted in a change in its immunity—regardless of whether the change is labeled as being the result of waiver or a change in the character of one of the claims against it.

The dissent says that failing to afford a governmental entity full immunity from suit after nonsuiting claims for relief will cause much confusion. We disagree. There will be no more confusion than before such a nonsuit. Assuming the entity had full immunity before making its affirmative claims, if it decides to forego its claims it can dismiss them, make both a motion for summary judgment and a motion to dismiss based on immunity from suit, and it should prevail on all the claims against it regardless of whether the claims against it were defensive, offsetting claims, or otherwise. Such a process comports with our prior decisions to the effect that after governmental entities decide to litigate, they are bound to participate in the litigation process as an ordinary litigant. *E.g.*, *Reata*, 197 S.W.3d at 377. The process also precludes entities from having the power to, by their actions, deprive a trial court of jurisdiction by nonsuiting if matters do not go well for them as to their affirmative claims.

Accordingly, we disagree with the court of appeals to the extent it held that the City reinstated full immunity from suit by nonsuiting its counterclaim.

C. Legislative Waiver of Immunity

Section 271.152 of the Local Government Code provides:

> 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, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV'T CODE § 271.152. A "contract subject to this subchapter" is defined as "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." *Id.* § 212.151(2). The language is a clear and unambiguous waiver of governmental immunity for certain breach of contract suits. *City of Houston v. Williams*, ___ S.W.3d ___, ___ (Tex. 2011).

The court of appeals remanded the issue of whether the Local Government Code amendments waive the City's immunity for the Officers' breach of contract claims. Neither party appealed that ruling.

We have remanded cases that were on appeal when the Legislature enacted the waiver of immunity in order that trial courts could first consider the waiver issue. *See, e.g.*, *City of Houston v. Clear Channel Outdoor, Inc.*, 197 S.W.3d 386, 386-87 (Tex. 2006); *McMahon Contracting, L.P. v. City of Carrollton*, 197 S.W.3d 387, 387 (Tex. 2006). Albert has, by post-submission motion, sought leave for the parties to submit briefing on and have us consider the issue. We recognize that

this case has been pending for an extraordinarily long time because of various factors, many of which were out of the control of the parties. Nevertheless, we decline to address the merits of the issue in light of (1) the failure of the parties to challenge the court of appeals' remanding of it, and (2) our having remanded similarly situated cases so the trial court could first consider the statutory waiver issue.

We next address whether immunity precludes the Officers' action under the Declaratory Judgment Act (DJA) for construction of the pay ordinance. The court of appeals held that it did not.

D. The Declaratory Judgment Action

While the case was awaiting oral argument here, we decided *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). We affirmed the principle that the DJA does not enlarge a court's jurisdiction; it is a procedural device for deciding cases already within a court's jurisdiction. *Id.* at 370-71; *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). The DJA waives a municipality's immunity in a suit that involves the validity of a municipal ordinance, TEX. CIV. PRAC. & REM. CODE § 37.006(b), but a party cannot circumvent governmental immunity by characterizing a suit for money damages as a claim for declaratory judgment. *City of Houston v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007) (per curiam). For example, in *Williams*, we held that the City of Houston was immune from suit where a group of firefighters was seeking a declaratory judgment regarding statutory lump sum payments of accumulated vacation and sick leave. *Id.* at 828. We held that because the firefighters' only alleged injury had already occurred and their only plausible remedy was an award of money damages, they could not circumvent the City's governmental immunity by requesting declaratory relief. *Id.* at 829.

The Officers are not attempting to invalidate the pay ordinance. To the contrary, they are attempting to enforce the ordinance according to its terms as they read it. And like the firefighters in *Williams*, the Officers do not dispute that the City is immune from their declaratory judgment claims regarding past due payments. But they claim that the City's immunity is waived as to their declaratory judgment action seeking an interpretation of the ordinance and contract with regard to the salary to be paid in the future. Assuming without deciding that the City's immunity would be waived in such a situation, we disagree that the Officers sought a declaration governing their future relationship with the City. In their trial court pleadings, the Officers alleged that they sustained damages equal to the difference between the amount of their salaries already paid by the City and the amount the City should have paid. They also asserted that they were seeking no damages for any back pay accrued following May 27, 1998, when the City adopted another pay resolution. The Officers made no claim for injunctive relief, future payments, or any other future action from the City. Because the Officers' only potential relief was an award of money damages, the City is immune from their declaratory judgment claims. *See id.*

The Officers assert that if we determine their declaratory judgment claims are actually ultra vires claims that they should have brought against city officials, then we should remand the case so they can amend their pleadings. *See Heinrich*, 284 S.W.3d at 371-72 (holding that a suit seeking a declaratory judgment that a governmental official acted without legal or statutory authority, such as where a statute or the constitution requires that a contract be performed in a certain way, is an ultra vires claim that must be brought against the official). But *Heinrich* clarified that only prospective, not retrospective, relief is available in an ultra vires claim. *Id.* at 376. Because the

Officers sought only retrospective relief, their declaratory judgment claims must be dismissed. *See id.*

We turn next to the Officers' assertion that the City does not have immunity because the pay ordinance was adopted through the referendum process. The court of appeals disagreed with the Officers. So do we.

E. Effect of the Referendum

The Officers assert that because this is a suit to enforce a voter-approved referendum, governmental immunity does not, or should not, apply. Addressing their arguments in logical order, we first consider their contention that on a policy basis the City's immunity in suits such as this should be abrogated. Referencing *Reata*, the Officers posit that because governmental immunity is a common-law doctrine, the Court should hold that it does not exist here because the purposes for immunity are inapplicable. The Officers claim that because the City's citizens made a policy decision requiring expenditure of city money, the rationale behind immunity—to protect the public treasury—is missing. *See Heinrich*, 284 S.W.3d at 375-76 (noting that the modern justification for immunity is protecting the public fisc).

The Officers' suit is for pay they assert is due and unpaid. The City asserts it does not owe the money. If the City is correct, the voters did not approve expenditure of the funds in the referendum. And suit to determine whether the Officers or the City is correct constitutes a suit for money damages. We have long recognized that immunity protects a governmental entity from suits for money damages absent Legislative consent. *See Heinrich*, 284 S.W.3d at 377; *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). In *Reata*, we concluded that immunity from suit was

abrogated to a limited degree for two primary reasons: first, it would have been fundamentally unfair to allow the City to assert affirmative claims against another party while claiming immunity from the other party's claims connected to, germane to, and defensive to the City's claims; and second, the City had little room to complain about litigation costs because it had decided to expend resources on litigation when it filed its affirmative claim. *Reata*,197 S.W.3d at 375-76. But here we do not see any fundamental unfairness or inequity occurring just because the ordinance was adopted through the referendum process. Nor do we see how the fact that the ordinance was adopted by referendum should cause it to be treated any differently for immunity purposes from one adopted by the Dallas City Council. No one urges that it is any more or less effective as an ordinance than any other validly adopted ordinance. Accordingly, we decline to abrogate the City's immunity from suit based on the ordinance because it was adopted by referendum.

We next consider the Officers' arguments that consent to their suit against the City exists. First, they assert that the ordinance must be considered consent for suit because the referendum is only effective if its results are enforceable, and allowing immunity to trump an action to enforce the ordinance defeats the true purpose of the referendum. Again we disagree. The purpose of the referendum was to adopt the ordinance, just as that is the intent of any legislative body that adopts an ordinance or law. When the citizens approved the ordinance by referendum they were acting as the legislative body of the City. *See Blum v. Lanier*, 977 S.W.2d 259, 262 (Tex. 1999) ("Citizens who exercise their rights under initiative provisions act as and 'become in fact the legislative branch of the municipal government.'" (quoting *Glass v. Smith*, 244 S.W.2d 645, 649 (Tex. 1951)). Their actions in that capacity had the same effect insofar as adoption of the ordinance as legislative actions

of the city council would have had if the council had adopted the ordinance absent the referendum. Moreover, the Officers do not argue that language in the ordinance purports to give consent for their damages suit against the City, even if a city ordinance could waive immunity.[7]

Next, the Officers argue that because the pay ordinance was adopted by referendum, that is, the citizens acting as a legislative body, immunity from suit must have been waived because the City would otherwise be asserting immunity against itself. The Officers reference *City of Canyon v. Fehr*, in which the court of appeals held that governmental immunity did not bar a suit by citizens to compel the City to *order* a referendum. 121 S.W.3d 899, 902-03 (Tex. App.—Amarillo 2003, no pet.). The argument misses the mark. In *Fehr*, citizens who opposed new zoning ordinance amendments sued the City, seeking to have the changes submitted as an issue in a referendum election. *Id.* at 901-02. The court of appeals reasoned that because the citizens were acting as the legislative branch of the city in the referendum process, allowing the city to invoke governmental immunity as to their suit would effectively result in the city using the immunity doctrine against itself. *Id.* at 902-03; *see also Blum*, 997 S.W.2d at 262. In *Blum*, the Court concluded that those who are qualified to vote and who sign a petition for initiative and referendum "have a justiciable interest in seeing that their legislation is submitted to the people for a vote." *Blum*, 997 S.W.2d at 262. The concepts underlying *Fehr* and *Blum* are not relevant here. The Officers are not acting as

[7] In *Tooke*, the argument was made that the city waived immunity by charter language providing the city "may sue and be sued, . . . implead and be impleaded in all courts and places and in all matters whatsoever." 197 S.W.3d at 344. We did not address the question of whether the city could waive its own immunity from suit because even if it could, the language in question did not clearly and unambiguously do so. *Id.*

the legislative branch of the City. They are acting as private citizens seeking to recover money damages.

Based on the foregoing, we conclude that adoption of the ordinance by referendum did not result in loss, removal, or waiver of the City's governmental immunity as to the Officers' claims. We further conclude, as did the court of appeals, that the ordinance itself does not serve as consent to the Officers' suit just because it was adopted by referendum.

III. Conclusion

The judgment of the court of appeals is reversed and the case is remanded to the trial court for further proceedings in accordance with this opinion.

Phil Johnson
Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 07-0284

CITY OF DALLAS, PETITIONER,

v.

KENNETH E. ALBERT ET AL., RESPONDENTS

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

JUSTICE HECHT, joined by CHIEF JUSTICE JEFFERSON, concurring in part and dissenting in part.

I join in all but Part II-B of the Court's opinion.

In *Reata Construction Corp. v. City of Dallas*, we held that the government's immunity from suit on a claim for damages does not extend to a claim asserted as an offset to a claim on which the government itself has sued and that is "germane to, connected with and properly defensive to" the government's claim.[1] Thus, for example, when the government is sued for damages and asserts a counterclaim, it is not immune from the plaintiff's suit to the extent his claim is defensive and offsetting. The counterclaim does not waive immunity; that would contradict the rule that waiver of immunity is generally a legislative matter.[2] Rather, the assertion of the counterclaim gives the

[1] 197 S.W.3d 371, 377 (Tex. 2006).

[2] *Id.* at 375.

plaintiff's claim a different character; it becomes defensive and offsetting, when it was not before. In my view, when the counterclaim is nonsuited or lost, the plaintiff's claim is no longer defensive and offsetting and is therefore barred by immunity. Just as the assertion of the counterclaim gave the plaintiff's claim a different character, when the counterclaim is gone, the plaintiff's claim loses that character. Immunity is not "reinstated" — the word the Court uses. The government is simply not immune from suit on defensive, offsetting damage claims, but is immune from damage claims that are not defensive and offsetting.

The Court rejects this simple approach for two reasons. First, it argues, the government cannot create immunity by its own actions.[3] I agree. We have held, for example, that when the government is sued on a claim for which immunity is waived, it cannot gain immunity by settling and then refusing to perform its obligations under the settlement agreement.[4] But nonsuiting a counterclaim, thereby leaving the plaintiff with a claim that is non-defensive, does not create immunity. Suppose the plaintiff, too, nonsuits, then refiles the same claim. If his claim is not barred, then only the government's nonsuit has consequences. But if the plaintiff's claim is barred, as it surely is, it is not because he has re-created immunity by nonsuiting; it is because he does not have a defensive, offsetting claim.

The second reason the Court rejects my simple approach is that it offers "no benefit".[5] Even if the government is no longer immune from the plaintiff's suit after nonsuiting its counterclaim, the

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[3] *Ante* at ___.

[4] *Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002).

[5] *Ante* at ___.

most the plaintiff can achieve is an offset against the government's recovery, and the government no longer has a claim. Of course, as the Court notes, the government can assert immunity by a plea to the jurisdiction and immediately appeal an adverse ruling, and to defeat the plaintiff's claim on the merits, it must move for summary judgment and wait to appeal an adverse ruling until the end of the case. This, the Court admits, "might take a little longer . . . and result in more attorney's fees", but the government should lie in the bed it has made. Perhaps so, but that seems to me to be a policy choice the Legislature should make. There is, in fact, *some* benefit to the government in being relieved of the additional burden, as the Court itself admits.

The Court holds instead that the result of the government's nonsuiting a counterclaim is extremely convoluted. In this case, when the City filed a counterclaim to the officers' damage claims,

> each officer had two possible categories of money damages claims pending. The first category consisted of claims that would offset, in whole or in part, any recovery by the City and that were germane to, connected with, and properly defensive to the City's claims. The second category consisted of (1) claims for amounts over and above the amount that would offset the City's claim but were nevertheless germane to, connected with, and properly defensive to the City's claims; and (2) claims that were not germane to, connected with, or properly defensive to the City's claim. The City had immunity from suit as to both types of claims in the second category, but it did not have immunity from suit as to claims in the first category. Because the City did not have immunity from suit as to claims in the first category once it filed its counterclaim, it could not "reinstate" such immunity by nonsuiting.[6]

Maybe a chart will help. This, I think, illustrates the passage just quoted:

[6] *Ante* at ___.

<table>
<tr><td></td><td></td><td colspan="2">germane to, connected with,
and properly defensive to counterclaim</td></tr>
<tr><td></td><td></td><td>YES</td><td>NO</td></tr>
<tr><td rowspan="2">OFFSETTING</td><td>YES</td><td>Category 1

no immunity</td><td rowspan="2">Category 2(2)

immunity</td></tr>
<tr><td>NO</td><td>Category 2(1)

immunity</td></tr>
</table>

In the Court's view, the City's dismissal of its counterclaim could not and did not alter these categories. So the City has lost its immunity from offsetting claims but retained it from non-offsetting claims. The problem is, with no counterclaim, there is no way to determine which of the plaintiffs' claims are offsetting and which are non-offsetting, because the counterclaim will never be adjudicated. The determination is important because the City can still assert immunity to non-offsetting claims by a plea to the jurisdiction and immediately appeal an adverse ruling. Since the determination is impossible to make, it is not clear whether the City can still assert immunity or is left to attack the officers' claims on the merits.

Immunity for Category 2(1) claims is critical to the Court's position. Its loss by nonsuiting the councerclaim would offend the rule that has driven the Court to this monstrosity in the first place: that the government cannot waive or create immunity by its litigation conduct. Yet the survival of such immunity makes the Court's position unworkable.

The Court seems intent on punishing the government for asserting and then nonsuiting a counterclaim, but this is a classic example of cutting off the nose to spite the face. There are now two different ways for the government to establish non-liability, one by assertion of immunity and the other by challenging the merits of the plaintiff's claim; two different vehicles for raising the issue; and two different kinds of appeals. Actually, there are probably now three different kinds of appellate review: immediate, interlocutory appeal, appeal from a final judgment, and mandamus, to substitute for the interlocutory appeal the Court has denied the government after the counterclaim is nonsuited. Let the litigation and confusion begin. Appellate courts running out of something to do will regard today's ruling as good news.

I repeat: when the government abandons or loses its claim, an opposing claim is no longer defensive and offsetting and should therefore be held to be barred by immunity, employing the usual procedures, just as if the counterclaim had not been asserted. From the Court's contrary view, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 07-0284

CITY OF DALLAS, PETITIONER,

v.

KENNETH E. ALBERT, ET AL., RESPONDENTS

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

JUSTICE WILLETT, dissenting.

Does Local Government Code Section 271.152 apply to waive the City's immunity? The Court wisely concludes the trial court should first tackle this potentially dispositive issue. If Section 271.152 applies, then that's that—the City has no immunity—making the balance of today's decision purely advisory, something the Court readily admits: "some of our discussion may not be necessary."[1] To clarify, the Court is unwilling to decide what is possibly controlling but willing to pre-decide what is purely contingent. If bad facts make bad law, then old cases make odd law. This litigation began in 1994, and I well understand the Court's desire to prod it along. But we should not leapfrog lower-court review by pre-answering a host of subsidiary questions that will never be asked if Section 271.152 indeed applies. Finding the Court's advisory opinion inadvisable, I respectfully dissent.

[1] The Court acknowledges that if Section 271.152 applies, "some of our discussion may not be necessary to resolution of the issues." *Ante* at __ n.5.

* * *

The myriad governmental-immunity issues in this case provoke varied views. In their competing opinions, JUSTICE JOHNSON and JUSTICE HECHT debate a particularly vexing point: the existence (or not) of the City's immunity once it nonsuited its counterclaims. I think it unnecessary and improper for the Court to reach this and other satellite issues unless and until it determines that Section 271.152 is inapplicable—if it is. That "if" is mighty consequential, and mighty worthy of lower-court examination.

As the Court recognized earlier this year and reaffirms today, Section 271.152 effects a "clear and unambiguous" (and retroactive) waiver of governmental immunity in certain breach-of-contract suits.[2] Is this such a suit? If so, then the City lacks immunity.[3] What weight is then due the Court's lengthy discussion of various other issues, all interesting but all incidental (the effect of the counterclaim, the declaratory-judgment action, and the referendum)?[4] As my LSAT instructor used to (mis)state: "It's irrevelant."

Under article V, section 8 of the Texas Constitution, we decide concrete cases; we do not dispense contingent advice. The "judicial power does not embrace the giving of advisory

[2] *City of Houston v. Williams*, __ S.W.3d __, __ (Tex. 2011); *see also* TEX. LOC. GOV'T CODE § 271.152.

[3] TEX. LOC. GOV'T CODE § 271.152

[4] *See ante* § II A–B, D–E.

opinions,"[5] those that decide an academic[6] or "abstract question of law without binding the parties."[7] Prudent development of the State's jurisprudence requires that courts refrain from giving "advice . . . upon speculative, hypothetical, or contingent situations."[8] To be sure, this long-running case poses important issues of Texas immunity law, issues we may need to decide one day. But today is not that day.

As the Court notes, Section 271.152 was enacted while this case was already at the court of appeals, meaning the trial court never had an opportunity to consider its applicability. Likewise, the court of appeals did not discuss it, and neither party challenged that court's decision not to discuss it. Today this Court wisely declines to short-circuit lower-court review of whether Section 271.152 waives the City's immunity, a path we have consistently followed in analogous Chapter 271 cases.[9] My quibble lies in the Court's eagerness to undertake a full-dress analysis of various subissues, all of which evaporate if Section 271.152 applies. The Court has enough to keep itself busy without premature predecisions and consultative guidance that presupposes—if not predestines—a certain lower-court path.

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[5] *Fireman's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968).

[6] *See City of West Univ. Place v. Martin*, 123 S.W.2d 638, 639 (Tex. 1939).

[7] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

[8] *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 443 (Tex. 1998) (citing *Camarena v. Tex. Emp't Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988)).

[9] *City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007); *City of Houston v. Clear Channel Outdoor, Inc.*, 197 S.W.3d 386, 386-87 (Tex. 2006); *McMahon Contracting, L.P. v. City of Carrollton*, 197 S.W.3d 387, 387 (Tex. 2006).

Again, because I find the Court's opinion advisory—and thus inadvisable—I respectfully dissent.

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Don R. Willett
Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 07-0647

EVELYN CLARK, R.N., ROSEANNE RODRIGUEZ, MHS, AND ELIZABETH ORTIZ, MAS, PETITIONERS,

v.

CYNTHIA SELL, ON BEHALF OF MITCHELL RAY SELL, RESPONDENT

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

PER CURIAM

Mitchell Ray Sell, while hospitalized for psychosis and hallucinations, was allegedly heavily medicated and left lying in the same position for many hours; as a result, he developed "compartment syndrome" in one arm, required surgery, and remains permanently injured. On Mitchell's behalf, respondent Cynthia Sell sued, among others, petitioners Evelyn Clark, Roseanne Rodriguez, and Elizabeth Ortiz for negligently failing to ensure Mitchell was periodically turned or roused; an attached report further suggests that defendants should have reported Mitchell's over-medication to a physician. Petitioners, after answering, moved to dismiss the claims against them under section 101.106(f) of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE §101.106(f), asserting that they were employees of a governmental entity, Sunrise Canyon Hospital. Petitioners argued that the

suit was based on conduct within the general scope of their employment, and that the claim could have been brought under the Tort Claims Act against the governmental unit. Sell responded.

After the trial court indicated that it would deny the motion to dismiss, and shortly before it signed its order, Clark and the other petitioners filed a notice of interlocutory appeal. The court of appeals, without addressing its jurisdiction over the interlocutory appeal, affirmed. 228 S.W.3d 873 (Tex. App.–Amarillo 2007).

While this case has been pending on appeal, we have decided *Franka v. Velasquez*, ___ S.W.3d ___ (Tex. 2011), holding among other things that, for purposes of section 101.106(f), a tort action is brought "under" the Texas Tort Claims Act, even if the government has not waived its immunity for such actions. ___ S.W.3d at ___. In light of *Franka*, we grant Clark, Rodriguez and Ortiz's petition for review, and without hearing oral argument, reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings. TEX. R. APP. P. 59.1.

Opinion delivered: January 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 07-0945

TEXAS PARKS AND WILDLIFE DEPARTMENT, PETITIONER,

v.

THE SAWYER TRUST, RESPONDENT

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

Argued November 19, 2009

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

CHIEF JUSTICE JEFFERSON filed a concurring opinion, in which JUSTICE MEDINA, JUSTICE WILLETT, and JUSTICE GUZMAN joined.

JUSTICE HECHT filed an opinon concurring in part and dissenting in part.

This appeal involves the issue of whether the trial court had jurisdiction over a claim against the Texas Parks and Wildlife Department to determine whether the Salt Fork of the Red River is navigable. The Sawyer Trust sued the Department for a declaratory judgment that the river is not navigable and that the Trust owns the riverbed where it crosses the Trust's property in Donley County. The Department filed a plea to the jurisdiction based on sovereign immunity. After the Department took the position that the river was navigable—and the State therefore owned the riverbed—the Trust added a constitutional takings claim. The trial court denied the Department's

plea and the court of appeals affirmed.

We hold that the Trust's claims for a declaratory judgment are barred by sovereign immunity and the Trust cannot assert a takings claim under these circumstances. We also hold, however, that the Trust is entitled to replead and attempt to assert an ultra vires claim against state officials if it chooses to do so. We reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

I. Background

The State of Texas owns the soil underlying navigable streams.[1] TEX. PARKS & WILD. CODE § 1.011(c); TEX. WATER CODE § 11.021; *see Maufrais v. State*, 180 S.W.2d 144, 148 (Tex. 1944); *State v. Bradford*, 50 S.W.2d 1065, 1069 (Tex. 1932). By statute, a "navigable stream" is "a stream which retains an average width of 30 feet from the mouth up." TEX. NAT. RES. CODE § 21.001(3). The taking of sand and gravel from state-owned waters and beds, including those of navigable streams, is regulated by the Department. TEX. PARKS & WILD. CODE § 1.011(d); TEX. NAT. RES. CODE § 51.291; 31 TEX. ADMIN. CODE § 69.101.

The Salt Fork of the Red River crosses property in Donley County owned by the Sawyer Trust. The Trust had an opportunity to sell sand and gravel from the streambed but was concerned that the Department would seek control of the property and interfere with the sale. *See* TEX. PARKS & WILD. CODE § 86.002(a); 31 TEX. ADMIN. CODE §§ 69.104, 69.114(a). The Trust sued the

[1] Subject to specified limitations, title to certain streambeds has been transferred by the State. *See* TEX. REV. CIV. STAT. art. 5414a-1. The State and the Trust contend their respective rights to the sand and gravel in the bed of the Salt Fork turn on the issue of navigability. We assume, without deciding, that their positions are correct.

Department[2] for a declaratory judgment that the Salt Fork was not navigable.[3] The Department filed a plea to the jurisdiction. It asserted that (1) the Trust had not pled a claim that fell within a waiver of sovereign immunity, and (2) the Trust's claims were not ripe because the Department had neither taken action contrary to the Trust's interests nor manifested any intent to do so.

Pursuant to agreement of the parties, and at the urging of the trial court, a surveyor from the General Land Office visited the streambed on the Trust property. He then filed a letter with the trial court setting out that his visit was "for the purpose of determining if the stream was statutorily navigable." He concluded that the Salt Fork was navigable at the point where he measured it on the Trust's property. The Trust then amended its pleadings and added an allegation that the State's claim of navigability constituted a taking of its property under the federal and Texas Constitutions. The trial court denied the Department's plea to the jurisdiction.

The court of appeals affirmed. It held that a declaratory judgment action seeking the determination of a disputed fact issue—the navigability of the stream—is not a suit against the State that implicates sovereign immunity. ___ S.W.3d ___. The court of appeals concluded that although the declaratory action "may have the collateral consequence of resolving a factual dispute that impacts a claim being made by the State, it is not an action that is in essence one for the recovery of money from the State or for determination of title; therefore, legislative permission to prosecute is unnecessary." *Id.* at ___.

The Department no longer urges its ripeness challenge to the Trust's claim: it maintains that

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[2] The Trust also sued, but then non-suited, the Texas Commission on Environmental Quality.

[3] The Trust also sued for injunctive relief. The parties do not address that claim and neither do we.

the Salt Fork is navigable. Nevertheless, the Department asserts that sovereign immunity deprived the trial court of jurisdiction because (1) there is no general right to sue a State entity for a declaration of rights—such relief is available only in an ultra vires claim against a state official; (2) determination of whether a stream is navigable constitutes a determination of the State's title to property and sovereign immunity bars a suit that would have such an effect; and (3) the Trust's pleadings fail to state a constitutional takings claim. The Trust counters that the trial court had jurisdiction because the suit is (1) a permissible declaratory judgment action under the Texas Constitution; (2) an authorized declaratory judgment action to determine a boundary line as opposed to a trespass to try title suit to determine ownership rights; and (3) a constitutional takings claim because the State has destroyed value and use of the Trust's property. Alternatively, the Trust argues that if this suit involves an ultra vires claim that it should have brought against a governmental actor, we should remand the case with instructions to modify the parties.

II. Discussion

A. Standard of Review

Whether a trial court has jurisdiction is a question of law subject to de novo review. *See Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

Generally, sovereign immunity deprives a trial court of jurisdiction over a lawsuit in which a party has sued the State or a state agency unless the Legislature has consented to suit. *See, e.g.*, *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). But when the State or a state agency has taken a person's property for public use, the State's consent to suit is not required; the Constitution grants the person consent to a suit for compensation. *See, e.g.*, *State v.*

Holland, 221 S.W.3d 639, 643 (Tex. 2007); *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980).

B. Declaratory Relief

The Declaratory Judgments Act (DJA) generally permits a person who is interested in a deed, or whose rights, status, or other legal relations are affected by a statute, to obtain a declaration of rights, status, or other legal relations thereunder. TEX. CIV. PRAC. & REM. CODE § 37.004(a). The Department urges, however, that there is no general right to sue a state agency for a declaration of rights. We agree.

1. Actions Against State Entities

While the DJA waives sovereign immunity for certain claims, it is not a general waiver of sovereign immunity. *See id.* § 37.006(b); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) (noting that the DJA waives immunity for claims challenging the validity of ordinances or statutes); *IT-Davy*, 74 S.W.3d at 855-56. But generally, the DJA does not alter a trial court's jurisdiction. *IT-Davy*, 74 S.W.3d at 855. Rather, the DJA is "merely a procedural device for deciding cases already within a court's jurisdiction." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). And a litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit. *Heinrich*, 284 S.W.3d at 370-71; *IT-Davy*, 74 S.W.3d at 855. Consequently, sovereign immunity will bar an otherwise proper DJA claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity. *See City of Houston v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007) (per curiam).

The Trust argues that sovereign immunity does not apply because the Department acted outside its legal authority when it asserted the Salt Fork was navigable and the State owned the streambed. We disagree—the Department is immune from suit.

The rule remains as it was set out in *State v. Lain*:

> When in this state the sovereign is made a party defendant to a suit for land, without legislative consent, its plea to the jurisdiction of the court based on sovereign immunity should be sustained . . . .

349 S.W.2d 579, 582 (Tex. 1961). Neither *Heinrich* nor the DJA creates an exception to a state agency's immunity in suits for title to land. *See Heinrich*, 284 S.W.3d at 370-73. If the Trust's suit against the Department is in substance a trespass to try title action, it is barred by sovereign immunity absent the Legislature's having waived its immunity. *See Lain*, 349 S.W.2d at 582.

2. Contesting Title with the State

Generally, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property. *See* TEX. PROP. CODE § 22.001(a) ("A trespass to try title action is the method of determining title to lands, tenements, or other real property."); *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004). "Real property" generally includes the sand and gravel on a tract of land, *see, e.g.*, *Maser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984), and in this case the Department does not claim otherwise.

In 2007, the Texas Legislature added an exception to the rule that a trespass to try title claim is the exclusive method for adjudicating disputed claims of title to real property. Section 37.004(c) of the Texas Civil Practice and Remedies Code provides that, notwithstanding the trespass to try title statute, a person interested under a deed, will, written contract, or other writings constituting a

contract may obtain a determination of title based on a property boundary line "when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties." TEX. CIV. PRAC. & REM. CODE § 37.004(c); *see* TEX. PROP. CODE § 22.001(a). The Trust argues that the claims in this case constitute a boundary dispute and that "new section 37.004(c) can easily and logically be construed as a legislative waiver of any sovereign immunity that has ever in the past impeded private titleholders' efforts to litigate their boundary disputes against the State." We disagree that the claims here constitute a boundary dispute.

The central test for determining jurisdiction is whether the "real substance" of the plaintiff's claims falls within the scope of a waiver of immunity from suit. *See, e.g., Dallas County Mental Health & Retardation v. Bossley*, 968 S.W.2d 339, 343-44 (Tex. 1998). The real substance of the Trust's pleadings, evidence, and arguments is that the Salt Fork is not navigable and the State has no ownership rights in its bed. Its allegations are summarized in its live pleading in the section entitled "Causes of Action Against Defendants":

> Defendants' claim of ownership and attempts to enter the property to limit or control Landowner's activities, and that of third parties, *by asserting rights of ownership and the right to control, regulate or prohibit the removal of sand and gravel* constitute an improper claim to and use of the property by Defendants and unreasonably interfere with the Landowner's rights to use and enjoy its property. (emphasis added)

Under the "Relief Sought" section of its pleadings, the Trust sought a declaratory judgment that no navigable stream is present on its property, despite the Department's contention to the contrary, and injunctive relief precluding the Department from entering the Trust's property in an attempt to limit, control, or interfere with the removal of sand and gravel from the Trust's property.

We need not decide whether section 37.004(c) effects a waiver of the State's immunity from suit for boundary disputes because this controversy is not over the boundary between State-owned land and Trust-owned land; rather it is over whether the State owns any land at all. The case involves rival claims to ownership of the entire streambed. Consequently, the Trust's suit in substance is one to determine title to land. Such a suit against the State is barred by sovereign immunity absent legislative consent. *See Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003); *Lain*, 349 S.W.2d at 582.

The Trust also urges that it may maintain its suit against the Department because whether a stream is navigable is a judicial determination. It cites to *State v. Bradford*, in which this Court stated,

> The public policy of this state with respect to navigable streams long has been established and enforced, and it is not a question left to the discretion and judgment of ministerial officers. Under the law, those officers were and are not clothed with the power to settle questions of navigability of streams, but, in view of the very nature and importance of the matter, for obvious reasons, it is a question for judicial determination.

50 S.W.2d 1065, 1070 (Tex. 1932) (citations omitted). We agree with the Trust that the issue is one for judicial determination. But as we discuss later in greater detail, such a claim is an ultra vires one that must be brought against a governmental official and not the State.

Here the Department, as a defendant, has asserted its sovereign immunity and the Trust has not shown any exceptions to or waiver of it. While courts may determine questions of navigability when they have jurisdiction, a navigability dispute does not comprise an exception to or waiver of sovereign immunity and vest jurisdiction in the courts when the State or a state agency is sued.

In sum, notwithstanding the manner in which they are pleaded, the Trust's claims for declaratory relief are claims against the Department to determine title to the bed of the Salt Fork and are barred by sovereign immunity. *See Lain*, 349 S.W.2d at 582.

C. Takings Claim

1. Analysis

The Trust also asserts that a waiver of immunity is not required because this is a suit based on a constitutional taking. The Trust argues that a taking has occurred because the Department's claim of ownership unreasonably interferes with the Trust's rights to use and enjoy its property. The Department urges that the Trust's claim is not a valid takings claim because the Trust seeks only declaratory and injunctive relief based on the dispute over title to the bed of the Salt Fork—a dispute that will be determined by whether the Salt Fork is navigable—but which is nothing more than a title dispute nonetheless.

We agree with the Department. Although the Trust referenced the United States and Texas Constitutions, it did not assert a valid takings claim giving the trial court jurisdiction over its claim.

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. Likewise, the United States Constitution provides "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Sovereign immunity does not shield the State from claims based on unconstitutional takings of property. *See, e.g.*, *Holland*, 221 S.W.3d at 643; *Steele*, 603 S.W.2d at 791. Whether the government's actions are sufficient to constitute a taking is a question of law.

E.g., *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001).

To establish a takings claim, the claimant must seek compensation because the defendant intentionally performed actions that resulted in taking, damaging, or destroying property for public use without the owner's consent. *See id.* Whether a taking has occurred depends largely on definitional and conceptual issues. *See* 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 6.01[1] (3d ed. 2006).

The premise for a constitutional takings cause of action is that one person should not have to absorb the cost of his property being put to a public use unless he consents. *See Steele*, 603 S.W.2d at 789. In contrast to a trespass to try title claim, which quiets title and the right of possession to property, a successful takings claim entitles a claimant to compensation, not to possession of the property. *See* TEX. CONST. art. I, § 17 ("No person's property shall be taken . . . *without adequate compensation* being made . . . .") (emphasis added); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) (stating that section 17 of the Texas Constitution waives immunity only when a claimant is seeking compensation); *cf. Martin*, 133 S.W.3d at 264-65 ("[a] trespass to try title action is the method of determining title to lands, tenements, or other real property." (quoting TEX. PROP. CODE § 22.001)).

In this case, the Trust asserted in its amended pleadings that through the Department's contention that a navigable stream exists on the Trust's property, the Department wrongfully claimed title to part of the Trust's property. The only relief sought by the Trust was declaratory and injunctive relief to effectively determine its ownership of and right to possess the bed of the Salt Fork. The Trust did not seek compensation—the only relief available in a takings claim—nor did

it seek a declaration that the Department had taken Trust property for public use. *See Bouillion*, 896 S.W.2d at 149. The difference between a takings claim and a trespass to try title claim was clearly articulated by the court of appeals in *Porretto v. Patterson*:

> In a trespass to try title or to quiet title action, an owner sues to recover immediate possession of land unlawfully withheld. A prevailing party's remedy is title to, and possession of, the real property interest at issue in the suit.
>
> On the other hand, a takings claim is one in which a landowner alleges that the government has taken his property for public use without permission, for which he seeks compensation. The available remedy is a key distinction between the two. While one suit quiets title and possession of the property, the other allows only for just compensation for the property taken or used—the prevailing party does not regain use of land lost to the public's use, or win possession of it.

251 S.W.3d 701, 708 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citations omitted).

Here, the Department has merely identified the streambed as belonging to the State because the State asserts the Salt Fork is navigable. *See* TEX. NAT. RES. CODE § 21.001(3); TEX. PARKS & WILD. CODE § 1.011(c); TEX. WATER CODE § 11.021; *Bradford*, 50 S.W.2d at 1068-69. The Trust stated in its amended pleadings that the State "wrongfully claim[ed] title" to the streambed, resting its assertion on the Department's contention that a navigable stream exists on the property. It is undisputed that the Department has not taken action to apply materials in the streambed to public use by actions such as selling them. *Cf. Porretto*, 251 S.W.3d 701 (takings claim was based on the State's leasing of property); *State v. BP Am. Prods.*, 290 S.W.3d 345 (Tex. App.—Austin 2009, pet. denied) (takings claim was based on the State's grant of an oil and gas lease); and *Koch v. Gen. Land Office*, 273 S.W.3d 451 (Tex. App.—Austin 2008, pet. denied) (takings claim was based on the General Land Office's removal and sale of limestone). It has not done anything that would require

it to compensate the Trust if the streambed is not navigable. Thus, the Trust cannot colorably claim that it seeks compensation by means of a suit in the nature of an inverse condemnation cause of action.

In a case such as the one before us, where the question of who owns the property is the only issue and title and possession are the only available remedies, the record and the briefs show conclusively that the Trust does not have a constitutional takings claim for compensation. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007) (holding that a remand to permit a claimant to replead would serve no legitimate purpose when the underlying claim was a breach of contract claim and immunity could not be overcome). If the Trust owns the property, it is not entitled to compensation for a taking. And if the State owns the property, the Trust is not entitled to compensation because nothing was taken from it. The Trust confirms the foregoing conclusions when it says in this Court that it "does not seek money damages" and "does not seek to establish liability."[4] While the Trust has requested that if the State is granted relief in any respect, the Trust be permitted to modify the parties to assert an ultra vires claim against state officials, it makes no similar request to replead to assert a claim for compensation. The reason why is clear, as we have set out above.

Generally, a party is not entitled to relief it does not request. *State v. Brown*, 262 S.W.3d 365, 370 (Tex. 2008). And just as the Trust's suit is not one to determine the boundary between land owned by the State and land owned by the Trust, it is not a takings claim. Allowing the Trust's

[4] The Trust also does not seek consequential damages. *See Omnia Comm. Co. v. U.S.*, 261 U.S. 502, 510 (1923) (stating that "for consequential loss or injury resulting from lawful government action the law affords no remedy").

claim of title to be adjudicated by means of a takings claim would allow claimants to circumvent the State's sovereign immunity by creatively pleading such claims. Creative pleading cannot be used to effect the loss or waiver of the State's sovereign immunity. *See IT-Davy*, 74 S.W.3d at 856.

2. Response to the Dissent

The dissent would allow the Trust to pursue a takings claim even though the Trust has no claim for compensation. It would do so because,

> [b]y imposing statutory damages and civil and criminal penalties for mining a streambed without a permit, the State has all but prohibited a claimant from acting on a right asserted in good faith and risking the consequences in an action brought by the State. Legislative consent to sue for title is thus made virtually absolute.

___ S.W.3d at ___ (Hecht, J., dissenting). But even recognizing the practical effects of statutory damages and civil and criminal penalties for taking state-owned property still does not mean that the government has taken property belonging to the Trust. Under the circumstances, we fail to see how the Trust's claim is or can be for compensation, which is the only constitutional remedy for a takings claim.

Further, it seems that the dissent has mingled takings claims and ordinary claims for which legislative consent is required by its statement that "[l]egislative consent to sue for title is thus made virtually absolute." Legislative consent is not required for a constitutional takings claim to be brought. And as to a statutory waiver of immunity, the Legislature has specified that it does not intend a statute to waive sovereign immunity "unless the waiver is effected by clear and unambiguous language." TEX. GOV'T CODE § 311.034. Whether Legislative consent to sue for title can be found in the statutory construct that protects materials in navigable streambeds by providing

penalties for selling them without the State's permission is relevant to the Trust's title determination claim for which legislative consent is required; it is not relevant as to a takings claim for which the Constitution provides consent. Finally, construing the imposition of statutory damages and civil and criminal penalties for taking public property as effecting a constitutional taking creates a structure in which title to public property is placed at risk of transfer to private persons by default. And the dissent's proposed construct would not necessarily be limited to determining who owned the bed of a stream. It might well apply to any title dispute involving the State. Such a situation would significantly affect the Legislature's power to manage the limited resources of the State in regard to litigating title claims. We do not believe such a departure from the existing framework of statutory law and our precedent is warranted.

D. Ultra Vires Claim

The Trust asserts that if the Court determines the suit cannot proceed against the Department, the Court should remand the case to permit it to add state actors as parties and pursue an ultra vires claim. The Department urges that the suit should be dismissed because there is no basis for arguing that a department official has acted ultra vires.

A suit against a state official for acting outside his authority is not barred by sovereign immunity. *See Heinrich,* 284 S.W.3d at 370-74. While suits to try the State's title are barred by immunity, in some instances a party may maintain a trespass to try title action against governmental officials acting in their official capacities. *See Lain*, 349 S.W.2d at 581. In *Heinrich*, the Court affirmed the rule that suits for declaratory or injunctive relief against a state official to compel compliance with statutory or constitutional provisions are not suits against the State. *See Heinrich,*

284 S.W.3d at 370-74. If a government official acting in his official capacity possesses property without authority, then possession is not legally that of the sovereign. Under such circumstances, a defendant official's claim that title or possession is on behalf of the State will not bar the suit. *See Lain*, 349 S.W.2d at 581-83. A suit to recover possession of property unlawfully claimed by a state official is essentially a suit to compel a state official to act within the officer's statutory or constitutional authority, and the remedy of compelling return of land illegally held is prospective in nature.

The State urges that evidence before the trial court showed a state surveyor had examined the river and determined it to be navigable and that "[g]iven the Department's express statutory authority to exercise the State's right of ownership over this sand and gravel, there is simply no basis for arguing that a department official has acted *ultra vires*." We disagree.

The Trust and the dissent point out that the Department is in a unique position. It has sovereign immunity from the Trust's suit to determine title to the streambed. Though the Trust strongly disagrees with the Department's claim of navigability, the Trust seemingly has little recourse if the Department's position that the stream is navigable cannot be challenged by an ultra vires suit. The Department suggests that the Trust could take materials from the streambed and if the State sought civil damages filed or criminal charges, then the State would have to prove it owned the materials in the streambed by proving the Salt Fork is navigable. A landowner should not be put in such an untenable position if it can be avoided. And while we disagree that the facts before us constitute a constitutional taking, we conclude that they constitute "possession" of the streambed by the State for purposes of *Lain*.

In *Lain*, we set out the manner in which trespass to try title claims against government officials should proceed and the manner of relief that should be granted when the officials file pleas to the jurisdiction:

> [W]hen officials of the state are the only defendants, or the only remaining defendants, and they file a plea to the jurisdiction based on sovereign immunity, it is the duty of the court to hear evidence on the issue of title and right of possession and to delay action on the plea until the evidence is in. If the plaintiff fails to establish his title and right of possession, a take nothing judgment should be entered against him as in other trespass to try title cases. If the evidence establishes superior title and right of possession in the sovereign, the officials are rightfully in possession of the sovereign's land as agents of the sovereign and their plea to the jurisdiction based on sovereign immunity should be sustained. If, on the other hand, the evidence establishes superior title and right of possession in the plaintiff, possession by officials of the sovereign is wrongful and the plaintiff is entitled to relief. In that event the plea to the jurisdiction based on sovereign immunity should be overruled and appropriate relief should be awarded against those in possession.

Lain, 349 S.W.2d at 582.

The Department has the authority to make determinations on behalf of the State as to navigability of streams and to exercise the State's rights over navigable streambeds. Nevertheless, its pronouncement that a stream is navigable is not conclusive of the question. This Court established long ago that the question of navigability is, at bottom, a judicial one. *Bradford*, 50 S.W.2d at 1070.

Here it is undisputed that the part of the streambed in question and claimed by the State to be navigable lies on land owned by the Trust. If the Salt Fork is not navigable, the Trust owns the bed. We see no good reason that the process and principles we set out long ago in *Lain* should not apply. The Trust should be given an opportunity to amend and cure the pleading and party defects, if it chooses to do so, and have the suit proceed against the governmental actors laying claim to the

streambed. *See Koseoglu*, 233 S.W.3d at 840; *Lain*, 349 S.W.2d at 582.

III. Conclusion

We reverse the judgment of the court of appeals. The case is remanded to the trial court for further proceedings in accordance with this opinion.

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Phil Johnson
Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 07-0945

TEXAS PARKS AND WILDLIFE DEPARTMENT, PETITIONER,

v.

THE SAWYER TRUST, RESPONDENT

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

CHIEF JUSTICE JEFFERSON, joined by JUSTICE MEDINA, JUSTICE WILLETT, and JUSTICE GUZMAN, concurring.

I join the Court's opinion but offer a few additional observations about the dissent. According to the dissent, our decision today is groundbreaking because it waives immunity for trespass to try title suits. But at least since *State v. Lain*,[1] and probably since *State v. Bradford*,[2] that has been the law in Texas. *See, e.g.*, *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 954 (Tex. 1976) (holding, in declaratory judgment action brought by private party, that title remained with that party and not with the water authority); *Lain*, 349 S.W.2d at 586 (affirming judgment that private parties had title and possession as against state officials who claimed title on behalf of the state); *Manry v. Robison*, 56 S.W.2d 438, 448–49 (Tex. 1932) (determining that State did not own riverbed

[1] 349 S.W.2d 579, 582 (Tex. 1961).

[2] 50 S.W.2d 1065, 1069 (Tex. 1932).

and that private parties had title thereto); *Tex. River Barges v. City of San Antonio*, 21 S.W.3d 347, 351–52 (Tex. App.—San Antonio 2000, pet. denied) (holding that trial court correctly concluded that river was navigable).[3]

The dissent accurately notes that *Heinrich*'s ultra vires rule does not apply if the government official's acts were discretionary. The dissent then laments that allowing an ultra vires claim to determine navigability goes beyond *Heinrich* and "abolish[es] immunity altogether." ___ S.W.3d at ___. This incorrectly presumes, however, that a state official's assertion of title is a discretionary act. But navigability (which, here, determines title) "is not a question left to the discretion and judgment of ministerial officers." *Bradford*, 50 S.W.2d at 1070. Rather, "[u]nder the law, *those officers were and are not clothed with the power to settle questions of navigability of streams, but in view of the very nature and importance of the matter, for obvious reasons, it is a question for judicial determination*." *Id.* (emphasis added).[4] Government officials cannot choose which properties the State owns; our constitution and statutes set those parameters, and our courts decide whether they have been satisfied. *See Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413 (Tex. 1943) (observing that lands covered by navigable waters could not be sold by the land commissioner or other ministerial officer; such sale or grant may only be authorized by the Legislature); *see also*

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[3] *See also, e.g.*, 17 WILLIAM V. DORSANEO, III, ET AL., TEXAS LITIGATION GUIDE § 251.04[4][b] (2011) ("A plaintiff . . . may effectively evade sovereign immunity concerns by bringing a trespass to try title action against an appropriate government officer in an official capacity, because legislative consent to suit against an officer is not required in the specific context of a trespass to try title action.") (citing *Lain*, 349 S.W.2d at 581).

[4] *Cf. Oklahoma v. Texas*, 258 U.S. 574, 585 (1922) (noting that government surveyors' determination created a "legal inference of navigability" that had little significance because "those officers were not clothed with power to settle questions of navigability"); *Barden v. N. Pac. R.R. Co.*, 154 U.S. 288, 320–21 (1894) (observing that government surveyor's determination was entitled to "[s]ome weight" but was not conclusive because he was not "authorized to determine finally the character of any lands granted or make any binding report thereon").

Manry, 56 S.W.2d at 449 (denying mandamus relief to party seeking mineral permit from the State, because evidence showed that State did not own riverbed).

In *Lain*, we made clear that a government actor is not immune from a trespass-to-try-title suit, and we described how to bring such a claim. *State v. Lain*, 349 S.W.2d 579, 581–82 (Tex. 1961) ("One who takes possession of another's land without legal right is no less a trespasser because he is a state official or employee, and the owner should not be required to obtain legislative consent to institute a suit to oust him simply because he asserts a good faith but overzealous claim that title or right of possession is in the state and that he is acting for an on behalf of the state."). We had earlier held that ultra vires actions remained viable, expressly rejecting the federal courts' approach (which so restricted officer suits and expanded immunity that Congress eventually passed the Quiet Title Act of 1972). *See W. D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 843 (Tex. 1958)[5]; *see also* 28 U.S.C.§§ 2409a, 1346(f), 1402(d).

The dissent has conjured an unorthodox takings claim based on the civil and criminal penalties associated with appropriating the State's sand and gravel. There are several problems with

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[5] We stated:

> Our quotation of portions of the opinion in [*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)] dealing with the contract phase of the case is not to be considered as an approval of the limitation imposed on the rule of *United States v. Lee* as that rule has been adopted and applied by the courts of this state in *Imperial Sugar Co. v. Cabell* and *State v. Epperson*, a limitation vigorously questioned in the dissenting opinion of Mr. Justice Frankfurter. *We have no disposition to extend or broaden the rule of immunity in this state.*

W. D. Haden Co. v. Dodgen, 308 S.W.2d 838, 843 (Tex. 1958) (emphasis added) (citations omitted).

this approach. First, if all the government has done is claim title,[6] a takings claim is premature. *Cf. Hous. N. Shore Ry. Co. v. Tyrrell*, 98 S.W.2d 786, 793 (Tex. 1936) (noting that "[i]f the petitioner in condemnation claims the fee title to the property, his petition should be dismissed" because "[u]nless title in the condemnee is admitted the county court is without jurisdiction" (quoting *McInnis v. Brown Cnty. Water Improvement Dist. No. 1*, 41 S.W.2d 741, 744 (Tex. Civ. App.—Austin 1931, writ ref'd))); *see also Wisc. Valley Improvement Co. v. FERC*, 236 F.3d 738, 743–44 (D.C. Cir. 2001) (observing that plaintiff could try its title claims in either state court or a federal district court and, if successful, could then pursue a takings claim in the Court of Federal Claims); 2 NICHOLS ON EMINENT DOMAIN § 5.02 [2][b] (3d ed. 2010) ("If petitioners claim title to the land they wish to occupy, a petition for condemnation is not the proper proceeding to institute for the purpose of trying the question."). We have long recognized that "there is irreconcilable inconsistency between an allegation by the condemnor of the entire title, or a paramount title, in himself, and the taking of the property of another by the proceeding; that condemnation rests upon necessity, and there can be no necessity to acquire what one already owns." *Tyrrell*, 98 S.W.2d at 794.

Second, authorizing a takings claim to determine title, when the Department has merely asserted ownership, evades statutory trespass-to-try-title requirements. A trespass-to-try-title suit is generally the only way to resolve contested title claims, even when its requirements have sometimes produced harsh results. TEX. PROP. CODE § 22.001(a); *Martin v. Amerman*, 133 S.W.3d

[6] *See* ___ S.W.3d at ___ (noting that the Department "has not done anything that would require it to compensate the Trust if the streambed is not navigable").

262, 265 (Tex. 2004). Whether such strictures are good policy[7] is a question for the Legislature, not the courts. Allowing a party to litigate title through a takings claim will essentially override these statutory requirements.

Third, the dissent would hold that a takings claim is viable when the government imposes severe penalties for an individual's legitimate assertion of title. At what point are penalties so severe that a takings action is authorized? A proliferation of lawsuits on "severity" is the predictable consequence of the dissent's approach. Even if the severity of a financial penalty could be defined, rarely will a case arise in which a criminal sanction does not accompany the theft of state property. And even if there were such a case, a landowner would be forced to sell natural resources at its peril, subject to a conversion claim the State *might* bring. How can a party manage its property without knowing whether it will be subject to liability for doing so?

The issue here is not whether the Department has taken Trust property but who owns the property in the first place. Answering that question will resolve this case, and under longstanding precedent, an ultra vires action—not a takings claim—is the appropriate vehicle for doing so.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: August 26, 2011

[7] *See, e.g.*, William V. Dorsaneo, III, *Dorsaneo on Trespass to Try Title Actions,* Martin v. Amerman, *and H.B. 1787*, 2008 EMERGING ISSUES 759, at *1 (Oct. 17, 2007) (asserting that "it is past time for the abolition of trespass to try title actions as the exclusive method of determining land title disputes generally").

IN THE SUPREME COURT OF TEXAS

NO. 07-0945

TEXAS PARKS AND WILDLIFE DEPARTMENT, PETITIONER,

v.

THE SAWYER TRUST, RESPONDENT

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

JUSTICE HECHT, concurring in part and dissenting in part.

By today's decision, the Court abolishes the State's immunity from suit to determine title to real property. All the plaintiff must do is name some state official as the defendant. The suit proceeds as against a private defendant. Of course, naming a state official instead of the State is a complete fiction. For all practical purposes, the suit is against the State. If the plaintiff's claim is superior to the State's, as advocated by the state official, the plaintiff wins, and the State is bound by the judgment.

In the Court's view, repeated in the concurring opinion, the State has *never* been immune from suit over real property, having announced that ruling fifty years ago in *State v. Lain*.[1] It is difficult to take this view seriously. For one thing, if it were true, then we should have granted this petition for review when it was first filed and reversed and remanded in a two-page per curiam

[1] 349 S.W.2d 579, 582-583 (Tex. 1961).

opinion, as we ordinarily would whenever the court of appeals has ruled directly contrary to an opinion of this Court. Instead, we requested full briefing, denied the petition, granted rehearing, requested more briefing, heard argument, and struggled with the issues. That's a lot of work to apply law that has been settled for fifty years ago.

Moreover, the courts of appeals have been divided in their view of *Lain*, with one reading that decision narrowly,[2] and three construing it more broadly.[3] *Lain* unquestionably allows suit against a government official when suit against the government itself would be barred. Less clear is whether, to prevail in a suit against a government official, the plaintiff must prove only that the official is in error in asserting a claim to property on behalf of the government, which is all the plaintiff would be required to prove against a private defendant, or whether the plaintiff must prove more: either that the official abused his discretion in asserting his claim, or that he had no discretion to assert the claim, or that he had no power to act at all. Only because the Court holds today that a plaintiff's burden of proof against a public official is no different than in a suit against a private individual, and the government is bound by a judgment against its officer, does it follow that the government has no immunity from suit.

It is difficult to square the Court's broad reading of *Lain* with its much narrower holding

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[2] *State v. Riemer*, 94 S.W.3d 103, 110 (Tex. App.–Amarillo 2002, no pet.); *see also Cornelius v. Armstrong*, 695 S.W.2d 48, 49 (Tex. App.–Tyler 1985, writ ref'd n.r.e.).

[3] *Fleming v. Patterson*, 310 S.W.3d 65, 70 (Tex. App.–Corpus Christi-Edinburg 2010, no pet.); *State v. BP Am. Prod. Co.*, 290 S.W.3d 345, 356-357 (Tex. App.–Austin 2009, pet. denied); *Porretto v. Patterson*, 251 S.W.3d 701, 711 (Tex. App.–Hous. [1st Dist.] 2007, no pet.); *Texas Parks and Wildlife Dep't v. Callaway*, 971 S.W.2d 145, 152 (Tex. App.–Austin 1998, no pet.); *Bell v. State Dep't of Highways and Pub. Transp.*, 945 S.W.2d 292, 295 n.1 (Tex. App.–Hous. [1st Dist.] 1997, pet. denied).

recently in *City of El Paso v. Heinrich*.[4] There we allowed suit against a city pension fund's trustees in their official capacity for acting *ultra vires* in denying the plaintiff's claim for benefits even though the city, the fund, and the board were all immune from suit.[5] But "[t]o fall within this *ultra vires* exception," we held, "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."[6] 2Because of this restriction, an *ultra vires* suit is an "exception" to the government's immunity from suit; it does not destroy immunity from suit.

Today — *and for the first time* — the Court allows a plaintiff to sue a government official for title to property, and recover in practical effect against the government itself, proving no more than would be required in a suit against a private defendant. The only remaining immunity from suit is in name only: the government cannot be sued, but its actors can. Why this should be — or as the Court believes, should always have been — the rule for title suits but not for suits for pension benefits, like *Heinrich*, for example, is not clear. Why the government's immunity from suit in tort and contract should be absolute, subject only to statutory waiver, its immunity from suit for the unauthorized actions of its agents should be subject to the narrow *Heinrich* exception, and its immunity from suit over title to real property should be nonexistent is a puzzle to which the Court is strangely oblivious.

I agree with the Court that respondent's declaratory judgment claim fails. In my view, the

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[4] 284 S.W.3d 366 (Tex. 2009).

[5] *Id.* at 370-372.

[6] *Id.* at 372.

law affords a practical solution for settling title disputes with the government that preserves immunity while providing a resolution of serious issues. When the government is met with a claim of ownership contrary to its own that it considers serious, it can sue for a resolution, thus waiving immunity. It would be required to sue to protect its own interests. When the government considers its own possible claim not worth asserting, the individual claimant has the property. But when the government claims immunity from suit over title, refuses to sue for a resolution of the dispute, and imposes criminal penalties on the individual claimant for treating the property as his own, the government has removed itself from the proper scope of immunity. In that situation, I would permit the individual claimant to sue for a taking, for which the government has no immunity.

At bottom, I would allow the government to preserve its immunity from suit but would preclude it from making that immunity absolute. Because the Court chooses to abolish immunity altogether, I respectfully dissent.

I

The parties agree that if the Salt Fork of the Red River is "navigable", a term that by statute refers to "a stream which retains an average width of 30 feet from the mouth up",[7] the State owns the bed on the Sawyer Trust ranch; if not, the Trust owns it.[8]

> The bed of a stream is that portion of its soil which is alternatively covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during an entire year, without

[7] TEX. NAT. RES. CODE § 21.001(3).

[8] *See State v. Bradford*, 50 S.W.2d 1065, 1069 (Tex. 1932) ("The rule long has been established in this state that the state is the owner of the soil underlying the navigable waters, such as navigable streams, as defined by statute . . . ."). The Department also contends that the Salt Fork on the Trust's property is governed by the "Small Bill", TEX. REV. CIV. STAT. ANN. art. 5414a-1, which grants title to the beds of certain "water courses or navigable streams.

> reference to the extra freshets of the winter or spring or the extreme drouths of the summer or autumn. . . . [The bed] include[s] all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time . . . .[9]

Determining whether the Salt Fork is "navigable" is not an easy matter. It rises in the Texas Panhandle near Amarillo and flows southeastward some fifty miles to Greenbelt Lake, just north of Clarendon, then extends another hundred miles or so across Texas and Oklahoma to its mouth in the Prairie Dog Town Fork of the Red River.[10] The Salt Fork crosses the Trust's property just below the Greenbelt Lake dam. No water flows there, except in floods. Even before the dam was built in 1966, there was never enough water in the Salt Fork on the Trust property for regular use.[11]

In 2006, the Trust contracted for the mining of sand and gravel from the dry streambed. But removal of such materials from the bed of a navigable stream requires a $1,200 permit[12] issued by

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[9] *Brainard v. State*, 12 S.W.3d 6, 16 (Tex. 1999) (citations omitted).

[10] Texas State Historical Ass'n, *Salt Fork of the Red River*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/rns05 (last visited Aug. 21, 2011); Texas State Historical Ass'n, *Greenbelt Lake*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/rog09 (last visited Aug. 21, 2011); Texas State Historical Ass'n, *Donley County*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/hcd10 (last visited Aug. 21, 2011); 30 TEX. ADMIN. CODE § 307.10(3), App. C.

[11] This evidence offered by the Trust has not been challenged and thus must be taken as true for purposes of resolving the jurisdictional issues before us. *See Tex. Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004) ("[I]f 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.").

[12] TEX. PARKS & WILDLIFE CODE § 86.002(a) ("No person may disturb or take marl, sand, gravel, shell, or mudshell under the management and protection of the commission or operate in or disturb any oyster bed or fishing water for any purpose other than that necessary or incidental to navigation or dredging under state or federal authority without first having acquired from the commission a permit authorizing the activity."); 31 TEX. ADMIN. CODE § 69.104 (stating that with exceptions, "the disturbance of sedimentary materials under the management and protection of the commission must be authorized under the terms and conditions of either an individual or a general permit"); *id.* § 69.114(a) (stating that "applications for permits to take or disturb sedimentary material shall be accompanied by the following nonrefundable application fees: (1) $1,200 for applications to take sedimentary material for purposes of sale").

the Texas Parks and Wildlife Department, which may be subject to various conditions.[13] The permittee must also post a bond[14] and pay royalties.[15] The Trust's contractor inquired of the State whether it claimed that the Salt Fork is navigable. When the State would not take a position one way or the other, the Trust sued the Department for a declaration that the Salt Fork is non-navigable. The Department asserted immunity,[16] still refusing to take a position on navigability, but after a hearing before the district court, it agreed to arrange for the Director of Surveying of the Texas General Land Office to visit the Trust property. He found that all water channels on the property were dry but that at one point the riverbed was 330 feet wide. Based on his brief observations at the site and his review of a few unspecified field notes from the original surveys, he concluded that the Salt Fork is navigable.[17] The trial court refused to dismiss the case, and the court of appeals

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[13] *Id.* § 69.111(a) ("The director [of the Department] may make such reasonable requirements of the permittee as required to effectuate the intent of Chapter 86 of the Parks and Wildlife Code.")

[14] *Id.* § 69.111(b) ("The director shall require the permittee to make a good and sufficient bond payable to the department, and conditioned upon the prompt payment of charges for sedimentary materials and any damage done to property under the ownership or trusteeship of the state.").

[15] *Id.* § 69.121(a).

[16] *See* TEX. PARKS & WILDLIFE CODE § 11.011 ("The Parks and Wildlife Department is established as an agency of the state. It is under the policy direction of the Parks and Wildlife Commission.").

[17] I quote the report of the Director of Surveying in full:

> Report of Inspection
> Salt Fork of the Red River
> Donley County, Texas
>
> A visit was made to the Salt Fork of the Red River in Donley County on August 22, 2006, for the purpose of determining if the stream was statutorily navigable. The inspection was made at a point approximately 4.7 miles north of Clarendon and less than one mile downstream from the dam creating Greenbelt Lake. Bob Sweeney, an attorney for the Parks & Wildlife Department, and I met with the landowner, a Mr. Sawyer, and his surveyor, Maxey Sheppard, LSLS.
>
> The Salt Fork of the Red River is a "Small Bill" stream. All of the original land surveys in the vicinity cross the river

affirmed.[18]

II

I agree with the Court that the Trust's suit against the Department to determine title to the bed of the Salt Fork is barred by immunity.[19] In *State v. Lain*, we held that "[w]hen in this state the sovereign is made a party defendant to a suit for land, without legislative consent, its plea to the jurisdiction of the court based on sovereign immunity should be sustained in limine."[20] For the reasons the Court explains, the State's immunity from land claims is not waived by the Declaratory

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even though, in the vicinity of the inspection site, the stream bed widths recited in the patent field notes for the original surveys vary from a minimum of 70 varas (194 feet) to as much as 453.5 varas (1260 feet) and at a point 5 miles west, above Greenbelt Lake, there is a reported width of 463 varas (1286 feet).

The inspection point on the river was in the vicinity of the southwest corner of G.C. & S.F. Ry. Co. Survey No.7, Abstract No. 282, in the east line of the Socorro Irrigation Co. Survey No.5, Abstract No. 238. Aerial photography indicates that, at this point, the river is separated into two channels by a rather large island. Only the north channel was inspected.

As with many high plains streams, the Salt Fork of the Red River is a wide sand-bed river with numerous channels lying between the river banks. The area of inspection was less than one mile below the dam creating Greenbelt Lake and at this point the riverbed is dry except when occasional releases are made from the lake. The riverbed at the point of inspection is vegetated from bank to bank but not with typical upland vegetation. The banks of the stream are well defined on both sides of the bed. There exist at least three separate water channels between the banks but all of them are dry at this time. The portion of the riverbed north of the island at the point of inspection was found to be approximately 330 feet in width.

Based on the above-recited observations, it is my opinion that the Salt Fork of the Red River is a statutorily navigable stream at this point.

/s C.B. Thomson
C.B. Thomson, LSLS, RPLS, PE
Director of Surveying
Texas General Land Office

[18] ___ S.W.3d ___ (Tex. App.–Amarillo 2007).

[19] *Ante* at ___ (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372-373 (Tex. 2009), and *State v. Lain*, 349 S.W.2d 579, 582 (Tex. 1961)).

[20] *Id.*

Judgment Act.[21] Immunity in this context serves important purposes. It preserves the separation of powers between the Legislative and Judicial Departments by limiting courts' authority to decide policy matters that may attend disputes over the State's ownership of property.[22] Immunity also respects the Executive Department's authority and discretion to handle property dispute issues on a consistent and comprehensive basis. In this case, for example, a decision on the navigability of the Salt Fork would have ramifications for other landowners, not only up and down the Salt Fork, but adjacent other streams as well. And immunity protects the State from the burdens of litigation that would require diversion of limited revenues from other purposes considered more important.

I also agree that immunity would not bar an *ultra vires* action by the Trust against an appropriate official for asserting the State's ownership of the bed contrary to law. Again, *Lain* holds:

> Well reasoned and authoritative decisions of the Supreme Court of the United States and of the courts of this state support the view that a plea of sovereign immunity by officials of the sovereign will not be sustained in a suit by the owner of land having the right of possession when the sovereign has neither title nor right of possession.[23]

We recently reconfirmed in *City of El Paso v. Heinrich* that *ultra vires* actions are permissible,[24] but history teaches that the line between such actions and actions for which the government retains

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[21] *Ante* at ___.

[22] *See Federal Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 413-415 (Tex. 1997) (Hecht, J., concurring) (stating that the decision whether to waive immunity from suit on a contract "involves policy choices more complex than simply waiver of immunity" and that "the Legislature . . . is better suited to deciding the kinds of political issues that . . . attend claims against the State").

[23] *Lain*, 349 S.W.2d at 581.

[24] *Heinrich*, 284 S.W.3d at 371.

immunity is hard to draw. The specific Supreme Court decision to which *Lain* referred was *United States v. Lee*,[25] in which the Court, 5-4, upheld a suit against federal officials to void the seizure of General Robert E. Lee's wife's Arlington estate for nonpayment of $92.07 taxes after it had been sold to the United States for $26,800 for use as a national cemetery. *Lee* was the most celebrated case of several over many years in which the Court attempted to set out exactly when a suit for land from which the United States is immune could be brought against a government official. Toward the end of this exercise, the Court admitted that it had been "inconsistent"[26] in determining whether to allow "officer suits", observing that "it is fair to say that to reconcile completely all the decisions of the Court in this field . . . would be a Procrustean task."[27]

Eventually, the Supreme Court "cut through the tangle" of its decisions and applied to land disputes the general rule it had announced for officer suits in *Larson v. Domestic & Foreign Corp.*:[28]

> the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.[29]

The difficulty with respect to land disputes evaporated with Congress' passage of the Quiet Title Act

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[25] 106 U.S. 196 (1882).

[26] *Block v. North Dakota*, 461 U.S. 273, 281 (1983).

[27] *Id*. (quoting *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962)).

[28] 337 U.S. 682, 702 (1949).

[29] *Block*, 461 U.S. at 281 (quoting *Malone*, 369 U.S. at 647, in turn quoting *Larson*, 337 U.S. at 702) (internal quotation marks omitted).

of 1972,[30] which waived the federal government's immunity from suits for land under certain conditions but also "provide[d] the exclusive means by which adverse claimants [can] challenge the United States' title to real property.[31]

The Texas Legislature has not acted similarly to free us of the continuing struggle to determine when government officers may be sued though the government is immune. We held in *City of El Paso v. Heinrich* that an *ultra vires* suit is permitted when a government official has acted contrary to a statute requiring him to "perform[] in a certain way, leaving no room for discretion".[32] This rule may not be as restrictive as the rule in *Larson*, as its application depends on the difficult decision of what is properly within an official's discretion and what lies beyond. Locating the banks of a stream to determine navigability may[33] or may not[34] involve discretion; determining from a single measurement and a few surveys that "a stream retains an average width of 30 feet from the mouth up"[35] may be an abuse of discretion. But we cannot decide these issues here because the Trust has not brought an *ultra vires* action. The Department insists that a discretionary determination was made and that any *ultra vires* action the Trust may assert will fail. The Court

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[30] Act of Oct. 25, 1972, Pub.L. No. 92-562, 86 Stat. 1176 (codified at 28 U.S.C. § 2409a, 28 U.S.C. § 1346(f), and 28 U.S.C. §1402(d)).

[31] *Block*, 461 U.S. at 286.

[32] *Heinrich*, 284 S.W.3d at 371.

[33] *See Bradford*, 50 S.W.2d at 1069 (stating that a determination of navigability will not be held void where "the surveying officers . . . made the surveys in the exercise of their discretion and honest judgment").

[34] *See Brainard v. State*, 12 S.W.3d 6, 10 (Tex. 1999) ("The differences between the parties' surveys (and, in particular, their chosen river banks) are based on conflicting legal theories that we must resolve.").

[35] TEX. NAT. RES. CODE § 21.001(3).

removes that argument by holding that an appropriate state official may be sued, just as a private person would be, and judgment rendered against the State.

III

The Department contends that there are only two ways for the Trust to challenge the State's assertion of ownership of the Salt Fork bed. One is for the Trust to seek permission from the Legislature to sue.[36] The Department concedes that this may be difficult, citing only one instance in which the Legislature has ever granted consent in similar circumstances.[37] But it argues that the difficulty is justified by the important purposes immunity serves.

The Trust's only other alternative, the Department contends, is to proceed with its mining plans and risk the consequences. This is not simply a dare. The Department might reconsider its claim of ownership or otherwise decide to take no action against the Trust. Or the Department might sue for damages, in which case it would not be immune from the Trust's counterclaim to determine title.[38] The Department would have to determine whether its claim was strong enough to justify losing—the expense of litigation as well as the ramifications of an adverse decision. If the Department prevailed on a claim for common-law conversion, the Trust would be liable, if it acted in good faith, for only the net value of the property taken, and if it did not act in good faith, for the

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[36] *See* TEX. CIV. PRAC. & REM. CODE §§ 107.001-.005 (providing framework for legislative consent to sue).

[37] *Brainard*, 12 S.W.3d at 10.

[38] *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375-376 (Tex. 2006) ("[I]t would be fundamentally unfair to allow a governmental entity to assert affirmative claims against a party while claiming it had immunity as to the party's claims against it."); *Anderson, Clayton & Co. v. State*, 62 S.W.2d 107, 110 (Tex. 1933) ("[W]here a state voluntarily files a suit and submits its rights for judicial determination it will be bound thereby and the defense will be entitled to plead and prove all matters properly defensive. This includes the right to make any defense by answer or cross-complaint germane to the matter in controversy.").

gross value of the property and the Department's expenses in recovering it.[39] The Trust would not be liable for punitive damages unless it acted with malice.[40] The Trust would have to evaluate whether the strength of its claim justified its exposure or whether it would be to its benefit in the long run to apply for a permit and pay the State a royalty. A Department-initiated suit for conversion presenting roughly correlative risks to each side preserves immunity and the purposes its serves while providing a viable mechanism for resolving the ownership dispute.

But conversion would not be the only action available to the Department, nor would the Trust's risk be limited to common-law damages. By statute, a person who removes sand and gravel belonging to the State without a permit may also be liable for consequential damages[41] as well as "a civil penalty of not less than $100 or more than $10,000 for each act of violation and for each day of violation".[42] Further, mining the State's sand and gravel without a permit is a crime[43] punishable

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[39] *Moore v. Jet Stream Investments, Ltd.*, 261 S.W.3d 412, 428-429 (Tex. App.–Texarkana 2008, pet. denied)

[40] *Bennett v. Reynolds*, 315 S.W.3d 867, 871-872 (Tex. 2010); TEX. CIV. PRAC. & REM. CODE § 41.003(a) (stating that, with exceptions, "exemplary damages may be awarded only 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: (1) fraud; (2) malice; or (3) gross negligence"); *id*. § 41.001(7) ("'Malice' means a specific intent by the defendant to cause substantial injury or harm to the claimant.").

[41] TEX. PARKS & WILDLIFE CODE § 86.023 "A person who takes marl, sand, gravel, shell, or mudshell under the jurisdiction of the commission in violation of this chapter or a rule adopted under this chapter is liable to the state for the value of: (1) the material taken; and (2) any other natural resource under the department's jurisdiction that is damaged or diminished in value.").

[42] *Id*. § 86.024.

[43] *Id*. § 86.022 ("A person who violates Section 86.002 [that is, mines sand and gravel without a permit] . . . commits an offense that is a Class C Parks and Wildlife Code misdemeanor.").

by a fine of $25 to $500 per day.[44] With the addition of these statutory civil and criminal penalties, the State has gone to some lengths to discourage any provocation for it to litigate ownership disputes.

The Trust argues for a third alternative: a suit for a taking of its property without compensation in violation of article I, section 17 of the Texas Constitution. The Department acknowledges that it is not immune from such suits but argues that the Trust cannot sue for a taking in this situation. The Court agrees for what I take to be three reasons.

First, the Court notes that "the State has not expressed an intent to take property belonging to the Trust [but] . . . has merely identified the streambed as belonging to the State".[45] But to say that the State is claiming only what it owns obviously begs the question. The Department argues that the government cannot have the intent to take property necessary to trigger a constitutional right to compensation as long as it reasonably believes it owns the property, but the Court does not even require that government's belief be reasonable. And this case illustrates what the Department means by reasonable belief: from one measurement of the dry riverbed on the Trust's property and a few unidentified field notes, one can infer that the Salt Fork has an average width of thirty feet from the mouth up. With no more basis than that, the Department's assertion of ownership is little more than a grab. The rule the Court implicitly applies is that the State never takes something it claims to own, however unfounded the claim may be. The government cannot avoid its constitutional responsibility

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[44] *Id.* §§ 12.406 ("An individual adjudged guilty of a Class C Parks and Wildlife Code misdemeanor shall be punished by a fine of not less than $25 nor more than $500."); 86.002(b) ("Each day's operation in violation of this section constitutes a separate offense.").

[45] *Ante* at ___.

simply by wishful thinking.

Second, the Court states that "[t]he Trust's suit is an action to determine whether it owns the streambed, not one for compensation".[46] But the fact that the Trust *has not sued* for compensation to date does not mean that it *cannot sue* for a taking in this situation. The Trust *has not sued* a state official, yet the Court explains at length that the Trust *could* bring an *ultra vires* action. There is no less reason to consider whether the Trust *could sue* the Department for a taking if it asserted a claim for compensation. This case is not about pleadings; it is about immunity.

Third, the Court argues that "[a]llowing the Trust's claim of title to be adjudicated by means of a takings claim would sanction claimants' circumventing the State's sovereign immunity by . . . [c]reative pleading . . . ."[47] But it may just as well be said that allowing the State to assert immunity from a takings suit merely because it claims title would sanction the State's circumvention of its constitutional responsibility. If a takings claim—which the Department concedes immunity would not bar—can be asserted even though title is disputed, then its assertion cannot be dismissed as creative pleading.

Not only does the Court offer no persuasive reason for holding that the Trust has no takings claim,[48] it allows a contrary result in a similar case to stand by denying the petition for review today

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[46] *Ante* at ___.

[47] *Ante* at ___.

[48] The Department also argues that if the Trust had a constitutional claim, it would be for a regulatory taking because the Trust's only complaint is that it must obtain a permit for its proposed mining operations. "Physical possession is, categorically, a taking for which compensation is constitutionally mandated, but a restriction in the permissible uses of property or a diminution in its value, resulting from regulatory action within the government's police power, may or may not be a compensable taking." *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 669-670 (Tex. 2004) (footnote omitted). The Department contends that because the Trust has not pleaded and cannot show that the permit requirement severely impacts the value of the property, it has no regulatory takings claim.

in *Koch v. Texas General Land Office*.[49] There, Koch sued the General Land Office for taking limestone from her land for highway construction. The State claimed ownership of the limestone because its 1926 land patent to Koch's predecessor reserved "[a]ll of the minerals", despite our holding in a 1949 case that ordinary limestone is not a mineral.[50] The GLO argued that the rule in that case should not apply retroactively or to the State, that it therefore had a colorable claim to the limestone, and that "if the State believes it is the owner of property, its use of that property cannot be an intentional act to take the property of another."[51] The court rejected this Cartesian *credo ergo capio* argument:

> We are not persuaded that the State's subjective belief regarding its title to property, by itself, changes or dictates the capacity in which the State acts. . . . When a plaintiff alleges a state taking of property and title to that property is in dispute, the State cannot evade its constitutional obligations merely by asserting that it "believes" it is acting as landowner rather than as sovereign regardless of whether that belief is, in fact, accurate. Otherwise, the State would be in the position of unilaterally determining the outcome of takings disputes simply by declaring a subjective belief —whether right or wrong—that it thought it owned the property.[52]

The court noted that two other courts had held that a dispute over the ownership of property does

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See id. at 672-673. But the disagreement between the Trust and the Department is over ownership of the riverbed, not the requirement of a permit to mine it. This is not a regulatory takings case.

[49] 273 S.W.3d 451 (Tex. App.–Austin 2008, pet. denied).

[50] *Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949) ("In our opinion substances such as sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value, as for example sand that is valuable for making glass and limestone of such quality that it may profitably be manufactured into cement. Such substances, when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word.").

[51] *Koch*, 273 S.W.3d at 458.

[52] *Id*. at 458-459.

not preclude a suit for its taking.[53]

Koch and the present case are quite similar. The ownership issue in *Koch* was purely legal: what did "mineral" mean in the State's land patent. The ownership issue in the present case may be partly legal— what standards govern the measurements made to determine navigability—and partly factual—the actual measurements themselves. But the basic nature of the issues in the two cases is the same. In both cases, the State argues that it cannot take property it reasonably believes it owns, but the bases for its belief are shaky: in *Koch* it claims that limestone is a mineral in the face of a contrary decision from this Court, and in the present case it claims that the Salt Fork is thirty feet wide on average, source to mouth, on the strength of one measurement and some unidentified notes. And although Koch sued for damages while the Trust has sought only declaratory and injunctive relief, nothing would prevent the Trust from adding a claim for damages.

In *Koch*, the State actually removed the limestone, while here, the State has only asserted that the Trust cannot remove sand and gravel without a permit. But in both cases, the State claims ownership of the property in issue. A permit to remove sand and gravel is required, not for the purpose of regulating a landowner's use of his own property, but to protect the State's right to its property. The imposition of a royalty in connection with the permit is based on the State's ownership of the material being mined. The State claims the right to remove sand and gravel from the Trust ranch, just as it removed limestone from Koch's property, only it has not yet chosen to

[53] *Id*. (citing *Porretto v. Patterson*, 251 S.W.3d 701, 709-710 (Tex. App.–Houston [1st Dist.] 2007, no pet.) (holding that a person claiming ownership of property could sue the State for a taking for having leased it); *Kenedy Mem'l Found. v. Mauro*, 921 S.W.2d 278, 282 (Tex. App.–Corpus Christi 1995, writ denied) (holding that immunity did not bar a takings claim merely because the State disputed the plaintiff's ownership of the property). This Court later noted in *Kenedy*, however, that the State's immunity had been waived by statute. *Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 289 & n.71 (Tex. 2002).

exercise that right. At bottom, this distinction in the two cases is one without a difference.

In my view, an action for a constitutionally compensable taking of property is not precluded merely by a dispute between the claimant and the government over ownership of the property. To hold otherwise would allow the government to avoid its constitutional obligation whenever it chose to do so. Nor do I think a takings action can be precluded when the government's belief in its right to the property is colorable or even reasonable. Such a rule would depreciate the constitutional right too much. On the other hand, to hold that the government's claim to property may always be challenged in a takings action would vitiate the rule of *Lain*, that the government is immune from such suits, and abolish any need for *ultra vires* actions. It is not necessary to go that far in this case.

The dilemma presented here results not from the State's assertion of immunity as a shield to prevent being drawn into litigation, but its use as a sword to discourage all claims to streambeds. By imposing statutory damages and civil and criminal penalties for mining a streambed without a permit, the State has all but prohibited a claimant from acting on a right asserted in good faith and risking the consequences in an action brought by the State. Legislative consent to sue for title is thus made virtually absolute. The effect is to shift authority for determining whether the State has taken a person's property without compensation from the Judicial Department to the Legislative Department, in violation of the fundamental principle that it is for the courts to decide what the constitution requires.[54] In these circumstances, I would hold that a takings action must be allowed. If the State loses that action, it must pay for property it might prefer not to have. Thus as a practical matter, the availability of a takings action forces the State to consider more carefully the strength

[54] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

of its claim. The State may statutorily increase the punishment for conversion, but it does so at the risk of incurring damages for insubstantial claims of ownership.

* * *

For these reasons, I would hold that the Trust may assert a claim for compensation against the Department under article I, section 17 of the Constitution. From the Court's decision to waive the State's immunity completely, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0172

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, PETITIONER,

v.

ATTORNEY GENERAL OF TEXAS AND THE DALLAS MORNING NEWS, LTD., RESPONDENTS

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

Argued September 10, 2009

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE MEDINA, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE LEHRMANN.

JUSTICE WAINWRIGHT delivered a dissenting and concurring opinion, joined by JUSTICE JOHNSON.

JUSTICE HECHT and JUSTICE WILLETT did not participate in the decision.

Invoking the Texas Public Information Act (PIA), the Dallas Morning News sought a copy of the Comptroller's payroll database for state employees. *See* TEX. GOV'T CODE ch. 552. The Comptroller responded with the full name, age, race, sex, salary, agency, job description, work address, date of initial employment, pay rate, and work hours for each employee. But the Comptroller withheld dates of birth as protected under Government Code section 552.101, which excepts from disclosure "information considered to be confidential by law, either constitutional,

statutory, or by judicial decision."[1] *Id*. § 552.101. She then sought the Attorney General's opinion on whether those dates must be disclosed. *Id*. § 552.301. In a comprehensive response, the Attorney General's letter ruling referenced not only section 552.101, but also section 552.102's personnel file exemption, which protects the privacy rights of government employees.

> In addition to [section 552.101], the Act also provides specific protection for the privacy rights of government employees. *See* Gov't Code § 552.102(a). Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* . . . The limitation of a "clearly unwarranted invasion of personal privacy" requires a balance between the protection of an individual's right of privacy and the preservation of the public's right to government information. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 n.8 (Tex.App.-Austin 1983, writ ref'd n.r.e.) (establishing test for privacy under exception; citing *Dept. of the Air Force v. Rose*, 425 U.S. 352, 378 n.16).

Tex. Att'y Gen. OR2006-01938, at 2.[2]

In the same opinion, the Attorney General discussed the growing problem of identity theft and described how birth dates, particularly when utilized with other data, facilitate that crime. He noted that "a majority of the fifty states protect date of birth information in government employee personnel files." *Id*. at 3. Ultimately, however, the Attorney General concluded that there was no proof "that harmful financial consequences will result from the release of the date of birth information in response to this request." *Id. at* 4. He left open the possibility that "based on a

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[1] The Comptroller also asserted that the information was protected under section 552.108, which excepts from disclosure certain law enforcement, correction, and prosecutorial information. TEX. GOV'T CODE § 552.108. That exception is not at issue here.

[2] Like all Open Records Letter Rulings, this one was signed by an assistant attorney general in the Open Records Division. *See* OPEN RECORDS LETTER RULINGS, ATTORNEY GENERAL OF TEXAS, https://www.oag.state.tx.us/open/index_orl.php.

presentation of new facts and additional arguments, . . . it is possible that Texas could join the growing number of states that protect from disclosure broad-based requests for date of birth information." *Id*.

The trial court and the court of appeals sided with the Attorney General. 244 S.W.3d 629. The Comptroller has petitioned this Court, and we must now decide if the PIA requires redaction of birth dates. In the course of answering that question, we must also decide whether, to protect 144,000 state employees whose privacy interests would otherwise be compromised,[3] we may consider an argument that the Comptroller presented expressly in the trial court and the court of appeals, but only tangentially here. For reasons expressed by the Attorney General in an earlier phase of this litigation, we conclude that the Comptroller properly withheld birth dates. We hold that, under the unique circumstances presented here, the questions the Comptroller has presented fairly include an argument that the privacy interest of the state's employees must be protected under the personnel-file exception. We reverse in part and affirm in part the court of appeals' judgment.

I. Procedural history

After the Attorney General issued his letter, the Comptroller, represented by the Attorney General, sued the Attorney General and sought a declaration that birth dates were excepted from disclosure. The Comptroller asserted that the Attorney General failed to apply the appropriate standards for employee privacy rights under both sections 552.101 and 552.102. The News

[3] According to the U.S. Census Bureau, as of March 2008, there were 257,830 full-time and 78,625 part-time employees of the State of Texas. 2008 ANNUAL SURVEY OF STATE AND LOCAL GOVERNMENT EMPLOYMENT AND PAYROLL, U.S. CENSUS BUREAU, *available at* http://www2.census.gov/govs/apes/08sttx.txt. (all Internet materials as visited December 1, 2010 and copy available in Clerk of Court's file). According to the Comptroller, around 144,000 employees working for state agencies in Texas would be affected by the Public Information Act request.

intervened and moved for summary judgment, as did the Comptroller. The trial court granted the News' motion (although it denied the News' request for attorney's fees) and denied the Comptroller's. The court of appeals affirmed. 244 S.W.3d 629.

In the trial court and the court of appeals, the Comptroller argued that section 552.102's personnel file exemption applied. Citing *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex.App.-Austin 1983, writ ref'd n.r.e.), however, the Comptroller contended that the test was the same under either section 552.101 or 552.102. The Attorney General agreed. The court of appeals, although noting the Comptroller's arguments under both sections 552.101 and 552.102, appears to have considered only section 552.101. 244 S.W.3d 629, 633, 635. We granted the petitions for review. 52 Tex. Sup. Ct. J. 377 (Feb. 27, 2009).[4]

II. The third party privacy interests persuade us to consider the section 552.102 exception that the Comptroller abridged from her argument in this Court.

Although his opinion letter cited a balancing test for determining whether birth date information falls within section 552.102's personnel file exception, neither the Attorney General nor the Comptroller (represented by the Attorney General) now contends that a balancing test is appropriate. Instead, before and since that letter, and based solely on the court of appeals' decision in *Hubert*, the Attorney General says that the test for information excepted from disclosure under section 552.102 is identical to that under section 552.101. *See, e.g.*, Tex. Att'y Gen. OR2010-01791, at 3 ("In *Hubert*, the court ruled that the test to be applied to information claimed to be protected

[4] The Texas Association of School Boards Legal Assistance Fund submitted an amicus curiae brief in support of the Comptroller; the Freedom of Information Foundation of Texas and the Reporters Committee for Freedom of the Press submitted an amici curiae brief in support of the Attorney General and the News.

under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation*, for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will consider your privacy claims under sections 552.101 and 552.102(a) together.") (citations omitted); Tex. Att'y Gen. OR2005-11671, at 4 (same); Tex. Att'y Gen. OR2005-00721, at 3 (same); ATTORNEY GENERAL OF TEXAS, PUBLIC INFORMATION 2010 HANDBOOK 81 (noting that "[t]he court in *Hubert v. Harte-Hanks Texas Newspapers, Inc.* ruled that the test to be applied under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for applying the doctrine of common law privacy as incorporated by section 552.101" and "[c]onsequently, in claiming that information is excepted from public disclosure under section 552.102, a governmental body should not rely upon decisions interpreting this provision that predate the *Hubert* decision").

In this Court, the Comptroller no longer presses the section 552.102 argument, although her petition for review cites state and federal cases holding that disclosure of dates of birth would be a "clear invasion of personal privacy"—similar to the section 552.102 standard ("clearly unwarranted invasion of personal privacy"). The petition also notes that "[a] majority of the fifty states now exempt[s] date of birth from disclosure when an open records request is made for the personnel files of government employees"; that "[s]everal states protect the information under an 'unwarranted invasion of personal privacy' exemption"; and that "[o]ther states protect date of birth as part of an exception for employee personnel records." The Comptroller cites an analogous case under the Freedom of Information Act's (FOIA) Exemption 6 (the federal personnel policy exemption), as well as a Delaware attorney general opinion determining that public release of the dates of birth of all

state employees would constitute an invasion of personal privacy under that state's personnel file exception. *See* Del. Op. Att'y. Gen. No. 94-I019 (1994). We find it difficult to ignore these citations, even in light of the Comptroller's statement at argument that she was no longer pursuing a section 552.102 exemption.

Given the unique circumstances of this case and the third party interests at stake, we conclude that the Comptroller's petition "fairly include[s]" an argument that section 552.102 applies. TEX. R. APP. P. 53.2(f); *see also Pub. Utils. Comm'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988) (observing that, "in our adversary system, a court has not only the power but the duty to insure that judicial proceedings remain truly adversary in nature"). This comports with the steps taken by the Legislature to protect third party privacy interests in PIA matters. For example, although a governmental body waives any exception to disclosure it fails to raise before the attorney general, that rule is inapplicable when the exception "involv[es] the property or privacy interests of another person." TEX. GOV'T CODE § 552.326. And before disclosure, a governmental body must "make a good faith attempt to notify" a person whose "proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131."[5] *Id.* § 552.305.

Cases interpreting the federal Act support a similar construction. The Supreme Court has made it clear that FOIA Exemption 6 protects the privacy interest belonging to the individual. *See DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) ("[B]oth the common law and the literal understandings of privacy encompass the individual's control of information

[5] Although the Comptroller asserted that dates of birth were exempt from disclosure under section 552.101, there is no indication that written notice was provided to the state employees whose data would be disclosed. The News states that no notice was given, and the Comptroller does not argue to the contrary.

concerning his or her person."); *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 363 (5th Cir. 2001) ("The Supreme Court has explained that the privacy interest at stake in FOIA exemption analysis belongs to the individual, not the agency holding the information."). In *August v. Federal Bureau of Investigation*, 328 F.3d 697, 702 (D.C. Cir. 2003), the court remanded for consideration of additional exemptions from disclosure because, although the government generally waives any FOIA exemption it fails to raise in initial proceedings, "the Government's failure . . . resulted from human error, because wholesale disclosure would pose a significant risk to the safety and privacy of third parties, and because the Government has taken steps to ensure that it does not make the same mistake again, we see this case as inappropriate for the rigid 'press it at the threshold, or lose it for all times' approach." That court pointed out that third parties, who "bear no responsibility for the Government's litigation strategy," should not "pay for the Government's [failure to raise the applicable exemptions]." *August*, 328 F.3d at 701; *see also Joseph W. Diemert, Jr. & Assocs. Co. v. FAA*, 218 F.App'x 479, 482 (6th Cir. 2007) ("[S]ome courts have concluded that where personal privacy interests are implicated, only the individual who owns such interest may validly waive it."). In another case, the court observed that, although an agency generally waives any exemption it fails to raise at the initial proceedings, "in certain FOIA cases where the judgment will impinge on rights of third parties that are expressly protected by FOIA, such as privacy or safety, district courts not only have the discretion, but sometimes the obligation to consider newly presented facts and to grant" post-judgment relief. *Piper v. DOJ*, 374 F.Supp.2d 73, 78 (D.D.C. 2005). Thus, "the importance of protecting third parties' interests makes judicial intervention proper," even though the Comptroller no longer presses the argument. *Id*. at 81.

III. Determining whether the information sought is a "clearly unwarranted invasion of personal privacy" requires us to balance the individual's right to privacy against the public's right to government information.

The Texas Legislature modeled the PIA after the FOIA. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 355 (Tex. 2000) (plurality op.). Both statutes favor disclosure,[6] but each contains exceptions.[7] Section 552.102(a) exempts information from a "personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." TEX. GOV'T CODE § 552.102(a). This language tracks its federal counterpart, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The United States Supreme Court, in *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976), interpreted the personnel file exemption to "require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act." The Supreme Court later explained that, under this balancing test "[i]nformation such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet . . . such information, if contained in a 'personnel' or 'medical' file, would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982) (noting that "'limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of

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[6] *See* TEX. GOV'T CODE § 552.001(b); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (noting that "disclosure, not secrecy, is the dominant objective of [FOIA]").

[7] *See, e.g.*, 5 U.S.C. § 552(b)(6); TEX. GOV'T CODE § 552.102.

privacy and the preservation of the public's right to Government information *by excluding those kinds of files the disclosure of which might harm the individual*'" (quoting H. R. Rep. No. 1497, 89th Cong., 2nd Sess., at 11 (1966))).

Although we have held that a balancing test is not required under section 552.101 (excepting from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision"), we have not rejected its application to section 552.102. *See Indus. Found. of South v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 681 (Tex. 1976). In *Industrial Foundation*, decided shortly after the U.S. Supreme Court issued *Rose*, we held only that *Rose*'s balancing test was inapplicable to section 552.101 because the PIA "contain[ed] no exception comparable to" FOIA's exception for "files '*similar' to* medical or personnel files." *Id*. (emphasis added).

In *Hubert v. Harte-Hanks Texas Newspapers, Inc*., 652 S.W.2d at 550, the only decision to consider whether a balancing test applied under section 552.102, a divided court of appeals held that it did not:

> Nothing in the language [of the PIA] indicates that . . . the federal balancing test or the *Industrial Foundation* test should be employed in determining cases involving 'information from personnel files.' Nevertheless, this Court has determined, finally, that the *Industrial Foundation* test for information deemed confidential by law under [section 552.101] . . . should apply also to [section 552.102].

The dissenting justice disagreed, arguing that "[t]he plain meaning of the term 'clearly unwarranted' implies in the strongest possible terms that the decision to disclose the information depends upon a balancing test." *Id.* at 559 n.4 (Powers, J., dissenting). He interpreted *Industrial Foundation* to endorse the use of a balancing test for claims under section 552.102:

> With respect to the [PIA], however, the Supreme Court of Texas observed that the same construction, if applied to [section 552.101] of the Texas statute, would render superfluous [section 552.102] of that statute in matters of personnel-file privacy. The Court thus implied in the strongest terms that the balancing test to which it referred would be applicable under [section 552.102], but not applicable outside that subsection.

Id. at 557-58 (Powers, J., dissenting).

We agree with Justice Powers. Because the PIA is modeled on the FOIA, federal precedent is persuasive, particularly where the statutory provisions mirror one another. *See In re Weekley Homes, L.P.*, 295 S.W.3d 309, 316-17 (Tex. 2009) (conceding that state discovery rules are not identical to federal rules, but "are not inconsistent," and "therefore we look to the federal rules for guidance"); *Farmers Group, Inc. v. Lubin*, 222 S.W.3d 417, 425 (Tex. 2007) (looking to cases interpreting federal rules where Texas rules incorporated the identical language); *Hallco Tex., Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 56 (Tex. 2006); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 664 (Tex. 2004). In drafting the FOIA, the U.S. Senate explained that "'[t]he phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.'" *Rose*, 425 U.S. at 372 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., at 9 (1965)). When the Texas Legislature used the same "clearly unwarranted invasion of personal privacy" language, it is fair to presume it intended the same meaning as that articulated by its federal predecessor. *Cf. Farmers Group*, 222 S.W.3d at 425 (noting that Texas statute incorporating language from Federal Rule of Civil Procedure indicated that statute was intended to have similar application).

The Attorney General recognized the applicability of this balancing test in his initial response to the Comptroller's open letter request, noting that "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' requires a balance between the protection of an individual's right of privacy and the preservation of the public's right to government information." Tex. Att'y Gen. OR2006-01938, at 2 (citing *Rose*, 425 U.S. at 378 n.16). We agree: *Rose*'s balancing test is the appropriate standard under section 552.102. Accordingly, we next weigh the third party privacy interest against the public's right to government information.

IV. Both the Attorney General and the Comptroller have identified significant privacy interests at stake, and the public interest in employee birth dates in this case is minimal.

The privacy interests protected by the PIA exemption involve the right of individuals "to determine for themselves when, how, and to what extent information about them is communicated to others." ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967), *quoted in Reporters Comm.*, 489 U.S. at 764 n.16. The News responds that it has no interest in disclosing birth dates to the world, but rather would use the information to investigate inappropriate hires or other misadventures the state may commit. We do not doubt that the News would put the information to beneficial use. But if the requested information is disclosed to the News, it must be disclosed to any applicant, including those who would employ it for illegitimate purposes. "[O]nce there is disclosure, the information belongs to the general public." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

Nor is it relevant that birth dates may be readily available from other sources. "An individual's interest in controlling the dissemination of information regarding personal matters does

not dissolve simply because that information may be available to the public in some form." *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994). The Supreme Court has held that government employees have a privacy interest in nondisclosure of their home addresses, even though "home addresses often are publicly available through sources such as telephone directories and voter registration lists." *Id*. (holding that such addresses were exempt from disclosure under FOIA Exemption 6).

Instead, we must examine whether state employees have a privacy interest in their birth dates. The Attorney General, in his initial response to the Comptroller, highlighted many of the issues implicated by the News' request:

> Identity theft, without question, is becoming one of the fastest growing criminal and consumer offenses in the twenty-first century. *See Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d 530, 535 (N.Y. Sup. 2004) (denying defendant's motion for summary judgment in negligence action against insurer who disclosed consumers' names, social security numbers, and date of birth information). The Federal Trade Commission estimated 27.3 million reported cases of identity theft, causing billions of dollars in damages, in the five years preceding early 2003. *Id.* (citing Thomas Fedorek, *Computers + Connectivity = New Opportunities for Criminals and Dilemmas for Investigators*, 76-Feb. N.Y. St. B.J. 10, 15 (February, 2004)). A date of birth obtained in combination with other data about an individual can be used in at least two harmful ways: to obtain sensitive information about an individual and to commit identity theft. *See Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d at 535-36; *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 539 (Ariz. 1998).

Tex. Att'y Gen. OR2006-01938, at 3.

> Nor can we ignore the reality of technology. As one court has noted:
>
> "There is a difference between electronic compilation in searchable form and records that can only be found by a diligent search through scattered files. The former presents a far greater threat to privacy" (Kurtz, *The Invisible Becomes Manifest: Information Privacy in a Digital Age*, 38 WASHBURN LJ 151, 155-56 [1998]).

> Moreover, on-line data brokers often collect information taken from public records and allow access in a searchable form, which potentially leads to abuse by identity thieves.

Goyer v. N.Y. State Dep't of Envtl. Conservation, 813 N.Y.S.2d 628, 639 (N.Y. Sup. Ct. 2005) (holding that personal information (including dates of birth) in hunting licenses were exempt from disclosure under state's "unwarranted invasion of personal privacy" standard). The Attorney General has observed that preventing identity theft "begins by reducing the number of places where your personal information can be found," *Preventing Identity Theft*, FIGHTING IDENTITY THEFT, www.texasfightsidtheft.gov/preventing.shtml, and he concedes that "[c]ertain public information websites allow individuals to locate [highly sensitive personal] information in any state, including Texas, using only a name and date of birth," Tex. Att'y Gen. OR2006-01938, at 3. One commentator has noted that "information deemed useful to be publicly available under the old transactions technology" is now "too available in a world of wired consumers." Alessandro Acquisti & Ralph Gross, *Predicting Social Security Numbers From Public Data*, 106 PROC. NAT'L ACAD. SCI. 10975, 10980 (2009), *available at* www.pnas.org/content/106/27/10975.full.pdf (citation omitted); *cf. Reporters Comm.*, 489 U.S. at 764 ("[T]here is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."). For this reason, almost every major consumer protection entity, whether governmental or non-governmental (including the Federal Trade Commission, the President's Task

Force on Identity Theft, and the Texas Attorney General's website), advises citizens against publicizing their dates of birth or using their dates of birth as pin numbers and passwords.[8]

Moreover, there is little question that one "can take personal information that's not sensitive, like birth date, and combine it with other publicly available data to come up with something very sensitive and confidential."[9] Hadley Legget, *Social Security Numbers Deduced From Public Data*, WIRED SCI. (July 6, 2009, 5:05 PM) http://www.wired.com/wiredscience/2009/07/predictingssn/. As the Arizona Supreme Court has observed:

> With both a name and birth date, one can obtain information about an individual's criminal record, arrest record . . . driving record, state of origin, political party affiliation, social security number, current and past addresses, civil litigation record, liens, property owned, credit history, financial accounts, and, quite possibly, information concerning an individual's complete medical and military histories, and insurance and investment portfolio.

Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co., 955 P.2d 534, 539 (Ariz. 1998); *see also Data Tree, LLC v. Meek*, 109 P.3d 1226, 1238 (Kan. 2005) ("An individual's social security number, date of birth, and mother's maiden name are often used as identifiers for financial accounts or for obtaining access to electronic commerce."); *Hearst Corp. v. State*, 882 N.Y.S.2d 862, 875 (N.Y. Sup.

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[8] *See, e.g.*, *Fighting Back Against Identity Theft*, FEDERAL TRADE COMMISSION, http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/deter-detect-defend.html; Graeeme R. Newman & Megan M. McNally, *Identity Theft Literature Review*, NATIONAL INST. J. 210459 (Jan. 27-28, 2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/210459.pdf; PRESIDENT'S TASK FORCE ON IDENTITY THEFT, COMBATING IDENTITY THEFT: A STRATEGIC PLAN (2007), *available at* http://www.idtheft.gov/reports/StrategicPlan.pdf; *Preventing Identity Theft*, ATTORNEY GENERAL OF TEXAS, *available at* https://www.oag.state.tx.us/consumer/identity_theft.shtml; *Seven Main Points of Identification*, GET ID SMART, *available at* http://www.getidsmart.com/; *Working to Resolve Identity Theft*, IDENTITY THEFT RESOURCE CENTER, *available at* http://www.idtheftcenter.org/artman2/publish/c_tips/index.shtml.

[9] This apparently stems from the Social Security Administration's methods for assigning numbers, which is usually done shortly after a person's birth, and based in part on geography. Hadley Legget, *Social Security Numbers Deduced From Public Data*, WIRED SCI. (July 6, 2009, 5:05 PM) http://www.wired.com/wiredscience/2009/07/predictingssn/.

Ct. 2009) (concluding that "a reasonable person would find the disclosure of their precise birth dates, taken together with their full name and other details of their State employment, to be offensive and objectionable"). In fact, "[a] key element from the privacy standpoint is the inclusion of residents' date of birth." Ira Bloom, *Freedom of Information Laws in the Digital Age: The Death Knell of Informational Privacy*, 12 RICH. J.L. & TECH. 9, at *19 (2006).

Additionally, the Legislature has provided that state employees' social security numbers, home addresses, and personal family information are excepted from disclosure. TEX. GOV'T CODE § 552.117(a); *see also id.* § 552.147(a) (excepting from disclosure the social security numbers of all "living person[s]"). As the Attorney General has noted, "it is universally agreed that SSNs are at the heart of identity theft and fraud, and in today's Internet world where information—including public government information—can be instantly and anonymously obtained by anyone with access to the worldwide web, the danger is even greater." Op. Tex. Att'y Gen. No. GA-519, at 6 (2007). These protections would be meaningless, however, if birth dates were disclosed, because those dates, when combined with name and place of birth, can reveal social security numbers. *See* Bob Moos, *How Secure is Your Social Security Data?*, DALLAS MORNING NEWS, Aug. 9, 2009, at 1D. "[I]t is by now well established that the disclosure of an individual's full birth date, taken together with his or her full name and the details of employment, can be used to facilitate identity theft, thereby resulting [in] both economic and personal hardship to individuals." *Hearst Corp.*, 882 N.Y.S.2d at 875; *see also Scottsdale*, 955 P.2d at 536 (noting that "birth dates are in fact private" and "may be used to gather great amounts of private information about individuals").

These concerns have led courts to conclude that birth dates implicate substantial privacy interests. *See, e.g.*, *Oliva v. United States*, 756 F.Supp. 105, 107 (E.D.N.Y. 1991) (holding that, under FOIA Exemption 6, "dates of birth[] are a private matter, particularly when coupled with . . . other information" and disclosure "would constitute a clearly unwarranted invasion of personal privacy"); *cf. Schiller v. INS*, 205 F.Supp.2d 648, 663 (W.D. Tex. 2002) (holding that, under FOIA Exemption 7(c) "the privacy interest of these individuals in their names and identifying information, i.e. birth date, outweighs the public interest in disclosure"); *Creel v. U.S. Dep't of State*, 1993 U.S. Dist. LEXIS 21187, at *19-*20 (E.D. Tex. 1997) (noting that, under FOIA Exemption 7(c), private citizen had a "significant personal privacy interest in her home address, birth date, social security number, and telephone number").

We conclude that the state employees have a "nontrivial privacy interest" in their dates of birth. *Dep't of Defense*, 510 U.S. at 501. And while we may not inquire into the requesting party's intended use of the information,[10] we must nevertheless examine "the only relevant public interest in the . . . balancing analysis—the extent to which disclosure of the information sought would 'shed

[10] *See* TEX. GOV'T CODE 552.222; *A&T Consultants v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995) (noting that FOIA also "bars the government from examining the motives or interests of the party requesting the release of public information"); *see also Reporters Comm.*, 489 U.S. at 771 (holding that "the identity of the requesting party has no bearing on the merits of his or her FOIA request"); *U.S. Dep't of Air Force, Scott Air Force Base v. Fed. Labor Relations Auth.*, 838 F.2d 229, 232-234 (7th Cir. 1988) (noting that requestor's use was irrelevant, as "[t]he special needs of one, or the lesser needs of another, do not matter," because "[t]he first person to get the information may give it away; so if one person gets it, 'any person' may. 'The Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein.'" (quoting *Sears*, 421 U.S. at 149)).

light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'"[11]

Like the FOIA, the PIA is based on the notion that citizens are entitled "to complete information about the affairs of government and the official acts of public officials and employees." TEX. GOV'T CODE § 552.001(a); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (observing "the basic policy that disclosure, not secrecy, is [FOIA's] dominant objective"). Thus, personal information about employees that does not shed light on their official actions would not further the purpose of the statute. *Cf.* Op. Tex. Att'y. Gen. GA-519, at 5 (noting that "[r]edacting SSNs from responsive records requested under the PIA will not detract from the PIA's purpose of making publicly available information about the affairs of government and the official acts of public officials and employees because the release of SSNs does not serve the purpose of openness in government in any foreseeably significant way"). In *Reporters Committee*, the U.S. Supreme Court clarified FOIA's statutory purpose as a means for citizens to know "what their government is up to":

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Reporters Committee, 489 U.S. at 773.

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[11] *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994) (quoting *Reporters Comm.*, 489 U.S. at 773).

Employee birth dates shed little light on government actions. The News points out that the public has an interest in monitoring the government, and birth dates could be used to determine whether governmental entities like school districts and hospitals have hired convicted felons or sex offenders. But when a protected privacy interest is at stake, the requestor must identify a sufficient reason for the disclosure; mere allegations of the possibility of wrongdoing are not enough. *See Favish*, 541 U.S. at 172 (noting that, when protected privacy interests are at stake, the requestor must "establish a sufficient reason for the disclosure").[12] A requestor must show that the public interest sought to be advanced is significant—an interest more specific than having the information for its own sake—and that the information sought is likely to advance that interest. *Id.* at 172; *cf. Indus. Found.*, 540 S.W.2d at 685 (requiring requestor to show that private information is of "legitimate public concern" before disclosure may be required under PIA section 552.101). This is distinct from identifying "the particular interest of the requestor, and the purpose for which he seeks the information," considerations that are irrelevant to our analysis, except to the extent "the requestor's interest in the information is the same as that of the public at large." *Indus. Found.*, 540 S.W.2d at 685.

But "[i]f a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information." *Dep't of State v.*

[12] Although *Favish* was decided under FOIA Exemption 7(c), the relevant public interest is the same under Exemption 6. *See Dep't of Defense v. Fed. Labor Relations Auth.,* 510 U.S. at 496 n.6 (noting that the identification of the relevant public interest is the same under Exemptions 6 and 7(c); the exceptions "differ in the magnitude of the public interest required to override the respective privacy interests"); *see also Checkbook v. U.S. Dep't of Health and Human Servs.*, 554 F.3d 1046, 1055 n.4 (D.C. Cir. 2009).

Ray, 502 U.S. 164, 179 (1991) (rejecting, under FOIA Exemption 6, asserted public interest in ascertaining veracity of government reports, as requestors had not produced "a scintilla of evidence . . . that tend[ed] to impugn the integrity of the reports"); *Consumers' Checkbook v. U.S. Dep't of Health and Human Servs.*, 554 F.3d 1046, 1054 n.5 (D.C. Cir. 2009) (holding that a "'mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests'" protected by FOIA Exemption 6) (quoting *McCutchen v. U.S. Dep't of Health and Human Servs.*, 30 F.3d 183, 188 (D.C. Cir. 1994))). The Supreme Court has criticized the idea that bare allegations would suffice to require disclosure. *Favish*, 541 U.S. at 174 (holding that "the requester must establish more than a bare suspicion" and "must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred"). Because the News has produced no evidence supporting government wrongdoing, the public interest in disclosure here is negligible.[13] *See Dep't of Defense*, 510 U.S. at 498 (noting that providing employees' home address would reveal little or nothing about employing agencies or their activities).

Moreover, the Comptroller has relinquished the full name, age, race, sex, salary, agency, job description, work address, date of initial employment, pay rate, and work hours of every agency employee. The Comptroller also showed that, using only the information produced, each employee was distinguishable without resort to date of birth. *See Horowitz v. Peace Corps*, 428 F.3d 271, 278

[13] Of course, should the News obtain such evidence, it would be free to make another PIA request for the relevant birth dates.

(D.C. Cir. 2005) ("The availability of information through other sources lessens the public interest in its release through FOIA.").

We hold that the state employees' privacy interest substantially outweighs the negligible public interest in disclosure here. Consistent with the federal courts and those in other states, we conclude that disclosing employee birth dates constitutes a clearly unwarranted invasion of personal privacy, making them exempt from disclosure under section 552.102.

V. Attorney's fees

The trial court denied the News' request for attorney's fees, and the court of appeals affirmed. 244 S.W.3d at 641-42. The News petitioned this Court for review, arguing that attorney's fees were proper under Government Code section 552.323(b) and the Declaratory Judgment Act. *See* TEX. GOV'T CODE § 552.323(b); TEX. CIV. PRAC. & REM. CODE § 37.009.

A. Government Code § 552.323(b)

Section 552.323(b) authorizes a court to award reasonable attorney's fees incurred by a party "who substantially prevails." TEX. GOV'T CODE § 552.323(b). Before a trial court may award fees, the statute also requires that a number of other conditions be met: that the action be brought under section 552.324; that the trial court consider whether the public information officer who withheld that information had a reasonable basis in law for doing so; and that the trial court examine whether the litigation was brought in bad faith. *See id.* The parties dispute whether these requirements were satisfied here. We need not reach those issues, however, because the Comptroller has prevailed.

B. Declaratory Judgment Act

Under the Declaratory Judgment Act, a trial court may award reasonable and necessary attorney's fees "as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. The News contends that it is entitled to fees because it is a prevailing party and because the Comptroller has no legal basis to support her position. Because, as outlined above, we disagree, we conclude that the trial court did not abuse its discretion in refusing to award the News attorney's fees, and we affirm the judgment denying the News' request for attorney's fees. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

VI. Conclusion

Identity theft cost Americans almost $50 billion in 2007 alone. RACHEL KIM, JAVELIN STRATEGY & RESEARCH, 2007 IDENTITY FRAUD SURVEY REPORT 1 (2007), *available at* http://graphics8.nytimes.com/images/blogs/freakonomics/pdf/Javelin%20Report%202007.pdf. In 2004, Texas ranked fourth among states for the number of identity-theft complaints reported to the Federal Trade Commission. OFFICE OF CONSUMER CREDIT, LEGISLATIVE REPORT REVIEWING IDENTITY THEFT AND SENATE BILL 473 (2004), *available at* http://www.occc.state.tx.us/pages/publications/Identity_Theft.pdf. The State of Texas employs over a quarter of a million people, 144,000 of whom represent the true parties involved in this controversy. When the privacy rights of a substantial class of innocent third parties are affected by one of our decisions, we have a duty to pay them heed. And because the state employees' privacy interest substantially outweighs the minimal public interest in the information, we hold that disclosure of state employee birth dates would constitute a clearly unwarranted invasion of personal privacy, and such dates are excepted from disclosure under section 552.102(a). *See* TEX. GOV'T

CODE § 552.102. We reverse in part and affirm in part the court of appeals' judgment and render judgment declaring that the public employee birth dates at issue in OR2006-01938 are excepted from disclosure under section 552.102. *See* TEX. R. APP. P. 60.2(a), (c).

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Wallace B. Jefferson
Chief Justice

Opinion Delivered: December 3, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0172

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, PETITIONER,

v.

ATTORNEY GENERAL OF TEXAS AND THE DALLAS MORNING NEWS, LTD., RESPONDENTS

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

Argued September 10, 2009

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, dissenting in part and concurring in part.

The dates of birth of state government employees that the Dallas Morning News requested from the Comptroller in this case are defined as public information—information legitimately collected and maintained by the State of Texas. There is no dispute of that fact. Unlike social security numbers, the Legislature has not expressly excepted birth dates from disclosure.[1] And no one disagrees with the proposition that public information should be handled in ways that provide protections against identity theft. But we should not forget that the more public information is

[1] Bills submitted in the 2009 legislative session that would prevent disclosure of birth dates of public employees failed to pass. Tex. S.B. 1912, 81st Leg., R.S. (2009); Tex. H.B. 4207, 81st Leg., R.S. (2009). So there is still no express preclusion on the requested disclosure of birth dates. There are protections of birth dates in specific circumstances that are not before the Court in this case. *See, e.g.*, TEX GOV'T CODE § 552.1176; TEX ELEC. CODE § 13.004(d)(4).

protected from disclosure to the people, the less information the public gets from the government that serves it. It is a fundamental policy of the State of Texas that its citizens are entitled "at all times to complete information about the affairs of government and the official acts of public officials and employees." *City of Dallas v. Abbott*, 304 S.W.3d 380, 388 (Tex. 2010) (Wainwright, J., dissenting) (citing TEX. GOV'T CODE § 552.001).

The public information at issue has proven quite useful not only to inform citizens of the actions of the government and to arm citizens to hold the public sector accountable but also to highlight problems in the public sector that should be addressed. For example, the information sought in this case, which had been released to the News in prior years, was used to determine that a number of Texas Youth Commission employees had some criminal background and that some employees of a local school district had criminal records.[2] Dates of birth were used to confirm the identities of public employees with criminal records and avoid confusing them with the wrong persons with similar or the same names. These are legitimate uses of public employees' birth dates, which the Court precludes by its opinion.

Obviously, whether to disclose or keep secret public information involves a balancing of policy objectives, including the public's right to transparency in governmental affairs and privacy concerns of public employees. In promulgating the Texas Public Information Act (PIA), the Legislature balanced disclosure and protection of different types of public information about public

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[2] Ryan McNeill, *ID Theft vs. Public Record: State May Hide Workers' Birthdates, but It Sells Same Info on All Drivers*, [hereinafter "McNeill, *ID Theft vs. Public Record*"] DALLAS MORNING NEWS, May 7, 2009, at A1, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/yahoolatestnews/stories/050709dnprodateofbirth.3fcf743.html (reporting that "private companies spent nearly $50 million during the last fiscal year" buying Texas drivers' data, including birth dates).

employees. The Legislature decided that dates of birth are public information, as the Court and the Comptroller concede. And the State of Texas for years has sold birth date information of Texas public employees to businesses, and the parties point to no problems with identity theft arising from those prior disclosures.[3] To address illicit *use* of personal information, the Legislature promulgated the Identity Theft Enforcement and Protection Act with criminal penalties for those parties who engage in identity theft.[4] Before today, no Texas court had held that dates of birth of public employees are confidential or otherwise precluded their disclosure.

This case is fundamentally about which institution decides that balance—the Legislature or the judiciary. Our task in this case is not to decide if we think these birth dates should be confidential. We are charged with deciding whether the Legislature excepted dates of birth of public employees from disclosure under section 552.101 of the PIA. I would hold that it did not. The Court reaches the contrary result, not under section 552.101, but under section 552.102, an issue the Comptroller did not raise in this Court and expressly disclaims as a basis for its position that the information should be protected. I respectfully dissent.

I. Factual and Procedural History

On November 18, 2005, an editor with the Dallas Morning News (News) submitted a PIA request to the Comptroller for an electronic copy of the Texas state employee payroll database. The

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[3] *See* McNeill, *ID Theft vs. Public Record*, at A1.

[4] The Identity Theft Enforcement and Protection Act prohibits use of personal identifying information without the other person's consent to obtain anything of value in the other person's name. TEX. BUS. & COM. CODE § 521.051. Personal identifying information includes name, social security number, date of birth or government-issued identification number. *Id.* § 521.002(a)(1). The penalties for violation may be civil or, in certain types of credit card theft, criminal. *Id.* §§ 521.151, 522.002.

News requested the full name, birth date, job description, agency, salary, race, sex, work address, date of initial employment, pay rate, and work hours of every state employee in the database. Contending that birth dates, certain salary deductions, and an employee's designation as a peace officer are protected from disclosure under sections 552.101 and 552.108 of the Act, the Comptroller submitted a timely request for an attorney general decision determining whether those portions of the public information should be withheld. *See* TEX. GOV'T CODE § 552.301 (mandating that a governmental body that wishes to withhold requested information from public disclosure that it considers to be excepted from disclosure under Subchapter C of the PIA must timely ask for a decision from the attorney general). In an open records letter ruling, the Attorney General concluded that public employees' dates of birth are public information that must be disclosed to the requestor. *See* Tex. Att'y Gen. OR2006–01938.

Arguing that the release of the birth dates could lead to identity theft, the Comptroller filed suit seeking declaratory relief from compliance with the Attorney General's letter ruling as provided by Subchapter H of the PIA. TEX. GOV'T CODE §§ 552.321–.327. The News intervened in the lawsuit and moved for partial summary judgment on the ground that birth dates are not protected from disclosure by the PIA. The Comptroller responded with a cross-motion for summary judgment, contending that the information is protected as a matter of law or, alternatively, that the issue is fact-intensive and not appropriate for summary judgment. The trial court granted the News's motion for partial summary judgment and denied the Comptroller's cross-motion for summary judgment. The Comptroller appealed arguing to withhold the information under 552.101 and 552.102.

The Comptroller argued that the trial court erred in granting the News's partial summary judgment because the release of a public employee's birth date, in conjunction with his name, is a violation of the employee's right of privacy. The court of appeals held that the disclosure of state employees' birth date information would not violate any privacy interests, and thus was not protected under section 552.101 of the PIA. 244 S.W.3d 629, 635 (Tex. App.—Austin 2008, pet. granted). In this Court, however, the Comptroller narrowed her argument and only argues that the birth dates are "confidential" under section 552.101 of the PIA and thus excepted from the PIA's mandatory disclosure requirement. Section 552.101 provides that information is excepted from disclosure "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. The Comptroller argues that birth date information is excepted as confidential "by judicial decision" because the Texas common law privacy tort of intrusion upon seclusion, described by this Court in *Billings v. Atkinson*, creates a protected privacy interest in this information, thus making it confidential. 489 S.W.2d 858, 859–60 (Tex. 1973).

II. Preservation and Waiver: The Court Decides This Case on an Issue the Comptroller Expressly Disclaimed.

The Comptroller was asked at oral argument specifically if her position included arguments under PIA section 552.102 and employing a balancing test to determine whether to protect the birth dates from disclosure. Her counsel responded:

> Answer: I would say that we are going solely under 552.101 . . . . We are not advocating a balancing test . . . we don't believe a balancing test is applicable under this particular state regulatory system.

* * *

Question: There's an argument that 552.102 is a stronger argument, but you're not making that argument. I want to be clear about that.

Answer: We are not making that argument.

* * *

Answer: [A] balancing test . . . is simply not found in the PIA.

The Comptroller's position on this issue could not be clearer. She unequivocally limited her argument for nondisclosure of birth dates of public employees "solely" to section 552.101 of the PIA and shunned the application of a balancing test. Nevertheless, the Court renders its decision not on section 552.101 of the PIA, but instead bases its decision on section 552.102 and creates a balancing test to determine that the information is excepted from disclosure. The Comptroller presents neither argument and disclaims both. She did not cite, much less discuss, section 552.102 in her petition for review or brief on the merits, and, at oral argument, specifically disclaimed any reliance on either section 552.102 or a balancing test.

On occasion, a case may present a court with a fine line between adjudication and advocacy. However, we should remain on the side of adjudicating only the issues presented, absent rare and extraordinary situations not presented here. *See In re B.L.D.*, 113 S.W.3d 340, 351–55 (Tex. 2003) (recognizing that courts may review fundamental error not assigned). The Legislature and the Attorney General have both decided as a matter of policy not to protect dates of birth from disclosure, yet the Court shuns its substantial precedents on waiver to reach the contrary policy. Moreover, the information the Court protects has already in large part been disclosed. In the summary judgment evidence, the News submitted an affidavit stating that it has received the state

employees database, including the dates of birth of the employees, from the Comptroller's office in response to previous requests for the information.

Our rules of procedure require that a party present the issues to be decided by this Court in the party's petition and brief on the merits. *See* TEX. R. APP. P. 33.1, 53.2(f), 53.4, 55.2(f). "[I]ssues not presented in the petition for review and brief on the merits are waived." *Guitar Holding Co., L.P. v. Hudspeth Cnty. Underground Water Conservation Dist. No. 1.*, 263 S.W.3d 910, 918 (Tex. 2008) (citing TEX. R. APP. P. 53.2(f)); *Ramos v. Richardson*, 228 S.W.3d 671, 673 (Tex. 2007) (per curiam) (refusing to address an argument raised in petitioners' merits brief because petitioners failed to advance it in their petition for review); *City of Austin v. Travis Cnty. Landfill Co.*, *L.L.C.*, 73 S.W.3d 234, 241 n.2 (Tex. 2002) (precluding consideration of an argument raised below because the respondent disclaimed the argument before the Supreme Court). "[W]e should not stretch for a reason to reverse that was not raised." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010). This is true even for constitutional issues. *In re B.L.D.*, 113 S.W.3d at 350–51. We make rare exceptions to our waiver rules to review "fundamental error," but only in situations related to preservation of jurisdictional error and in "quasi-criminal" juvenile delinquency cases. *Id.* The Comptroller does not allege fundamental error.

Waiver rules exist for good reasons. "[A]dhering to our preservation rules isn't a mere technical nicety; the interests at stake are too important to relax rules that serve a critical purpose." *In re L.M.I.*, 119 S.W.3d 707, 708 (Tex. 2003). The rules, among other things, prevent unfair surprise of the other party and constrain us to perform our constitutional task to decide only existing cases or controversies. *See B.L.D.*, 113 S.W.3d at 350; *L.M.I.*, 119 S.W.3d at 710–11; *see also* TEX.

CONST. art. II, § 1; *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 164 (Tex. 2004) (recognizing that the separation of powers clause in article II, section 1 of the Texas Constitution bars this Court from issuing advisory opinions). I dare say that the News will be surprised by the Court's deciding this case on a ground it was not given an opportunity to address.

This is not a typical waiver case in which a party argues that it did raise the issue or that it is fairly included in its petition and briefs. Not only did the Comptroller choose not to raise or analyze the exception from disclosure under section 552.102 in her petition or brief, her counsel affirmatively disclaimed the argument at least four times at oral argument. *See supra* at 5–6 ("[W]e are going solely under 552.101 . . . . We are not making that argument . . . . We are not advocating a balancing test. . . . [A] balancing test . . . is simply not found in the PIA.").

The Court holds that the Comptroller properly withheld birth dates under section 552.102. The Court's reasoning for reaching the section 552.102 issue is: "Given the unique circumstances of this case and the third party interests at stake, we conclude that the Comptroller's petition 'fairly include[s]' an argument that section 552.102 applies. TEX. R. APP. P. 53.2(f)." ___ S.W.3d ___ (further citation omitted). That's an odd conclusion when the beneficiary of the ruling expressly disclaims that very argument. In essence, the Court holds that the Comptroller's section 552.101 argument fairly includes the section 552.102 argument, and it will consider arguments the Comptroller did not make.

The Court indicates it acts on behalf of public employees who do not have a voice in this dispute. But, the PIA provides a mechanism for the public employees affected to submit their arguments to the Attorney General when considering a governmental body's decision not to disclose

public information. The governmental entity shall make a good faith attempt to notify such persons in writing of the request for the attorney general decision and may then submit a brief with reasons why the information should be withheld. TEX. GOV'T CODE § 552.305. Although the record indicates that the mechanism was not utilized, the Court's holding makes the provision irrelevant in this case.

I disagree that the Court should disregard our rules on waiver to decide an issue specifically and repeatedly disclaimed by the Comptroller, without any allegation of fundamental error. Because the Court decides this case under section 552.102, I note some concerns with that analysis. I also analyze this dispute under the statutory framework raised and argued by the parties—whether section 552.101 excepts state employees' dates of birth from disclosure.

III. Risk of Identity Theft

Applying Section 552.102 and adopting a new balancing test articulated by the U.S. Supreme Court in *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976), the Court holds that the state employees' privacy interests substantially outweigh the public interest in disclosure. ___ S.W.3d ___.

A. The Sky Is Not Falling: The Court's Characterization of the Privacy Interest at Stake Is Overstated.

Section 552.102 excepts from disclosure information in a personnel file "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." TEX. GOV'T CODE § 552.102. The *Rose* test, adopted today by this Court, balances an individual's privacy claims against the public interest in disclosure. *Rose*, 425 U.S. at 372. Because Congress only excepted

from disclosure information that constitutes a "clearly unwarranted" invasion of privacy, federal courts have noted that the balance of disclosure interests should be tilted in favor of disclosure and creates a "heavy burden" for an agency invoking the exception. *E.g., Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1128 (D.C. Cir. 2007) (noting that the CIA had the burden to show withholding is necessary under the federal Freedom of Information Act (FOIA) Exemption 6 for records pertaining to a deceased CIA officer, and no privacy interest was articulated); *Wash. Post Co. v. U.S. Dep't of Health & Hum. Servs.*, 690 F.2d 252, 275 (D.C. Cir. 1982). The Court jumps on the bandwagon of a number of other states, or federal trial courts, that have held that birth date information may constitute a clearly unwarranted invasion of personal privacy. While I am sensitive to the privacy rights of public employees and understand the concern of the Court, I believe the Court's reasoning is misguided for three fundamental reasons.

First, the Legislature has not protected dates of birth of public employees from disclosure. Birth dates by themselves are not private or damaging.[5] The Court and the parties have recognized as much. And the Restatement of Torts recognizes as much. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b ("Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth . . . ."). And even the U.S. Supreme Court has recognized as much, reasoning that information that is "not intimate" such as "place of birth, date of birth, date of marriage, employment history, and comparable data" may be restricted only in the disclosure of a "personnel" or "medical" file that itself would be a clearly unwarranted invasion

[5] Unless, of course, one is sensitive about one's age. But if that were the case, then the Comptroller's release of employees' ages would be just as offensive as birth dates.

of personal privacy. *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982). "'[C]ongress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its "personnel" files.'" *Id.* at 601 (quoting *Rose*, 425 U.S. at 372).

The Court points to no evidence that disclosure of birth dates would be offensive to a reasonable person, would cause harm, or would lead to personal harm. Instead, the Court holds, much more tenuously, that disclosure is harmful because birth date information, "taken together" with other information, may "be used to facilitate identity theft," or may be used to locate a Social Security number, which may be used to facilitate identity theft. ___ S.W.3d ___ (quoting *Hearst Corp. v. State*, 882 N.Y.S.2d 862, 875 (N.Y. Sup. Ct. 2009)). In other words, the harm is not in the disclosure of the birth date, but in the possibility that some evildoer *may use* a birth date to gain other information (such as a social security number) which he or she then *may* use to commit identity theft. Never before has the Court held that information is not subject to disclosure under the PIA because the information may lead to other information that may be used to cause harm. By that logic, much information of a personal nature would be immune from disclosure—names of public employees, dates of employment, home addresses. This sort of information, taken together with other information, might lead to the employee's social security number and possibly to identity theft. While the state has outlawed identity theft, and individuals may sue when others misappropriate their private data, the Court should not allow subversion of the open-government policies of the PIA under the risk that some of the public information may later be misused.

As written, FOIA Exemption 6 (substantially identical to section 552.102) likely only protects the information itself, not its derivative uses or problems down the line.

> Perhaps FOIA would be a more sensible law if the Exemption applied whenever disclosure would "cause," "produce," or "lead to " a clearly unwarranted invasion of personal privacy—though the practical problems in implementing such a provision would be considerable. That is not, however, the statute Congress enacted. Since the question under 5 U.S.C. § 552(b)(6) is whether "disclosure" would "constitute a clearly unwarranted invasion of personal privacy"; and since we have repeatedly held that FOIA's exemptions "'must be narrowly construed,'" *it is unavoidable that the focus, in assessing a claim under Exemption 6, must be solely upon what the requested information reveals, not upon what it might lead to*. That result is in accord with the general policy of FOIA, which we referred to in *United States Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 771 (1989) that the particular purposes for which a request is made are irrelevant.

U.S. Dep't of State v. Ray, 502 U.S. 164, 180–81(1991) (Scalia, J., concurring) (emphasis added) (citations and quotations omitted). Birth date information is not highly intimate or embarrassing; birth dates are not generally included in "the type of information that a person would ordinarily not wish to make known about himself or herself." *Assoc. Press. v. U.S. Dep't of Def.*, 554 F.3d 274, 292 (2d Cir. 2009). If it had been raised, the text of section 552.102 does not require consideration of derivative harm.

Interestingly, the Texas Identity Theft Enforcement and Protection Act requires businesses to take reasonable steps to protect "sensitive personal information" collected or maintained by the business in the regular course. TEX. BUS. & COM. CODE § 521.052. Sensitive personal information is generally an individual's name combined with any one or more of the following: social security number, driver's license number or government-issued identification number, or account, credit card or debit card number. *Id.* § 521.002(a)(2). The Legislature has not extended this obligation to dates of birth. *Id.*[6] Notifications to others required by the Identity Theft Act for breaches of computer

[6] "Personal identifying information," different from "sensitive personal information," includes date of birth. TEX. GOV'T CODE § 521.002(a)(1).

security apply only when sensitive personal information is reasonably believed to have been acquired by an unauthorized person. *Id.* § 521.053. Again, the Legislature did not include dates of birth in the same risk category with sensitive personal information.

Second, the support relied on by the Court is far from conclusive. The Court repeats general statements about birth date information but cites to and provides no real data supporting the proposition that birth date information truly leads to identity theft, or that the disclosure of someone's birth date, in and of itself, has caused any person to be the victim of identity theft. The Court points to a study from Carnegie-Mellon University in which researchers were able, with *60% accuracy*, to determine *the first six digits* of a person's Social Security number when given the person's date and location of birth, for persons *born after 1989*. ___ S.W.3d ___ (citing Alessandro Acquisti & Ralph Gross, *Predicting Social Security Numbers From Public Data*, 106 PROC. NAT'L ACAD. SCI. 10975 (2009)). Other scholarly and media reports and court cases cited by the Court repeat the findings of the Acquisti and Gross study, or make general statements that compilation of data can be more helpful to identity thieves than data spread out through multiple sources, or that simply assert that birth dates may lead to more private data. Neither the Court nor the Comptroller cite any study positively demonstrating that release of birth date information with a person's name, without a social security number, makes it significantly more likely that the person will be the victim of identity theft. And neither cites any study evidencing an identity theft that began through birth date information being disclosed in a public database.

Credible studies indicate that dates of birth are not the *sin qua non* of identity theft. The most common form of identity theft arises from credit card theft or check fraud, and the least common

form arises from stolen social security numbers or other personal information. Herb Weisbaum, *Identity Theft Problem: The Facts Behind the Fear*, MSNBC (Oct. 21, 2010, 7:42 AM) http://www.msnbc.msn.com/id/39763386/ns/business-consumer_news/ (last visited Dec. 1, 2010) (recognizing a recent report that the "most common form of identity theft is . . . 'old-fashioned credit card theft or check fraud,'" with nearly all respondents to the survey recognizing that their identity theft was due to stolen or misused credit or debit cards, and that a hijacking of an identity using a "Social Security number and other basic information" is the "least common form of identity fraud"). A recent study published by the United States Federal Trade Commission reports that a thief's use of a social security number with a new name and *false* date of birth currently accounts for 80–85 percent of all identity fraud. Lanny Britnell, Identity Theft America, *The Changing Face of Identity Theft*, at 1, *available at* http://www.ftc.gov/os/comments/creditreportfreezes/534030-00033.pdf; *see also* SYNOVATE, FEDERAL TRADE COMMISSION—2006 IDENTITY THEFT SURVEY REPORT 30 (Nov. 2007), *available at* http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf (recognizing that 56 percent of victims did not know how their information was stolen, and of the 43 percent of victims who did, many knew the thief personally, had their identities stolen through a purchase or other transaction, from a wallet, from a company that had the information, from hacking, "phishing," the mail, or some other way). The Attorney General's office indicated its strong desire to eliminate identity theft, but candidly acknowledged at argument that there is "no firm evidence" that disclosure of birth dates facilitates identity theft and confirmed that the PIA is not intended to prohibit illegal use of data.

The information here is public information, and the connection between the information being disclosed and the actual harm sought to be prevented is too tenuous to support the judicial restrictions on disclosure of the public's information proffered by the Court when that same public information has been shown to have positive benefits.

Finally, the privacy interest at stake here is lower than the Court makes it out to be because much if not most of the information at issue has been distributed by the state for years—in some instances for a fee. Texas sells personal information under the Motor Vehicle Records Disclosure Act, including names, addresses, dates of birth and driver's license numbers, to businesses, insurance companies, private investigatory agencies and other third parties, for a number of specified purposes. *See* TEX. TRANSP. CODE §§ 730.007, .011 (permitting agencies to disclose the personal information and to charge "reasonable fees for such disclosure"); Ryan McNeill, *ID Theft vs. Public Record* at A1 (reporting that "private companies spent nearly $50 million during the last fiscal year" buying Texas drivers' data). To the extent that Texas government employees have driver's licenses, it is likely that their dates of birth have either already been released by a Texas governmental agency or sold to private entities, or both. Even though the Transportation Code section has been in place for nearly 13 years, there is no evidence submitted indicating that information disclosed through that mechanism has been a hotbed of identity theft. The State has sold similar information on Texans with driver's licenses for years, suggesting that arguments that the same information about a subset of Texans will greatly increase the possibility of identity theft ring hollow. This Act regulates the use of motor vehicle information and allows disclosure of birth dates of all Texas drivers, whether public or private employees, to many private parties capable of disguising their true identities. And

an authorized recipient of this personal information is authorized to resell or redisclose that information for permitted purposes. TEX. TRANSP. CODE § 730.013(b).[7] It is ironic that the Court cuts off free access by the public under the PIA to the same public information that is being sold under the Transportation Code.

B. The News Has Established a "Sufficient Reason" for the Disclosure.

When personal privacy interests are at stake, the second part of the *Rose* balancing test is whether the requestor has established a "sufficient reason for the disclosure." *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). The requesting party must establish "that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance the interest. Otherwise, the invasion of privacy is unwarranted." *Id.*

The Court holds that the News loses under the balancing test because it "has produced no evidence supporting government wrongdoing [and therefore] the public interest in disclosure is negligible." ___ S.W.3d ___ (citation omitted). I disagree; the public interest in the information is demonstrated. The News argues that it wishes to use the date of birth information to determine whether particular governmental employees who work in or near children are convicted felons or sex offenders. The News asserts a two-fold need for birth dates: first, to determine whether governmental entities are employing sex offenders or felons in jobs that may put children or the public at large at risk, and second, to confirm the identity of a particular governmental employee who

[7] Prior to 2001, the Transportation Code permitted agencies to distribute birth date information "for bulk distribution for surveys, marketing, or solicitations" provided that persons had the opportunity to opt-out and prohibit the uses. TEX. TRANSP. CODE § 730.007, *repealed* by Acts 2001, 77th Leg., R.S., ch. 1032.

may have a criminal record. The News advises that some 2,000 employees of the State of Texas have the same first and last name. It is reasonable and desirable that the media check the identities of these employees before publishing unflattering facts about them. The News further advises that, through its research, it was able to disclose in an article that over 250 employees of the Texas Youth Commission were convicted felons. *See* McNeill, *ID Theft vs. Public Record*, at A1. These are legitimate and productive uses of dates of birth.

No one doubts that citizens of this state have a right to know the names of those who work for them in government. Neither party, nor the Court, disputes that the News has the right to such names, and the names are easily available, in electronic form, on various governmental websites and other databases. *See, e.g.*, Capitol Complex Telephone System (CCTS) Directory, http://www.dir.state.tx.us/ccts/directory/index.html (last visited Dec. 1, 2010) (listing the names, titles, and telephone numbers of employees working in or near the Capitol). On the other hand, no one argues that state employees give up all of their privacy rights simply by working as an unelected public servant. But the disclosure of the birth dates in this case may actually help preserve government workers' privacy, by ensuring that any organization—media, political, watchdog, financial, governmental, or otherwise—does not falsely accuse those governmental employees of being persons they are not. This is different from the data that the government collects about non-governmental employees. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Free Press*, 489 U.S. 749, 773 (1989) (concerning a FOIA request for criminal records of an individual investigated by the FBI). The information at issue may actually prevent mistaken identities and will help keep the government accountable for those they hire.

But fundamentally, under the summary judgment procedures, the Court errs by requiring evidence in the record that the News had no reason to provide in the first place. At the trial court in her summary judgment motion, the Comptroller argued that section 552.101 excepted birth dates from disclosure under *Industrial Foundation* and the Texas common law. Although the Comptroller mentioned that other courts had applied a balancing test, she did not request that one be applied to the facts here. Likewise, at the court of appeals, the Comptroller once again argued that section 552.101 excepts public employees' birth dates from disclosure under common law and constitutional concepts. *Rose*, and the balancing test now adopted by the Court, was not cited as a basis for the Comptroller's position before the court of appeals issued its opinion. The Comptroller cited section 552.102 only in her reply brief at the court of appeal to support the position that sections 552.101 and 552.102 "protect the same privacy interests." There was no need for the News to submit any evidence for the trial court summary judgment proceedings showing a "significant" public interest that the information is "likely to advance." ___ S.W.3d ___ (citing *Favish*, 541 U.S. at 172). We cannot expect a party to present evidence for a standard unknown, unargued, and unapplied below—another reason we enforce our waiver rules. *E.g.*, *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam) (noting that a party should not "surprise his opponent on appeal by stating his complaint for the first time"). At a minimum, this Court should remand the case to the trial court for the parties to develop the record and argue the balancing test under the new standard. TEX. R. APP. P. 60.2(f), 60.3 (providing that this Court may remand for further proceedings in light of changes in the law or in the interest of justice); *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993) ("We have broad discretion to remand for a new trial in the interest of justice where it appears a party

may have proceeded under the wrong legal theory. Remand is particularly appropriate where the losing party may have presented his or her case in reliance on controlling precedent that was subsequently overruled." (citations omitted)). Here, the successful party at trial relied on a standard that the Court has now abandoned. Certainly the News should have an opportunity to make its case under the new formula.

For these reasons, I would not decide this case under section 552.102 and the Court's balancing test. As discussed below, under the issue asserted by the Comptroller, birth dates are not confidential under section 552.101.

IV. Disclosure of Birth Date Information

The Comptroller argues that public employees' dates of birth are "confidential" under section 552.101 of the PIA. It is useful to understand the PIA's structure.

A. The Legislature's Comprehensive Statutory Scheme for Government Transparency

The stated policy of the PIA is to promote open government. "[I]t 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(a). "Public information" includes information that is "collected, assembled, or maintained . . . in connection with the transaction of official business" by a governmental body. *Id.* § 552.002(a). In general, the PIA is to be liberally construed in favor of granting requests for information. *Id.* § 552.001(b). Relative to other freedom of information laws, such as FOIA, the Texas PIA more strongly favors transparency and open government. *See*, *e.g.*, *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) ("Unlike the FOIA, our

Act contains a strong statement of public policy favoring public access to governmental information and a statutory mandate to construe the Act to implement that policy and to construe it in favor of granting a request for information.").

While the PIA provides an ardent statutory edict for openness in state affairs, the Legislature has protected specified information from disclosure in Subchapter C of the PIA. TEX. GOV'T CODE §§ 552.101–.151. A governmental agency is not required to disclose information excepted under Subchapter C of the PIA, but it may disclose such information if it chooses, "unless the disclosure is expressly prohibited by law or the information is confidential under law." *Id*. § 552.007. Some examples of information that the PIA excepts from disclosure include information that would give advantage to a competitor or bidder, information in a student record at an educational institution funded wholly or partly by state revenue, and the social security number of a living person. *Id*. §§ 552.104, .114(a), .147(a).

In addition to these exceptions, the Legislature created a special category of information in the PIA— "confidential" information. Information that is considered "confidential" is a subset of the information excepted from disclosure. *See id*. § 552.101. But, unlike information that is merely excepted from disclosure, the PIA *prohibits* the disclosure of confidential information and makes its disclosure a crime punishable by: "(1) a fine of not more than $1,000; (2) confinement in the county jail for not more than six months; or (3) both the fine and confinement." *Id.* § 552.352. The Legislature specifically identifies in the PIA some information that is considered confidential.[8]

[8] Examples include the home address, home telephone number, or social security number of peace officers, county jailers, and current or former employees of the Texas Department of Criminal Justice, among others; any identifying information of a crime victim or claimant, including address and social security number; credit card, debit

Outside of the PIA, no fewer than 100 Texas statutes classify information as confidential for purposes of the PIA.[9] Other statutes specifically limit the scope of "confidential" information. For example, while section 552.147 generally excepts social security numbers of living persons from disclosure, it also explicitly states that it "does not make the social security number of a living person confidential under another provision of this chapter or other law." TEX. GOV'T CODE § 552.147. Other statutes, however, do make social security numbers contained in specified records "confidential" and subject to criminal penalties, such as on voter registration applications and in law enforcement personnel records. *See* TEX. ELEC. CODE § 13.004(c); TEX. GOV'T CODE § 552.1175.

The text of the PIA indicates that the Legislature intended the word "confidential" to have a specific meaning in the PIA, separating highly sensitive information that is *prohibited* from disclosure (such as the home address of a peace officer) from sensitive information that is merely *excepted* from disclosure (such as information in a student record). The PIA thus creates three distinct categories of public information—information required to be disclosed, information excepted from mandatory (but not voluntary) disclosure, and confidential information that is

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card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body; and the social security number of applicants for a marriage license. TEX. GOV'T CODE § 552.1175, .132, .136, .141.

[9] An electronic search of Texas statutes returned 101 results in which certain information was "confidential" and "not subject to disclosure" under the PIA. Examples include certain records of teacher certification examinations (TEX. EDUC. CODE § 21.048(c-1)), student loan borrower records (TEX. EDUC. CODE § 57.11(d)), child welfare service reports, (TEX. FAM. CODE § 264.613(a)), DNA records stored in the Department of Public Safety DNA database (TEX. GOV'T CODE § 411.153(a)), the responses to exit interviews provided by departing government workers (TEX. GOV'T CODE § 651.007(g)), certain nursing home records (TEX. HEALTH & SAFETY CODE § 242.134(a)), certain carrier contracts in the workers' compensation system, (TEX. INS. CODE § 1305.154(a)), social security numbers provided by applicants for professional licenses (TEX. OCC. CODE § 59.001), pending proposals for comprehensive development agreements in transportation projects (TEX. TRANSP. CODE § 370.307(a)), and certain information relating to mineral, oil, and gas leases (TEX. NAT. RES. CODE §§ 52.190(d), 53.081(d)).

prohibited from disclosure and subject to criminal penalties.[10] It is within this statutory framework that I consider whether birth dates of public employees are considered to be part of this third category of "confidential information."

As a policy matter, it is admittedly undesirable to release information about public employees that could lead to identity theft. States typically have overwhelmingly addressed this issue by legislation. The Attorney General noted that a number of other states have excepted birth date information in personnel files from open records request disclosures in statutes.[11]

The Texas Legislature has balanced the competing interests of open government and individual privacy in deciding which types of public information are excepted from disclosure in the

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[10] The PIA may not criminalize all distribution of information designated "confidential" in some manner in the statute. The penal provision of the PIA makes distribution of information "considered confidential under the terms of this chapter" a misdemeanor punishable by fine, confinement in county jail, or both. TEX. GOV'T CODE § 552.352(a). Information "considered to be confidential by law" is "excepted" from the disclosure requirements of section 552.021. *Id.* § 552.101. We have not addressed whether the "confidential" information referred to in section 552.021 is treated the same as the "confidential" information in section 552.352(a).

[11] Tex. Att'y Gen. OR2006-01938 (citing State Practices for Classification of Date of Birth in Public Records (on file with Open Records Division of the Office of the Attorney General)):

> According to the survey, states with an "unwarranted invasion of personal privacy" exemption in their open records law protect date of birth information. *See* HAW. REV. STAT. § 92F-13(1); 5 ILL. COMP. STAT. 140/7(1)(b); KAN. STAT. ANN. § 45-221(30); KY. REV. STAT. § 61.878(1)(a); MASS. GEN. LAWS ANN. ch. 66, § 10; MICH. COMP. LAWS ANN. § 15.243; N.H. REV. STAT. ANN. § 91-A:5; N.J. STAT. ANN. § 47:1A-10; N.Y. PUB. OFF. § 89(2)(b)(iv); UTAH CODE ANN. § 63-2-302(2)(d). One state grants date of birth protection under a similar standard, "unreasonable invasion of personal privacy." *See* S.C. CODE ANN. § 30-4-40(a)(2). Several states protect date of birth information under an exception for employee "personnel" records. *See* ARIZ. ADMIN. CODE R2-5-105; DEL. CODE ANN. tit. 29 § 10002; KAN. STAT. ANN. § 45-221(4); IOWA CODE § 22.7; MD. CODE ANN., STATE GOV'T § 10-616(h)(2)(I); MISS. CODE ANN. § 25-1-100; N.D. CENT. CODE § 44-04-18.1; OR. REV. STAT. § 192.502(3); R.I. GEN. LAWS § 38-2-2; VA. CODE ANN. § 2.2-3705.1(1); WYO. STAT. ANN. § 16-4-203. The state of Georgia protects employee date of birth information under a statute that specifically makes confidential date of birth information "if technically feasible at a reasonable cost." *See* GA. CODE ANN. § 50-18-72(a)11.3(A). Several states protect date of birth information by unofficial policy. Finally, the state of Washington protects date of birth information under a state plan to curtail identity theft.

PIA. This Court previously acknowledged that this is the Legislature's role. "Although we recognize that there is often much potential for abuse of information in government records, the task of balancing the public's right of access to government records against potential abuses of the right has been made by the Legislature; the court's task is to enforce the public's right of access given by the Act." *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 675 (Tex. 1976). The Legislature excepted information for privacy reasons if it has been "considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. We are constrained therefore not to apply a different, or more expansive meaning of "confidential" for purposes of section 552.101 because it might be good policy to prevent the disclosure of certain information. Our task is to enforce the public's right to access given by the PIA and adhere to the language of section 552.101 and the statutory scheme set up by the PIA, "not to second-guess the policy choices" that inform these statutes. *See McIntyre v. Ramirez*, 109 S.W.3d 747, 748 (Tex. 2003).

Nowhere in the PIA has the Legislature specifically excepted general birth date information, birth date information combined with other identifying information, or information the disclosure of which is feared may lead to identity theft. The Legislature has enacted specific statutes to protect against identity theft. *See* TEX. BUS. & COM. CODE §§ 72.004, 521.001–523.053. My inquiry, then, is whether birth date information is "confidential" pursuant to section 552.101.

B. Exception to Mandatory Disclosure of Public Information Under Section 552.101 of the PIA

Section 552.101 of the PIA states that public information is excepted from the broad disclosure "requirements of Section 552.021 if it is information considered to be confidential . . . by judicial decision." Relying on the opinion in *Industrial Foundation*, the Comptroller argues that the release of birth date information would violate the tort of intrusion upon seclusion. Therefore, she argues, such information has been considered to be confidential by the judicial decision in *Billings v. Atkinson* and is excepted from disclosure by section 552.101.

This Court's only interpretation of section 552.101 was the subject of a fractured opinion (a three justice plurality, two separate concurrences, and a four justice dissent) in *Industrial Foundation of the South v. Texas Industrial Accident Board.*, 540 S.W.2d 668, 675 (Tex. 1976). Despite the various views of the *Industrial Foundation* Court, there was unanimity on the proposition that the PIA does not give courts the discretion to secret certain information from the public by creating new categories of confidential information not protected by the terms of the PIA. In *Industrial Foundation*, the petitioners argued that the Legislature intended section 552.101 "to delegate to the courts a duty to determine what information should be excepted from disclosure as confidential by balancing in each case the interest in privacy against the interest in disclosure, thus creating a common-law privacy doctrine which would except the information involved 'by judicial decision.'" *Indus. Found.*, 540 S.W.2d at 681. The Court rejected that argument:

> We do not believe that a court is free to balance the public's interest in disclosure against the harm resulting to an individual by reason of such disclosure. This policy determination was made by the Legislature when it enacted the statute. "All

> information collected, assembled, or maintained by governmental bodies" is subject to disclosure unless specifically excepted. We decline to adopt an interpretation which would allow the court in its discretion to deny disclosure even though there is no specific exception provided.

Id. at 681–82; *see also id*. at 691–92 (Reavley, J., dissenting, joined by Steakley, Pope, and Denton, JJ.) ("I agree with everything in the opinion of the majority except what is written to support the holding that information on the nature of the injury. . . may be 'deemed confidential' . . . . It was not the intention of the Legislature to turn over the administration of the Open Records Act to the judiciary."). In other words, courts do not have the discretion to classify information as confidential on an *ad hoc* basis; confidentiality of public information is to be determined by the terms of the Act. To sanction the creation by courts of new types of protected information not identified in the PIA would open the way for judicial amendment of the PIA. Accordingly, I would interpret section 552.101 to deem confidential information that was held by judicial decision to be confidential at or before the time of the provision.

This approach would leave policy-making to the Legislature. It would also provide certainty in the definition of confidential information so that governmental entities and public officials may act accordingly. If courts decided which public information is considered to be confidential on an *ad hoc* basis, according to what individual jurists believe to be good policy, a court could decide to make birth date information confidential under the PIA in order to further the policy goal of preventing identity theft. An immediate consequence of this might be the attachment of criminal penalties for the disclosure, apparently even if unintended, of birth date information. *See* note 10. Government officials may be forced to redact all birth date information disclosed to the public or

face criminal penalties, even in records that are decades old and currently made available to the public in, for example, all the state courthouses in the two hundred fifty-four counties around the state.[12] By limiting these determinations to information that has already been considered confidential, such as information the disclosure of which would violate the public disclosure tort, legislators can enact policy in a careful, deliberate manner, often preventing the substantial practical problems that may accompany judicial overstepping.

A majority of the court in *Industrial Foundation* looked to the Court's decision in *Billings v. Atkinson*, which recognized the tort of public disclosure of private facts, in order to determine whether the information at issue had been considered to be "confidential." "We recognized in *Billings* . . . that an individual has the right to be free from 'the publicizing of one's private affairs with which the public has no legitimate concern . . . .'" *Indus. Found.*, 540 S.W.2d at 682. The Court interpreted "confidential" according to its common dictionary definition—"'known only to a limited few: not publicly disseminated: PRIVATE, SECRET.'" *Id*. at 683. The majority reasoned that the characteristics of the dictionary definition of confidential are "precisely the characteristics which information protected by this branch of the tort invasion of privacy must have. And, we believe that it is this type of information which the Legislature intended to exempt from mandatory disclosure . . . ." *Id*. *Billings* explained that certain information is protected by the tort of public

[12] An example of the scope of unintended consequences and potential harm of such a seemingly simple act of making birth date information confidential was shown recently when an attorney general opinion opined that social security numbers are confidential. Tex. Att'y Gen. Op. No. GA-0519 (2007). District and county court clerks around the state uniformly petitioned for relief because their provision of access to the social security numbers in the public records of the numerous courts they serve potentially subjected them to criminal penalties. The Attorney General's office abated its opinion and the Legislature swiftly and unanimously passed a statute expressly providing that Social Security numbers are not confidential. *See* TEX. GOV'T CODE 552.147(a).

disclosure. The majority opinion in *Industrial Foundation* held that the Legislature intended to protect this same information from disclosure under the PIA by excepting it as confidential (or private) by the judicial decision in *Billings*. Thus, "if a governmental unit's action in making its records available to the general public would be an invasion of an individual's freedom from the publicizing of his private affairs, then the information in those records should be deemed confidential by judicial decision." *Id.*

Reasonable minds may differ today as to the meaning of the phrase "information considered to be confidential . . . by judicial decision."[13] But the Legislature has not amended this section of the PIA in the thirty-seven years since that decision, and *Industrial Foundation* is still our sole authority on the meaning of section 552.101. TEX. GOV'T CODE § 552.101; *see* Acts June 14, 1973, 63rd Leg., R.S., ch. 424, § 3, 1973 Tex. Gen. Laws 1112, 1113. Respecting the Legislature's prerogative and the precedential value of the opinion in *Industrial Foundation*, I would not extend it to create unintended exceptions under the PIA.

C. The Comptroller's Argument for Analysis under the Intrusion upon Seclusion Tort

The Comptroller asks this Court to expand *Industrial Foundation* by holding that if the disclosure of information would lead to a violation of the privacy tort of intrusion upon seclusion,

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[13] *See*, *e.g.*, *Indus. Found.,* 540 S.W.2d at 688 (Daniel, J., concurring) ("It is my opinion that . . . the Legislature did not intend [the Open Records Act] to be as broad as it was written."); *id*. (Johnson, J., concurring) ("Since a majority of this court has concluded that Rule 9.040 of the Industrial Accident Board is invalid . . . this writer joins Justice Doughty's opinion insofar as it requires that certain information in the Board's records be withheld to protect the common law right of privacy of compensation claimants."); *id*. at 691–92 (Reavley, J., dissenting) ("I doubt that we are entitled to read this intent into the Legislature's use of 'confidential.' . . . It was not the intention of the Legislature to turn over the administration of the Open Records Act to the judiciary. I would construe our question of legislative intent in favor of disclosure and then await legislative change if the result is objectionable. This area of confidentiality can best be mapped by statute.").

such information should be considered to be confidential under section 552.101. The Comptroller acknowledges that no judicial decision has ever held that information is confidential because disclosure of such would violate the tort of intrusion upon seclusion, and no Texas court has ever held that the intrusion upon seclusion tort can be violated by a disclosure of information. *Cf. Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993); *Cornhill Ins. PLC v. Valsamis*, *Inc.*, 106 F.3d 80, 85 (5th Cir. 1997) (applying Texas law); *Clayton v. Wisener*, 190 S.W.3d 685, 696–97 (Tex. App.—Tyler 2005, no writ); *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 6 (Tex. App.—Corpus Christi 1991, no writ).

The elements of the torts of public disclosure of private facts (as applied in *Industrial Foundation*) and intrusion upon seclusion contain important differences. The public disclosure tort has two elements: "information [is] deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public." *Indus. Found.*, 540 S.W.2d at 685. On the other hand, the intrusion tort's elements are: "(1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, which (2) would be highly offensive to a reasonable person." *Valenzuela*, 853 S.W.2d at 513.

The Comptroller attempts to expand section 552.101 to include as confidential by judicial decision information that would be protected by the intrusion upon seclusion tort. For this argument to succeed, the Court would have to redefine the intrusion tort to include the disclosure of birth date information that *may* lead to an intrusion (i.e. by an identity thief). This connection is difficult to make. For instance, if a burglar enters your house, reads through your private files and papers, and

steals your credit cards and identification, is the publisher of the phone book from which the burglar obtained your address liable for the intrusion? The answer is, of course, no. The tort of intrusion upon seclusion can only be committed by "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns." *Id*. The tort is not committed by one who unintentionally facilitates the possible intrusion. Moreover, no Texas court has ever found a violation of the intrusion tort absent a physical intrusion or surveillance upon the seclusion of another, and the Comptroller does not cite any judicial decision that has ever made such a determination. *Cf. Clayton*, 190 S.W.3d at 696–97; *Wilhite,* 812 S.W.2d at 6; *Valsamis,* 106 F.3d at 85.

Industrial Foundation is very clear that the question is whether the disclosure itself, not the requestor's use of the information, would violate an individual's right to privacy. "[I]f a *governmental unit's action* in making its records available to the general public would be an invasion of an individual's freedom from the publicizing of his or her private affairs, then the information in those records should be deemed confidential by judicial decision under . . . the Act." *Indus. Found*, 540 S.W.2d at 683 (emphasis added). Justice Reavley, in dissent, also agreed that the Legislature is "concerned with confidentiality entirely apart from the manner of use of the information." *Id*. at 692 (Reavley, J., dissenting). The analysis should focus on whether the government's disclosure would violate the individual's privacy. For PIA tenets to apply based on the use rather than nature of the information would require government entities to obtain the reasons why the information is requested. This would contradict the clear prohibition in the PIA against government inquiries into the purpose for the requested information. TEX. GOV'T CODE § 552.222; *A & T Consultants, Inc.*

v. Sharp, 904 S.W.2d 668, 676 (Tex. 1995) (holding that courts may neither consider purpose of the request nor inquire into how the requestor intends to use the information).

The Comptroller's argument for extending *Industrial Foundation* to include an alternative analysis of section 552.101 using the intrusion upon seclusion tort is not supported by the provisions of the PIA.

D. Application of the Industrial Foundation *Test*

The *Industrial Foundation* test holds that information "is excepted from mandatory disclosure . . . as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public." *Indus. Found.*, 540 S.W.2d at 685. I first analyze whether birth date information is highly intimate or embarrassing information, the publication of which would be highly objectionable to a reasonable person.

The Court in *Industrial Foundation* analyzed information contained in workers' compensation files to determine whether it satisfied this element of the tort. The Court reasoned that some information would satisfy the "highly intimate" standard, including:

> a claim for injuries arising from a sexual assault of a female clerk following an armed robbery; a claim on behalf of illegitimate children for benefits following their father's death; a teacher's claim for expenses of a pregnancy resulting from the failure of a contraceptive device; claims for psychiatric treatment of mental disorders following work related injuries; claims for injuries to sexual organs, and for injuries stemming from an attempted suicide; and claims of disability caused by physical or mental abuse by co-employees or supervisors.

Id. at 683. This is the deeply personal, highly intimate type of information the tort is meant to protect from publicity.

The Second Restatement of Torts also gives examples of information that rises to the level of highly intimate or embarrassing. "Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget." RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). Contrasting this private information, the Restatement notes, "there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the *date of his birth*, the fact of his marriage, [or] his military record . . . ." *Id.* (emphasis added). The U.S. Court of Appeals for the Fifth Circuit, interpreting Texas law, came to the same conclusion:

> However, none of these items of information — middle initial, age, street address, job title — can be characterized under Texas law as "private" and "highly intimate or embarrassing facts about a person's private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities." Texas invasion of privacy law in this respect has been guided by Prosser, *Law of Torts* § 117 (4th ed. 1971) and Restatement (Second) of Torts § 652D. Prosser, *supra*, states "'[t]he plaintiff cannot complain when . . . publicity is given to matters such as the *date of his birth*.'" *Id*. § 117 at 858 . . . . The Restatement (Second) of Torts . . . is to the same effect . . . "[t]here is no liability for giving publicity to facts about the plaintiff's life . . . such as the *date of his birth* . . . ."

Johnson v. Sawyer, 47 F.3d 716, 732–33 (5th Cir. 1995) (citing *Indus. Found.*, 540 S.W.2d at 682–84) (further citations omitted) (emphasis added). If disclosure of birth dates is held to violate the public disclosure of private facts tort, the consequence to tort law would be to potentially allow recovery for damages whenever someone publicizes information as "highly intimate" as a birth date. The public disclosure tort was not meant to protect such information from publicity. *See Johnson*, 47 F.3d at 732; RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

The Comptroller argues that the combination of birth date information and other identifying information, such as a name, rises to the level of "highly intimate" justifying exclusion from disclosure. She argues that because birth date information, in conjunction with this other information, can be *used* to access sensitive information, such as a social security number, birth date information itself is sensitive information. The argument casts too broad a net and misses the essence of the inquiry. How otherwise public information is used after disclosure does not guide the analysis of whether it is confidential and excepted from disclosure under section 552.101. *See Indus. Found.* 540 S.W.2d at 692 (Reavley, J., dissenting) ("I read the Legislature to be concerned with confidentiality entirely apart from the manner of use of the information."). If that analysis were determinative, much of the defined public information would be withheld because of a possibility or likelihood of it being used itself or in conjunction with other public information for inappropriate or illegal purposes. For example, that a person's business address, race, and gender could be *used* by a stalker to identify and commit an assault at the person's workplace, does not convert the work address into confidential information. In addition, the public disclosure tort focuses on the character of the information itself. Is it "highly intimate" such that its mere publication would be objectionable to a reasonable person? *See Indus. Found.* 540 S.W.2d at 683. How the information is used once it is made public, while of obvious concern to policy-makers who balance the risks in writing statutes, does not drive the analysis in interpreting section 552.101. Accordingly, public employees' birth dates do not constitute highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person.

This information is also of legitimate public concern. The News contends that birth date information ensures accuracy in identifying subjects of newspaper articles, and the information has also been used to determine that criminal offenders have been employed by some public school systems. The Comptroller has offered no response to this contention. In any event, birth date information does not satisfy the first requirement of the public disclosure analysis, that the information contain highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. I would conclude that the disclosure of birth date information does not violate the public disclosure tort, and birth date information is not confidential under section 552.101 of the PIA.

E. The Balancing Test

The Court applies a balancing test following the U.S. Supreme Court's decision in *Rose v. Department of the Air Force*, 425 U.S. 352 (1976), to hold that birth date information is confidential under our PIA. In that case, the Supreme Court interpreted Exemption 6 of FOIA, which excepts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* at 370 (quoting 5 U.S.C. § 552(b)(6)). The Court held that the language "clearly unwarranted invasion of personal privacy" in the statute was a Congressional mandate for courts to balance "the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Id.* at 372.

As noted above, the pivotal language in FOIA Exemption 6 is not contained in section 552.101 of the Texas PIA. The Court should not create a balancing test for the section 552.101

analysis when the language from which the test arises ("clearly unwarranted invasion of personal privacy") is not contained in the relevant provision. *See Indus. Found.*, 540 S.W.2d at 681–82 ("Absent [a provision with the "clearly unwarranted" language], we do not believe that a court is free to balance the public's interest in disclosure against the harm resulting [from] disclosure."). Therefore, the Court's balancing test is inappropriate here, and we should leave for another day whether a balancing test is appropriate for any determination under section 552.102, or, as the Austin Court of Appeals held in *Hubert v. Harte-Hanks Texas Newspapers, Inc.* twenty-seven years ago, that the test is the same under both sections. 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

IV. Fee Shifting

The News also challenges the trial court's refusal to award attorney's fees under the PIA and the Uniform Declaratory Judgment Act as an abuse of discretion, based upon language in two sections of the PIA that were in effect at the time of this suit but have subsequently been amended. TEX GOV'T CODE §§ 552.323(b), .324.[14] The Court did not address the issue at length because the

[14] Each of these sections has since been amended, clarifying the attorney's fees issue. The Legislature moved the cause of action from Texas Government Code section 552.353(b)(3) to 552.324. The amended section 552.324 now reads:

> (a) The only suit a governmental body may file seeking to withhold information from a requestor is a suit that:
>
> (1) is filed in a Travis County district court against the attorney general in accordance with Section 552.325; and
>
> (2) seeks declaratory relief from compliance with a decision by the attorney general issued under Subchapter G.
>
> (b) The governmental body must bring the suit not later than the 30th calendar day after the date the governmental body receives the decision of the attorney general determining that the requested information must be disclosed to the requestor . If the governmental body does not bring suit within that period, the governmental body shall comply with the decision of the attorney general. If a governmental body wishes to preserve an affirmative defense for its officer for public information as provided in Section 552.353(b)(3), suit must be filed within the deadline provided in Section 552.353(b)(3) .

Comptroller prevailed. ___ S.W.3d ___. In my view, the News should prevail, but I would hold that the trial court was correct in exercising its discretion in deciding whether to assess attorney's fees against the Comptroller. Because the Comptroller had a legitimate concern over privacy issues relating to the disclosure of birth date information under the PIA, she had a reasonable basis in law to refuse disclosure of the information and the litigation was brought in good faith. Accordingly, I concur in the judgment of the Court on the attorney's fees issue.

V. Conclusion

The Legislature's comprehensive statutory scheme that guarantees public access to government information through the PIA, with selected exceptions, does not make birth dates confidential under section 552.101. Because the Court reaches a different result based on an issue the Comptroller waived, I respectfully dissent. I concur in the judgment on the attorney's fees issue.

Dale Wainwright
Justice

Opinion Delivered: December 3, 2010

TEX. GOV'T CODE § 552.324. Section 552.353(b)(3) now reads:

> (b) It is an affirmative defense to prosecution under Subsection (a) that the officer for public information reasonably believed that public access to the requested information was not required and that:
>
> > (3) not later than the 10th calendar day after the date of receipt of a decision by the attorney general that the information is public, the officer or the governmental body for whom the defendant is the officer for public information filed a petition for a declaratory judgment against the attorney general in a Travis County district court seeking relief from compliance with the decision of the attorney general, as provided by Section 552.324, and the cause is pending.

Id. § 552.353(b)(3). And section 552.323(b) now explicitly allows the trial court to shift fees in an action under section 552.324:

> (b) In an action brought under Section 552.324, the court may assess costs of litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails. . . .

Id. § 552.323(b). This new statutory scheme should prevent the confusion found here from occurring in future cases.

IN THE SUPREME COURT OF TEXAS

NO. 08-0215

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS, PETITIONER,

v.

THE ESTATE OF IRENE ESTHER ARANCIBIA BY ITS BENEFICIARY VICTOR HUGO VASQUEZ-ARANCIBIA, VICTOR HUGO VASQUEZ-ARANCIBIA, INDIVIDUALLY, AND CECILIA VASQUEZ-ARANCIBIA, INDIVIDUALLY, RESPONDENTS

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

Argued September 10, 2009

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE LEHRMANN.

JUSTICE JOHNSON delivered a dissenting opinion, joined by JUSTICE WAINWRIGHT.

This appeal turns not on the merits of the underlying claim but on whether prerequisites to suit have been satisfied, and if not, whether an interlocutory appeal is available. Because the relevant requirements were met here, and because interlocutory appeal was appropriate, we affirm the court of appeals' judgment.

I. Background

Irene Arancibia underwent laparoscopic hernia surgery at Parkland Memorial Hospital on September 4, 2003. The procedure was performed by two resident physicians, Drs. Curtis and Yau, and attended by Dr. Watson, an assistant professor of surgery in the gastrointestinal/endocrine division, Department of Surgery, at U.T. Southwestern in Dallas. Arancibia was discharged later that day. Two days later, she presented to Parkland's emergency room with severe abdominal pain. Emergency surgery revealed that, during the hernia repair, her bowel had been perforated in two places, leading to acute peritonitis with sepsis. She died the following day.

Her family initially sued the operating physicians but later nonsuited them, naming Southwestern and Parkland in their stead. Southwestern moved to dismiss the case, contending that the trial court lacked jurisdiction because the Arancibias failed to provide timely notice of their claim. The trial court denied the plea, and the court of appeals affirmed. 244 S.W.3d 455, 462. We granted the petition for review, 52 Tex. Sup. Ct. J. 910, 911 (June 26, 2009), and now affirm.

II. The 2005 amendment to Government Code section 311.034 applies.

Absent a waiver, governmental entities, like Southwestern, are generally immune from suits for damages. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). The Texas Tort Claims act waives immunity from suit "to the extent of liability created by [the Act]." TEX. CIV. PRAC. & REM. CODE § 101.025(a). To take advantage of this waiver, the plaintiffs must notify the government of a claim within six months. *Id*. § 101.101(a). The notice must reasonably describe the injury, the time and place of the incident, and the incident itself. *Id*. But this formality is not required "if the governmental unit has actual notice that death has occurred [or] that the claimant has received some injury." *Id*. § 101.101(c).

In 2004, we concluded that the notice requirements were mandatory, rather than jurisdictional, and that there was no interlocutory appellate jurisdiction over an order that denied a governmental unit's jurisdictional plea based on a claimant's failure to provide notice. *See Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 365-66 (Tex. 2004). Shortly thereafter, the Legislature amended the Government Code to provide that "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." TEX. GOV'T CODE § 311.034. The 2005 amendment did not change those statutory prerequisites; it merely stated the consequence of a failure to comply with them. The amendment took effect September 1, 2005. Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 2, 2005 Tex. Gen. Laws 3783, 3783.

Southwestern then filed a plea to the jurisdiction, contending that it had no pre-suit notice (formal or actual) of the Arancibias' claim. The court of appeals did not reach this issue, because it held that this case, filed years before the 2005 amendment, was not governed by its terms—an issue that has led to considerable disagreement among our courts of appeals (including a split between Houston's First and Fourteenth Districts).[1]

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[1] 244 S.W.3d at 459 (holding that amendment was "not retroactive"); *compare Howard v. Harrell*, No. 07-08-0013-CV, 2009 Tex. App. LEXIS 2322, *10-11 (Tex. App—Amarillo Mar. 31, 2009, no pet.)(amendments to section 311.034 do not apply to case filed before statute enacted), *and Dallas Cty. v. Posey*, 239 S.W.3d 336, 339 (Tex. App.—Dallas 2007) (same), *vacated on other grounds*, *Dallas Cty. v. Posey*, 290 S.W.3d 869, 872 n.1 (Tex. 2009) (per curiam), *and Tex. Tech Univ. Health Sci. Ctr. v. Lucero*, 234 S.W.3d 158, 166 (Tex. App.—El Paso 2007, pet. denied) (same), *and Baylor Coll. of Med. v. Hernandez*, 208 S.W.3d 4, 8 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (same) *with Tex. Dep't of Criminal Justice v. Thomas*, 263 S.W.3d 212, 218 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (amendment applies to case filed before enactment), *and Med. Arts Hosp. v. Robison*, 216 S.W.3d 38, 41 (Tex. App.—Eastland 2006, no pet.) (same), *and Tex. Dep't of Criminal Justice v. Simons*, 197 S.W.3d 904, 906-07 (Tex. App.—Beaumont 2006, no pet.)(same); *see also* Hon. Scott Brister, *Is It Time To Reform Our Courts of Appeals?*, 40 HOUS. LAW. 22, 25 (Mar./Apr. 2003) (noting that "conflicting interpretations of the law are especially acute in Houston, due both to the volume of litigation in Harris County and the larger uncertainty as to who will hear the

If the amendment applies, a lack of notice would be jurisdictional, meaning that the trial court could dispose of the case on a plea to the jurisdiction, and a governmental unit would have a statutory right of interlocutory appeal if the plea failed. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8); *Loutzenhiser*, 140 S.W.3d at 359. If the requirement is merely mandatory, a governmental unit would be entitled to summary judgment, but the trial court's denial of that motion could not be immediately appealed, and the governmental unit could waive the issue. *Loutzenhiser*, 140 S.W.3d at 359.

The Legislature did not state whether the amendment applied prospectively or retroactively, nor did the act contain a savings clause for pending suits. The amendment merely provided that it "takes effect September 1, 2005." Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 2, 2005 Tex. Gen. Laws 3783, 3783. We presume the statute is prospective unless expressly made retrospective. *See* TEX. GOV'T CODE § 311.022.

But the prospectivity presumption does not necessarily answer whether the amendment governs this suit. Another rule provides that a court is to apply the law in effect at the time it decides the case. *See Bradley v. Sch. Bd. of the City of Richmond*, 416 U.S. 696, 711 (1974); *Tex. Mun. Power Agency v. Public Utils. Comm'n of Tex.*, 253 S.W.3d 184, 198 (Tex. 2007)(explaining that jurisdictional statutes should be applied as they exist at the time judgment is rendered); *see also Landgraf v. USI Film Prods*., 511 U.S. 244, 264 (1994)(noting the "apparent tension" between these two maxims). On closer examination, however, these two rules can be reconciled. *See Landgraf*,

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appeal"). This conflict gives us jurisdiction over this interlocutory appeal. TEX. GOV'T CODE § 22.225(c), (e).

511 U.S. at 273 (noting that "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations"). A statute does not operate retroactively merely because it is applied in a case arising from conduct predating the enactment. *Id*. at 269.

The prohibition against retroactive application of laws does not apply to procedural, remedial, or jurisdictional statutes, because such statutes typically do not affect a vested right. *Tex. Mun. Power Agency*, 253 S.W.3d at 198. Because application of a new jurisdictional rule generally takes away no substantive right but simply impacts a tribunal's power to hear the case, present law normally governs in such situations. *Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."). Thus, the Supreme Court of the United States has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id*. at 274. Statutes—like section 311.034—that do not deprive the parties of a substantive right and "speak to the power of the court rather than to the rights or obligations of the parties" may be applied to cases pending at the time of enactment. *Id*. at 274-75 (noting that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity") (citations omitted). We agree that it is appropriate to do so here, and such a construction is not retroactive. *See Quick v. City of Austin*, 7 S.W.3d 109, 132 (Tex. 1999).

Because the amendment applies, the purported failure to provide notice would deprive the trial court of jurisdiction, an issue that may be raised on interlocutory appeal. We now turn to Southwestern's contention that it lacked actual notice under the Act.

III. Southwestern had actual notice under Government Code section 101.101(c).

The Tort Claims Act states that formal notice is not required "if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged." TEX. CIV. PRAC. & REM. CODE § 101.101(c). But we have rejected an interpretation of actual notice that would "require[] *only* that a governmental unit have knowledge of a death, an injury, or property damage," because a defendant, like a hospital, would then have "to investigate the standard of care provided to each and every patient that received treatment," eviscerating the notice requirement's purpose. *See Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (emphasis added). Instead, we held that the governmental unit had to know of its "alleged fault producing or contributing to the death, injury, or property damage."[2] *Id*. This standard led to some confusion among our courts of appeals,[3] and we explained it further in *Texas Department of Criminal Justice v. Simons*, 140 S.W.3d 338 (Tex. 2004):

> What we intended in *Cathey* by the second requirement for actual notice 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.

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[2] We also held that actual notice required that the governmental unit know of the death, injury, or damages claimed, as well as the identity of the parties involved. *Cathey v. Booth*, 900 S.W.2d at 341. Southwestern does not dispute that it had notice of those matters in this case.

[3] *See Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 345-48 (Tex. 2004) (collecting cases).

Simons, 140 S.W.3d at 347. We observed that, if a governmental unit had this awareness of fault, along with the other information to which it was entitled under section 101.101(a), then requiring formal, written notice in addition would do nothing to further the statutory purposes of information gathering, settling claims, and preparing for trial.[4] *Id.*

We must, then, decide whether this record demonstrates Southwestern's subjective awareness of its fault, as ultimately alleged by the Arancibias, in producing or contributing to Arancibia's death. Although we have said that actual notice may be a fact question when the evidence is disputed, *id.* at 348, the pertinent facts here are uncontested. Dr. Watson was present during Arancibia's laparoscopic hernia repair. The day after her death, Watson emailed his immediate supervisor, who was chief of the division. The email begins, "I wanted to give you a heads up on a terrible outcome with a Surgery A patient." Watson described the surgery, which he believed went well, and Arancibia's return to the emergency room two days later. A laparotomy at that time "showed an unrecognized bowel injury," and Arancibia died the next day of multiple organ failure. Watson's email concluded, "I have already spoken with risk mgt."

Watson's supervisor responded, thanking Watson for the notification and mentioning that he would forward the email to the Chair of the Department of Surgery. The Chair responded and discussed several of the reasons patients might present with symptoms more than twenty-four hours after surgery. His email began, "I heard about this today."

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[4] We did not decide whether the TDCJ had actual notice of Simons's claim because, in a case decided the same day as *Simons*, we held that a claimant's failure to provide notice did not deprive the trial court of jurisdiction. *See Simons*, 140 S.W.3d at 348-49 (citing *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004)).

Dr. Watson surmised that the bowel perforation "was a result of a retraction injury out of the field of view." He stated that, in Arancibia's subsequent surgery, the physician observed a "through and through hole in the jejunum."[5] This was confirmed by the surgery records, which showed two perforations in the jejunum.

Shortly thereafter, upon reviewing Arancibia's treatment, Watson's supervisor concluded that "[a] technical error occurred during the original hernia operation resulting in a through-and-through small bowel injury" and that "[c]linical management contributed to" Arancibia's death. He stated that "[a]lthough unfortunate, this is a recognized complication of laparoscopic hernia surgery. No standard of care issues were identified upon review."

We conclude that this record shows that Southwestern was subjectively aware of its fault, as ultimately alleged by the Arancibias, in producing or contributing to Arancibia's death. Although Dr Watson's supervisor determined that there were no standard of care violations, he noted that a "technical error" was made, that clinical management contributed to Arancibia's death, and that the care "was not necessarily consistent with established standards." His ultimate conclusion that those errors were acceptable does not detract from his subjective awareness that medical error contributed to Arancibia's death. It is true that, although Watson said he had contacted risk management, there was no evidence of why he did so or what he reported. But Watson and his superiors knew that Arancibia had died of multiple organ failure caused by sepsis, that her jejunum had been perforated in two places (an injury that Watson surmised probably occurred when surgical tools were being

[5] The jejunum is "the first two fifths of the small intestine beyond the duodenum usu. merging almost imperceptibly with the ileum though somewhat larger, thicker-walled, and more vascular and having more numerous circular folds and fewer Peyer's patches." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1213 (2002).

retracted), and that risk management had been alerted. *Simons*, 140 S.W.3d at 348 (noting that subjective awareness will often be proved, "if at all, by circumstantial evidence").

Fault, as it pertains to actual notice, is not synonymous with liability; rather, it implies responsibility for the injury claimed. Thus, we have held that a police report showing that barricades were missing was not evidence of a governmental unit's subjective awareness of its fault after an accident, because "a private contractor or another governmental entity (such as the county or state) could have been responsible for the [missing barricades]." *City of Dallas v. Carbajal*, 53 Tex. Sup. Ct. J. 715, 716 (May 7, 2010) (per curiam). But that cannot be the case when the sole instrumentality of harm is the government itself. Here, the government has conceded that its surgical error perforated Arancibia's intestine, resulting in sepsis, multiple organ failure, and death. A jury may absolve the government of liability for that death for any number of reasons. But a government cannot evade the determination by subjectively refuting fault. We cannot conclude that Southwestern was unaware of its fault in producing or contributing to the injury alleged.

Under the dissent's approach, only an unqualified confession of fault would provide actual notice of the incident. The dissent would conclude that because Southwestern's internal investigation found no breach of the standard of care, Southwestern could not have been aware of its fault in producing or contributing to Arancibia's death. But "fault" as required under *Simons* is not fault as defined by *the defendant*, but rather "as ultimately alleged by *the claimant*." *Simons*, 140 S.W.3d at 347 (emphasis added). Here, the Arancibias alleged that physician error led to Arancibia's perforated intestine and, ultimately, her death. That Southwestern was aware that its surgeons' errors caused those perforations and that clinical management contributed to her death is undisputed.

The purpose of the notice requirement is "to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial." *Cathey*, 900 S.W.2d at 341. The notice here satisfied that requirement; "requiring formal, written notice in addition would do nothing to further the purpose of the statute." *Simons*, 140 S.W.3d at 347. Indeed, such notice would state exactly what Southwestern already knew. And while a bad result, in and of itself, is not evidence of a breach of the standard of care, the proof of actual notice in this case went beyond the mere fact of Arancibia's death. Viewing the evidence in the light most favorable to the Arancibias, as we must,[6] Southwestern had actual notice as required by section 101.101(c).

IV. We need not reach the question of whether a party may raise on interlocutory appeal an issue of sovereign immunity that it failed to raise in the trial court.

Even assuming that it had the requisite notice, Southwestern contends that the Arancibias did not substitute it as a party within thirty days of Dr. Watson's motion to dismiss under Tort Claims Act section 101.106. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(f). Because Southwestern failed to raise this argument in the trial court, the court of appeals refused to consider the issue on interlocutory appeal. 244 S.W.3d at 461. Southwestern challenges this conclusion and argues that because we have held that immunity implicates subject matter jurisdiction, we may reach on interlocutory appeal issues the parties failed to raise in the trial court. The Arancibias disagree, contending that immunity is different from standing, ripeness, or other matters involving subject matter jurisdiction, and interlocutory appeal is different from final judgment.

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[6] *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

We need not resolve this issue today. The 101.106 argument fails as a matter of law even if Southwestern could raise the issue for the first time on interlocutory appeal.

V. Dr. Watson's answer was not a 101.106 motion.

Section 101.106(f) requires that "[o]n the employee's motion, the suit against the employee shall be dismissed" unless amended pleadings naming the governmental unit as a defendant are filed within thirty days. TEX. CIV. PRAC. & REM. CODE § 101.106(f). Dr. Watson moved to dismiss the case against him on January 20, 2005. Eight days later, the Arancibias filed their amended petition naming Southwestern as a defendant.

Southwestern argues that the Arancibias failed to meet the thirty-day deadline because the last sentence of Dr. Watson's answer (and his prayer), filed months earlier, mentioned 101.106 and prayed for dismissal. Southwestern urges us to treat Watson's general denial as if it were a 101.106 motion, triggering the thirty-day amended pleading deadline.

We conclude that Southwestern's general denial was not a 101.106(f) motion. Section 101.106(f) lists several prerequisites that must be satisfied before an employee is entitled to dismissal. The employee must show that the suit was filed against him based on conduct within the general scope of his employment and that it could have been brought under chapter 101 against the governmental unit only. *See id.* Watson's motion attached an affidavit stating he was acting within the scope of his employment with Southwestern; his answer did not.

Watson's motion incorporated portions of Arancibia's petition and argued that the claims she alleged were ones that could have been brought against Southwestern in the first instance; his answer did not.

Watson's motion was entitled "Motion to Dismiss Pursuant to TCPRC Section 101.106"; his answer was not.[7]

The motion attached a blank fiat setting the matter for hearing; the answer did not.

The parties' Rule 11 agreement stated that Dr. Watson would not file a 101.106(f) motion before January 31, 2005 (long after he had filed his answer). While that agreement has no bearing on whether the answer was a motion, it shows that the parties certainly did not consider it as such. Nor do we.

Watson's answer bears little resemblance to the motion he filed subsequently. Pleadings must give fair notice of a claim, and we must construe them "so as to do substantial justice." TEX. R. CIV. P. 45. Construing the answer as a 101.106(f) motion would not comport with this rule. Even assuming Southwestern's 101.106 complaint was properly before us, Watson's answer was not a motion to dismiss under section 101.106(f).

VI. Conclusion

Southwestern had the right of interlocutory appeal, but it also had actual notice and a timely substitution after a section 101.106 motion. We affirm the court of appeals' judgment. TEX. R. APP. P. 60.2(a).

Wallace B. Jefferson
Chief Justice

[7] It was titled "Original Answer, Abatement and Special Exceptions to Plaintiffs' Original Petition."

Opinion Delivered: October 22, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0215

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS, PETITIONER,

v.

THE ESTATE OF IRENE ESTHER ARANCIBIA BY ITS BENEFICIARY VICTOR HUGO VASQUEZ-ARANCIBIA, VICTOR HUGO VASQUEZ-ARANCIBIA, INDIVIDUALLY, AND CECILIA VASQUEZ-ARANCIBIA, INDIVIDUALLY, RESPONDENTS

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

Argued September 10, 2009

JUSTICE JOHNSON, joined by JUSTICE WAINWRIGHT, dissenting.

I agree that the Tort Claims Act's prerequisites to suit are jurisdictional as to the Arancibias' claim. And because the Arancibias did not give timely formal notice of their claim as required by the Tort Claims Act, U. T. Southwestern's immunity from suit was waived only if it had actual notice of the Arancibias' claim as the term "actual notice" is used in the Tort Claims Act. In order for Southwestern to have had actual notice, it had to have timely, subjective knowledge that it was at fault in causing Irene Arancibia's death. *See Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 348 (Tex. 2004). The basis for the Arancibias' claim that Southwestern was at fault

is that the surgeons who first operated on Irene negligently caused her death by breaching the applicable standard of care. The Court does not identify evidence that Southwestern knew the injuries to Irene were caused by breach of a standard of care and that it therefore had actual subjective awareness it was at fault in causing Irene's death. Thus, I disagree with the Court's conclusion that Southwestern had timely, actual notice of the Arancibias' claim within the meaning of the Tort Claims Act.

I.

The Arancibia family did not give notice of claim to Southwestern, Parkland Hospital, where the surgery was performed, or any of the doctors who performed the first surgery until over seven months after Irene's death. By a letter dated May 7, 2004, they notified Dr. Mark Watson, who had supervised Irene's surgery, that the family intended to pursue legal action. On August 3, 2004, Irene's son and daughter filed suit against Dr. Watson and the doctors who had performed the surgery, Drs. Curtis and Yau, individually. They alleged that in several ways the doctors breached applicable standards of care and the breaches caused Irene's death. On January 28, 2005, the Arancibias amended their pleadings. They added Southwestern and Dallas County Hospital District d/b/a Parkland Hospital (collectively, the entities) as defendants and dismissed the doctors. The entities pled lack of notice under the Tort Claims Act and sought dismissal on the basis of sovereign immunity.

The trial court denied the entities' jurisdictional pleas and the court of appeals affirmed. 244 S.W.3d 455, 460.

Only Southwestern filed a petition for review. It asserts, in part, that sovereign immunity bars the Arancibias' claims because section 311.034 makes prerequisites to suit jurisdictional, *see* TEX. GOV'T CODE § 311.034, the Arancibias admittedly failed to give timely notice of claim under section 101.101(a), *see* TEX. CIV. PRAC. & REM. CODE § 101.101(a), and Southwestern did not have actual notice of the claim pursuant to section 101.101(c). *See id.* § 101.101(c). In response, the Arancibias urge that formal notice to Southwestern was not required because they first sued the doctors individually as opposed to the entities, and reading the Tort Claims Act to require pre-suit notice to Southwestern under such circumstances would yield an absurd result. They also claim that Southwestern had actual notice of their claim so formal notice under section 101.101(a) was not required.

II.

Section 101.101(a) of the Tort Claims Act establishes the general rule that timely notice of a claim must be given to a governmental entity as a prerequisite to suit against that entity:

> A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:
>
> (1) the damage or injury claimed;
> (2) the time and place of the incident; and
> (3) the incident.

TEX. CIV. PRAC. & REM. CODE § 101.101(a). As the Court notes, the purpose of the notice requirement "is to ensure prompt reporting of claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial."

Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995) (citing *City of Houston v. Torres*, 621 S.W.2d 588, 591 (Tex. 1981)).

Even absent the formal notice of claim required by section 101.101(a), however, section 101.101(c) waives a governmental entity's immunity if the entity "has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged." TEX. CIV. PRAC. & REM. CODE § 101.101(c). In *Cathey*, the Court held that to have actual notice under section 101.101(c), the governmental unit must 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." *Id.* at 341.

The Court clarified the second element of this standard—the governmental unit's alleged fault producing or contributing to the death, injury, or property damage—in *Simons*, a case strikingly similar to the case before us in regard to whether the governmental entity had actual notice of its fault. *See* 140 S.W.3d 338. In *Simons*, a work crew from the Terrell Unit of the Texas Department of Criminal Justice was digging postholes using an auger attached to a power take-off (PTO) mounted on the rear of a tractor. The auger became stuck in the ground, so the PTO was disengaged and a pipe wrench was attached to the auger in an attempt to back the auger out of the ground by hand. The TDCJ work supervisor, Ron Canon, left the area of the auger, went to the tractor and re-engaged the PTO. Simons was struck in the head and severely injured when the auger rotated and the pipe wrench swung around.

TDCJ immediately investigated and took statements from Canon and all the work crew. The statements and the report of the accident submitted by the prison safety officer indicated that when

Canon went back to the tractor to re-engage the PTO, the pipe wrench had been taken off the auger, the workers had been told to stand clear of the auger, and Canon looked back before he engaged the auger and could see Simons but could not see that the pipe wrench, instead of being off the auger, was on the auger. *Id.* at 339-41.

Three days after the accident, the prison safety officer and the TDCJ regional safety officer took a statement from Simons who was in the hospital and on a prescription pain reliever. Simons opined that the person operating the tractor was "kinda new." Simons remembered putting the pipe wrench on the auger and making one or two turns to back the auger out, and he did not remember hearing anyone say "stand clear." He also opined that he did not blame anyone for his injury, he did not want anyone to get in trouble or lose good time over it, it was a mistake and "a mistake is a mistake." 140 S.W.3d at 339-42. Thus, there was an unquestioned, unintended injury that resulted from a TDCJ employee's intentional act of re-engaging the PTO while a pipe wrench was attached to the auger, the wrench was out of the employee's field of view, and the injured person attributed the injury to a "mistake" without directing blame toward anyone specific.

The court of appeals held that TDCJ had actual notice under the Tort Claims Act. *Tex. Dep't of Criminal Justice v. Simons*, 74 S.W.3d 138, 142 (Tex. App.—Beaumont 2002), *rev'd*, 140 S.W.3d 338 (Tex. 2004). In reaching its conclusion, it noted that there was an unquestioned injury, a TDCJ employee had re-engaged the PTO that resulted in the injury, and an investigation was accomplished that put TDCJ on inquiry of its possible fault:

> To support its argument that its records do not raise a fact issue on notice of culpability, the Department relies upon the conclusion it reached after it completed its investigation of the incident. We are concerned here only with the Department's

> realization of its possible culpability, that is, whether the Department realized that it could be accused of negligence arising from the accident. . . . [T]he Department's safety officers conducted an extensive investigation of a serious injury that occurred while the inmates were operating motor-driven machinery in a supervised work detail. Reports were prepared and promptly submitted to the unit's safety committee. That notice, sufficient to put the Department on inquiry of its possible fault, is demonstrated by the existence of the safety review actually conducted. The Department did investigate the accident and gather the information it needed to defend Simons's claim.

Id. This Court disagreed and explained:

> What we intended in *Cathey* by the second requirement for actual notice 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. *If a governmental unit has this subjective awareness of fault, along with the other information to which it is entitled under section 101.101(a),* then requiring formal, written notice in addition would do nothing to further the purpose of the statute—which is, "to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial." It is not enough that a governmental unit should have investigated an incident as a prudent person would have, *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.

Simons, 140 S.W.3d at 347-48 (emphasis added).

Proof of a defendant's fault in a health care liability claim does not depend on proof of ordinary negligence, such as failing to assure that no one would be injured by the auger or an attached pipe wrench when a PTO on a tractor was engaged, but is rather dependant on proof that the defendant breached an applicable standard of care. *See* TEX. CIV. PRAC. & REM. CODE § 74.351 (requiring timely service of a report providing an expert's opinion regarding applicable standards of

care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed); *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005). Then, if breach of a standard of care is shown and it is also proved that the breach proximately caused the injury, the defendant may be found liable for damages. *E.g.*, *Hart v. Van Zandt*, 399 S.W.2d 791, 792 (Tex. 1965) (noting that it is not enough in a medical negligence case to show an injury and that the injury might have occurred because of a doctor's negligence). In this case, the Arancibias allege that the surgeons who first operated on Irene were at fault because they breached standards of care. They also allege, of course, that the breaches caused her death and Southwestern is liable for the surgeons' fault or negligence.

III.

A.

The Arancibias first claim that they were not required to give notice of claim to Southwestern at all because they first sued the doctors individually. I disagree.

Under section 101.106 of the Tort Claims Act, plaintiffs must elect to sue either government employees or their employers. TEX. CIV. PRAC. & REM. CODE § 101.106. The Arancibias assert that the notice requirements of section 101.101 do not apply to suits against employees sued individually and because they first sued the doctors individually, interpreting the Tort Claims Act to require notice to the doctors' governmental-entity employers is unreasonable and absurd. They argue that plaintiffs will not generally give notice when they sue government employees individually because they are not required to. Thus, as will generally be the case, if notice has not been given to the entity,

then requiring the governmental entity to be substituted for the employee is unfair and requires a futile action because the entity will do what Southwestern has done here and assert its lack of notice. The Arancibias, however, do not point to any language in the Tort Claims Act that indicates the Legislature intended section 101.106 to dispense with the notice requirements of section 101.101.

In responding, Southwestern makes four arguments: (1) section 101.101(a) specifies that it applies to any claim against a governmental entity "under this chapter," and the clear statutory language contains no exceptions; (2) the Legislature did not intend to allow plaintiffs to grant themselves an exemption from the notice requirement by suing employees first, and to do so makes no sense because regardless of when the governmental entity is sued it still needs notice, so it can investigate the claim; (3) the Arancibias' interpretation would eviscerate the notice requirements of section 101.101 because a plaintiff who failed to give notice could initially sue an individual employee, wait for the inevitable motion to dismiss the employee pursuant to section 101.106(f) and then sue the employer; and (4) it is not unfair, as the Arancibias claim, to require all claimants to give notice pursuant to section 101.101(a)—the notice requirement is clearly stated and compliance is simple and inexpensive.

I agree with Southwestern. There is no language in the Tort Claims Act indicating the Legislature intended section 101.106 to allow persons to sue governmental entities without giving statutory notice. Regardless of the Arancibias' concerns, construing the Tort Claims Act's language as they urge would, for all practical purposes, negate the notice requirements of section 101.101(a). Plaintiffs who failed to give notice of claim as required could sue a governmental employee individually, wait for the employee to move for dismissal, and then sue the employer, thereby

avoiding the notice requirements. Thus, I would hold that regardless of the fact that the Arancibias first filed suit against the doctors individually, the Arancibias must still have satisfied the notice prerequisites of section 101.101 in order to maintain their suit against Southwestern.

B.

As to actual notice, the Arancibias urge that Dr. Watson's e-mails to his supervisor and the subsequent investigation prove, or at least create a fact question about, whether Southwestern had subjective knowledge of its fault. They also rely on testimony by Victor Arancibia that one of the surgeons who performed the corrective surgery after Irene returned to the hospital told Victor "somebody did something very wrong" during the first surgery and Victor should get a lawyer. Southwestern argues this evidence does not raise a fact question regarding whether Southwestern subjectively knew that breach of a standard of care, as ultimately claimed by the Arancibias, caused Irene's death.

First, Victor Arancibia's testimony that following the second (corrective) surgery, one of the surgeons told Victor that he should find a lawyer because someone had done something wrong during the first surgery is not evidence that Southwestern had subjective knowledge it was at fault in causing Irene's death. Victor did not identify the surgeon who made the statement and there is no evidence the surgeon was an employee of Southwestern or that the surgeon's opinion should be imputed to Southwestern. Further, whether "in the first operation somebody did something very wrong" is not the issue. Everyone agrees that the colon perforations were an unintended and undesirable result. The issue is whether Southwestern had subjective knowledge that the surgeons

breached a standard of care appropriate to the laparoscopic surgery. That issue was not addressed by the statement Victor attributed to the unknown surgeon.

As for the actions of the doctors, immediately after Irene's death Dr. Watson e-mailed his supervisor, Dr. Edward Livingston, Chief of the Gastrointestinal Endocrine Surgery Division at Southwestern, and Dr. Robert Rege, Chair of both the Department of Surgery at Southwestern and the Division of Surgery at Parkland Hospital, about the situation. Dr. Watson described Irene's death as a terrible outcome, noted that he had "scrubbed the entire procedure," thought it went well, and advised Drs. Livingston and Rege that he had already spoken with risk management.

Parkland has a possible three-step review process that takes place when an unexpected patient care occurrence is identified. The first step is initial screening by the hospital's quality management team. The second is referral to a physician or monitoring committee if certain criteria are identified in the screening process. The third step is review by a Division Peer Review Committee if the second-step physician reviewer or monitoring committee so recommends.

Dr. Livingston was assigned to review the surgery as part of Parkland's quality control process.[1] His review was the second of the three-step process. The documents used by Dr. Livingston in making his report were preprinted with specific questions about most aspects of the patient's care. He answered in one instance that "[c]linical management contributed to" Irene's death and explained his answer by a narrative that "a technical error occurred during the original hernia operation resulting in a through-and-through small bowel injury." In regard to questions as

[1] The parties stipulated that Dr. Livingston's investigation and findings could be considered for the purpose of determining if Southwestern had actual notice of the Arancibias' claim.

to medical management, he checked the "No" box in response to "**Criteria 1** = Practice [was] consistent with established standards. Physician Reviewer comfortable with practice. Practice Acceptable." However, he checked the "Yes" box in regard to "**Criteria 2** = Reviewed practice not necessarily consistent with established standards, but still acceptable. Physician Reviewer comfortable with practice. Practice Acceptable." He checked additional boxes to indicate that the reviewed practice did not deviate or deviate significantly from established standards or that the practice was unacceptable. He included a narrative statement of his findings/conclusions in which he said that the unfortunate occurrence was a recognized complication of laparoscopic hernia surgery and no standard of care issues were identified. He did not recommend further review of the case. *See Roark v. Allen*, 633 S.W.2d 804, 811 (Tex. 1982) (holding there was no evidence that a doctor's negligence proximately caused the injury when forceps slipped during delivery and a baby's skull was fractured).

In regard to Dr. Watson's e-mail statement that he had contacted risk management about Irene's death, evidence that an employee or agent contacted an enterprise's risk management department is not evidence that the employee or anyone else subjectively believed the enterprise was at fault. Most entities of any significant size have risk management departments and require accidents or unusual incidents to be reported to the risk management team. The reporting requirement generally exists regardless of who, if anyone, is suspected of being at fault in causing the accident or incident.

The Arancibias point to the fact that Dr. Watson contacted risk management, but the record does not contain evidence explaining why he made the contact or what he reported to risk

management. For example, there is no evidence of whether (1) Dr. Watson contacted risk management pursuant to routine protocol because a death was involved or because of the unexpected patient outcome, (2) his contact was not routine but was out of an abundance of caution, or (3) his contact was because he subjectively believed a breach of appropriate standards of care caused Irene's death. Although Dr. Watson could not recall what he told risk management, the evidence is undisputed that he reported to Drs. Rege and Livingston that he believed the surgery went well and that the perforations could have been retraction injuries that occurred out of the field of view of the surgeons. Absent evidence of the reason Dr. Watson contacted risk management or what he reported, the fact the contact took place does not raise an inference that he believed Irene's death was due to a breach of applicable standards of care as alleged by the Arancibias any more than it raises an inference that the contact was the product of routine protocol or some other reason. *Cf. Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (Phillips, C.J., concurring in part and dissenting in part) (noting that the equal inference rule is a species of the no-evidence rule that "when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence"). For the same foregoing reasons, the fact that Dr. Watson reported his contact with risk management to Drs. Livingston and Rege, without more, does not support an inference that any of the doctors subjectively believed Irene's death was due to a breach of applicable standards of care.

Next to be considered are Dr. Livingston's investigation and report. The evidence shows that when a patient dies, Parkland's standard procedure is to have the case reviewed for quality management purposes. There is no evidence Dr. Livingston's review was other than pursuant to standard procedures. His report contains language that, considered in isolation or out of context,

might support an inference that he developed a subjective belief the surgeons may have been at fault. For example, he indicated "[c]linical management contributed to" Irene's death, "a technical error occurred during the original hernia operation resulting in a through-and-through small bowel injury," and checked the "No" box in response to "Criteria 1 = Practice consistent with established standards. Physician Reviewer comfortable with practice. Practice Acceptable." But in considering all the evidence, as we must, Dr. Livingston's explanatory statement giving his opinions and conclusions cannot be disregarded. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824-25 (Tex. 2005). He checked boxes specifically indicating Irene's death was not the result of a breach of standards of care and in a narrative statement on the form he clearly set out his opinion that the unfortunate occurrence was a recognized complication of laparoscopic hernia surgery and "no standard of care issues were identified." *See Roark*, 633 S.W.2d at 811. He recommended that no further review be taken, and none was. The third step in Parkland's quality management follow-up process was not initiated and there is no evidence that further investigation of any nature was made.

The Court recently considered the actual notice issue in a non-health care setting in *City of Dallas v. Carbajal*, ___ S.W.3d ___ (Tex. 2010). There, the plaintiff sued for injuries she suffered when she drove into a gap in the roadway in a construction area. A City of Dallas police officer promptly investigated the accident. The officer's written report indicated that the plaintiff drove through an unbarricaded area. The plaintiff sued over a year after the accident, but she had not given timely formal notice of claim to the City. The trial court denied the City's plea to the jurisdiction based on lack of timely notice under the Tort Claims Act and the court of appeals affirmed. The court of appeals' opinion turned on the City's immediate notice that an incident had occurred, the

lack of evidence of a responsible entity other than the City, and the City's knowledge of its possible fault in the matter:

> [T]he police report here shows the City had *immediate notice* of the incident and its *possible fault* in failing to block the gap in the road properly with barricades. . . . [T]here is no evidence here of a responsible entity other than the City, and the police officer making the report is an employee of that entity. . . . [T]he police report here is more than just notice of an accident or a description of a road condition; it is the police officer's report of her perception of the cause of the accident.

City of Dallas v. Carbajal, 278 S.W.3d 802, 806 (Tex. App.—Dallas 2009), *rev'd*, ___ S.W.3d ___ (Tex. 2010) (emphasis added). The Court reversed the court of appeals' judgment. In doing so, the Court quoted and emphasized some of the previously-quoted language from *Simons*:

> "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."

Carbajal, ___ S.W.3d at ___ (quoting *Simons*, 140 S.W.3d at 347-48). The Court concluded that "[w]hen 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." *Id.* at ___. That same reasoning should apply to the Arancibias' claim.

Dr. Livingston was designated to investigate the care Irene received and determine whether breaches of applicable standards of care occurred as part of routine procedures. His report shows that he recognized the perforations in Irene's bowel were technical errors, yet it also shows his opinion was that the perforations were a recognized complication of the surgery Irene underwent and were not outside the boundaries of accepted standards of care. He made an unambiguous hand-

written summary statement to that effect and recommended that no further review of the matter take place. Dr. Livingston explained his reasoning in his deposition and maintained that his report correctly set out his subjective opinion that there were no standard of care violations. Based on Dr. Livingston's recommendation, the third step of Parkland's quality management review process did not occur. And there is no evidence that before the Arancibias finally sent their letter notice to Dr. Watson more than seven months after Irene's death, Southwestern believed it should take action to gather information "necessary to guard against unfounded claims, settle claims, and prepare for trial." *See Cathey*, 900 S.W.2d at 341.

The Court's holding today does not take into account the nature of determining "fault" in health care cases. All the physicians recognized that the unrepaired perforations and Irene's death were bad results. But although there is always possible, or potential, liability for a bad health care result, a bad result simply is not evidence that a health care provider was at fault because standards of care were breached. The Arancibias dispute Dr. Livingston's opinion, but they do not point to any reason for Southwestern to have subjectively disbelieved the sincerity of his findings and conclusions. Nor do they refer to evidence that Southwestern or any of its physicians discounted Dr. Livingston's investigation and opinion or otherwise independently formed a subjective belief that the surgeons caused the perforations by breaching any standards of care. Thus, there is no evidence that Drs. Watson, Livingston, Rege, or Southwestern had subjective knowledge or belief that the surgeons and Southwestern were at fault in regard to Irene's death—and until today such knowledge has been required for actual notice when a litigant fails to give timely formal notice of claim.

In *Simons*, the Court stated that "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." 140 S.W.3d at 348. And in *Carbajal*, the Court rejected the argument that immediate knowledge of the facts by the City of Dallas together with the absence of evidence of other responsible parties and its knowledge of possible fault because of missing barricades was actual notice. ___ S.W.3d at ___. The Court should likewise reject the argument that Southwestern had actual notice because it knew of injuries and knew of undetected and uncorrected technical errors that potentially could generate allegations that the injuries were caused by breaches of standards of care.

IV.

I agree that statutory notice is jurisdictional under the Tort Claims Act as it applies to this case. I would hold that the notice issue is dispositive: Southwestern did not have actual notice, thus the Arancibias were required to, but did not, give timely formal notice. I would reverse the judgment of the court of appeals and dismiss the Arancibias' suit against Southwestern for lack of jurisdiction.

_____

Phil Johnson
Justice

OPINION DELIVERED: October 22, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0231

OMAHA HEALTHCARE CENTER, LLC, PETITIONER,

v.

WILMA JOHNSON, ON BEHALF OF THE ESTATE OF CLASSIE MAE REED, DECEASED, RESPONDENT

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

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

JUSTICE LEHRMANN filed a dissenting opinion, in which JUSTICE MEDINA joined.

In this case we consider whether claims against a nursing home regarding a patient's death alleged to have been caused by a brown recluse spider bite are health care liability claims (HCLCs) that required an expert report to be served. The trial court and court of appeals held that they were not. We disagree.

I. Background

Wilma Johnson, on behalf of the estate of her deceased sister, Classie Mae Reed, filed suit against Omaha Healthcare Center (Omaha), a nursing home. Johnson alleged that while Reed was being cared for by Omaha she was bitten by a brown recluse spider and died. Johnson asserted that

Omaha had a duty to use ordinary care in maintaining its premises in a safe condition and breached its duty by failing to (1) inspect the premises for spider and insect infestations, (2) properly clean the premises, (3) institute proper pest control policies and procedures, and (4) take the necessary actions to prevent insect and spider infestations.

Omaha filed a motion to dismiss on the grounds that Johnson's claims were HCLCs and she did not serve an expert report as required by statute. *See* TEX. CIV. PRAC. & REM. CODE § 74.351 (a), (b)[1] (stating that an HCLC claimant must serve an expert report within 120 days of filing suit and a trial court shall dismiss the claim if no report is served). Johnson responded that her claims were matters of ordinary negligence and did not fall under the statutory definition of "health care liability claim." The trial court denied Omaha's motion and Omaha filed an interlocutory appeal. *See id.* § 51.014. The court of appeals affirmed. 246 S.W.3d 278. We reverse the judgment of the court of appeals and remand the case to the trial court with instructions to dismiss the case and consider Omaha's request for attorney's fees and costs.

II. Discussion

As relevant to this case an HCLC is

> 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 or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

[1] Section 74.351 was amended after Johnson's cause of action accrued, and the prior law is applicable to Johnson's claim. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590. At the time of Reed's injury, the statute required an expert report to be served within 120 days of the "claim" being filed. It now requires that an expert report be filed within 120 days of the filing of the "original petition." Because the amendment has no impact on our analysis, for ease of reference we will cite the current version of the statute.

Id. § 74.001(a)(13). "Health care" is

> any act or treatment performed or furnished, or that 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. § 74.001(a)(10); *see Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005) (describing health care as "broadly defined"). "Safety" is not defined in the statute, so "we apply its meaning as consistent with the common law [which is] the condition of being 'untouched by danger; not exposed to danger; secure from danger, harm or loss.'" *Diversicare*, 185 S.W.3d 855 (quoting BLACK'S LAW DICTIONARY 1336 (6th ed. 1990)).

The court of appeals concluded that the claim was a safety claim and under section 74.001(a)(13), a safety claim must be "'directly related to health care' to be actionable as an HCLC." 246 S.W.3d at 284. The court then concluded that because Johnson's claims were neither integral to nor inseparable from the health care and nursing services Omaha provided to Reed, they were not HCLCs. *Id.* at 287.

In this Court, Omaha asserts that Johnson's claim is a safety claim directly related to health care and the court of appeals incorrectly determined otherwise.[2] Under such standard, Johnson's claim against Omaha is an HCLC if it is for a departure from accepted standards of safety directly related to "any act . . . that should have been performed or furnished by [Omaha] to, or on behalf of [Reed] during [Reed's] medical care, treatment, or confinement." *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10), (13).

[2] Omaha does not challenge the court of appeals' conclusion that a safety claim under section 74.001(a)(13) must be directly related to health care. We agree with Omaha that Johnson's claim is directly related to health care and do not address the issue of whether it must be.

In order to determine whether a claim is an HCLC, we consider the underlying nature of the claim. *Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010). Artful pleading cannot alter that nature. *Id.*

The services a nursing home provides to its patients during their confinement include meeting patients' fundamental needs. *See Diversicare*, 185 S.W.3d at 849. Part of the fundamental patient care required of a nursing home is to protect the health and safety of the residents. 40 TEX. ADMIN. CODE § 19.1701; *see id.* § 19.401(b) (providing that nursing home residents have a right to safe, decent, and clean conditions). A nursing home facility "must provide a safe, functional, sanitary, and comfortable environment for residents" and "must . . . maintain an effective pest control program." *Id.* § 19.309(1)(c). In its pest control program a nursing home must "use the least toxic . . . effective insecticides." *Id.* § 19.324.

The court of appeals concluded that just because there are regulations requiring pest control in nursing homes does not mean that the regulations are related to health care. 246 S.W.3d at 286-87. It found "no indication pest control judgments are actually, as opposed to theoretically, based on the physical care the patients require or implicate the medical duty to diagnose and treat." *Id.* at 287.

But "health care" involves more than acts of physical care and medical diagnosis and treatment. It involves "*any act* performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's . . . confinement." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10) (emphasis added). And nursing homes are required to provide more than physical care and treatment. They are required to take

actions to provide "quality care" which includes things such as safety of the environment. *See* TEX. HEALTH & SAFETY CODE § 242.001(a)(1), (8).

As noted above, Johnson alleged that Omaha failed to maintain the premises in a safe condition by failing to inspect the premises, failing to properly clean the premises, failing to institute proper pest control policies, and failing to prevent insect and spider infestations. Although Johnson pled that Omaha was liable because it failed to exercise ordinary care to conduct the referenced activities, the underlying nature of her claim was that Omaha should have but did not exercise the care required of an ordinarily prudent nursing home to protect and care for Reed while she was confined there. That is, she alleged that Omaha failed to take appropriate actions to protect Reed from danger or harm while caring for her. *See Diversicare*, 185 S.W.3d at 855. Those claims fell within the statutory definition of a health care liability claim. Because they did, the statute required the suit to be dismissed unless Johnson timely filed an expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351 (a), (b).

III. Response to the Dissent

The dissent relies to a large degree on language derived from the dissenting opinions in *Marks v. St. Luke's Episcopal Hospital*, 319 S.W.3d 658 (Tex. 2010), and *Diversicare*, and the dissent's interpretation of the statutory definitions of "health care liability claim" and "health care." The dissenting opinions in *Marks* and *Diversicare* did not carry the day in those cases; they do not do so in this case. Further, we disagree with the dissent's interpretation of the statutory language. The dissent opines that interpreting the language of the statute to mean what it simply and plainly says—as we do—will cause confusion. We fail to see how. Consistently interpreting statutory

language according to its plain meaning and context, unless that interpretation yields an absurd or nonsensical result, honors the Legislature's intent and reduces confusion by giving legislators, the bar, and ordinary persons confidence that courts will interpret statutes to mean what they say. *See Molinet v. Kimbrell*, ___ S.W.3d ___, ___ (Tex. 2011) ("Our primary objective in construing statutes is to give effect to the Legislature's intent. The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.") (citations omitted).

It is not absurd or nonsensical for the Legislature to have required that a party filing suit against a health care provider must timely serve a statutory expert report. In a suit against a nursing home—a health care provider—based on allegations that the facility failed to take proper actions it should have "performed or furnished, . . . for, to, or on behalf of a patient during the patient's . . . confinement," a claimant must timely serve a statutory expert report. Johnson did not do so and her claim must be dismissed.

IV. Conclusion

Johnson's claim is an HCLC and should have been dismissed. Because Omaha requested its attorney's fees and costs in the trial court pursuant to Civil Practice and Remedies Code section 74.351(b)(1), the case must be remanded.

We grant Omaha's petition for review. Without hearing oral argument we reverse the court of appeals' judgment and remand the case to the trial court with instructions to dismiss Johnson's claims and consider Omaha's request for attorney's fees and costs.

Phil Johnson
Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0231

OMAHA HEALTHCARE CENTER, LLC, PETITIONER,

v.

WILMA JOHNSON, ON BEHALF OF THE ESTATE OF CLASSIE MAE REED, DECEASED, RESPONDENT

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

JUSTICE LEHRMANN, joined by JUSTICE MEDINA, dissenting

Expert testimony is often critical to assist the trier of fact. *See Salem v. U.S. Lines Co.*, 370 U.S. 31, 32 (1962). Complex matters need to be explained to aid in assessing the nature of the claims and separating the meritorious from the frivolous. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993). 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. TEX. R. EVID. 702; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556–57 (Tex. 1995).

Our Legislature, in enacting the health care liability claim statute, recognized the importance of expert testimony in medical malpractice suits by requiring that plaintiffs serve, within 120 days, expert reports for each health care provider against whom a liability claim is brought. TEX. CIV.

PRAC. & REM. CODE § 74.351(a). The Legislature defined a health care liability claim as one "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 or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant." *Id.* § 74.001(a)(13). In holding that a spider bite in a nursing home is a health care liability claim for which an expert report is required, the Court reaches a result that is contrary to the Legislature's intent, belies common sense, and contorts the role of experts in health care litigation.

The Court has not, at least so far, expressly held that *all* injuries in a health care setting, regardless of any relationship to medical care, must be filed as health care liability claims. But today's opinion does as much implicitly. In doing so, the Court radically departs from our clear assurances that there can be "premises liability claims in a healthcare setting that may not be properly classified as health care liability claims," *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005), and the plurality's recognition in *Marks v. St. Luke's Episcopal Hospital* that safety-based health care liability claims necessarily implicate medical care standards. 319 S.W.3d 658, 664 (Tex. 2010) (plurality opinion). In *Marks*, the plurality noted that the alleged negligence in health care safety claims must be "*inseparabl[y] and integral[ly]*" related to the rendition of medical services. *Marks*, 319 S.W.3d at 664; *see Diversicare*, 185 S.W.3d at 848–49. In applying that standard, we have heretofore considered a number of factors, among them whether a specialized standard in the health care community applies in the particular circumstances; whether the alleged negligence involves medical judgment related to patient care or treatment; and whether expert

testimony from a medical professional is necessary to prove a cause of action. *See Diversicare*, 185 S.W.3d at 847–52. But the Court considers none of these limiting factors in the present case, effectively holding that *all* premises claims by injured patients are health care liability claims.

In *Diversicare*, we emphasized that the acts or omissions at issue were inseparable from the provision of health care, carefully distinguishing them from garden-variety negligence claims like those stemming from "an unlocked window" or a "rickety staircase." *Id.* at 854. Similarly, in *Marks*, the plurality's holding that an injury caused by a defective footboard on a hospital bed was a health care liability claim turned on the fact that a hospital bed, unlike a typical one, was "[m]edical equipment specific to [the] particular patient's care or treatment," and thus an "integral and inseparable part of the health care services provided." *Marks*, 319 S.W.3d at 664. The *Marks* plurality noted that the Legislature could not have intended that safety standards within the statute's scope "encompass all negligent injuries to patients" in light of the statute's "more specific standards of medical and health care." *Id.* In my view, a spider, in any setting, is more akin to a rickety staircase than a condition resulting from medical negligence or defective medical equipment.

In holding that inadequate pest control is a health care safety violation, the Court essentially declares that all injuries in a health care setting are subject to Chapter 74, without explicitly saying so. As a result of the Court's holding, any patient injured in a hospital will be required to file an expert report even though the injury is entirely unrelated to the delivery of health care services. If it had been the Legislature's intent to subject all claims against health care providers to the statute, "it would have defined a 'health care liability claim' to be any claim against a physician or health care provider in a medical or health care setting." *See Drewery v. Adventist Health System/Tex., Inc.*,

No. 03–10–00334–CV, 2011 WL 1991763 at n. 4 (Tex. App.—Austin May 20, 2011, no pet. h.). Given the sweeping interpretation of "safety" implicit in the Court's conclusion, I urge the Legislature to clarify whether a safety violation must be related to health care.

The present case is the Court's second opinion in two months to hold that a health care provider's departure from general safety standards gives rise to a health care liability claim. *See Harris Methodist Fort Worth v. Ollie*, ___ S.W.3d ___ (Tex. 2011) (per curiam). In *Harris Methodist*, we held that a patient's post-knee-replacement slip and fall on a slick bathroom floor was a health care liability claim. I agreed with the Court's decision because the underlying nature of Ollie's claim—the hospital's failure to supervise her or warn her of the slick floor—bore on the staff's medical judgment in assessing her post-surgery condition and her ability to safely bathe. *See id.* at ___. Applying *Diversicare*, it was logical to presume that health care providers generally adhere to specialized standards governing post-surgical patient care, including assessing the patient's ability to safely bathe without assistance, necessitating expert testimony on that issue. Likewise, expert medical testimony may have been necessary to prove that lack of supervision or assistance specific to the patient's condition resulted in the injuries. None of those factors are present in *Omaha*.

In *Harris Methodist*, we noted that the underlying nature of the patient's claim determines "whether the claim is for a departure from accepted standards of safety" relating to an act that should have been performed on the patient's behalf during the patient's medical care, treatment, or confinement. *Id.* at ___. Because medical expert testimony would have been necessary on whether the hospital should have provided special equipment or staff supervision to allow the patient to safely

bathe, the claim was the type the Legislature intended to be governed by the statute. The same cannot be said, though, of a nursing home's extermination procedures. Wilma Johnson's claim against the nursing home involves the home's failure to keep the premises properly treated for pests, leading to her sister's death as the result of a brown recluse spider bite. The nursing home's alleged negligence did not involve defective medical equipment or a lapse in medical judgment, but instead a general, common-sense duty to keep the premises clean and bug-free. This is not a situation where the jury would be aided by expert medical opinion. No medical judgment or expertise is implicated in determining whether Omaha adopted proper extermination standards.

The Court's holding that Omaha's failure to prevent a spider infestation is a health care liability claim, of course, means that Johnson was required to serve an expert report in order to avoid dismissal. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a). An expert qualified to file a report on the health care provider's departure from accepted standards of care must "practic[e] health care in a field of practice that involves the same type of care or treatment," "ha[ve] knowledge of accepted standards of care for . . . the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim[, and be] qualified on the basis of training or experience to offer an expert opinion regarding" those standards. *Id.* § 74.402(b); *see also id.* § 74.351(r)(5)(B). In assessing witness qualifications, the court should look at licenses, certifications, or substantial training or experience "in the area of health care relevant to the claim," as well as active practice in the health care industry relevant to the claim. *Id.* § 74.402(c). In making this determination, the court is permitted to depart from the above criteria only if it determines, and states so on the record, that there is good reason to admit the proffered testimony. *See id.* § 74.402(d).

Applying the Court's holding, Johnson's experts would need to testify on what the applicable standard of pest control would be in providing a safe nursing home environment, whether allowing a spider infestation departs from that standard, and whether that departure caused the patient's injuries. *See id.* § 74.351(a), (r)(6). Presumably, the expert report would outline the standard of care in selecting pest control services for a prudent nursing home, as well as Omaha's breach and causation. *See id.* § 74.351(r)(6) (expert report must state "applicable standards of care, the manner in which the care . . . failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed").

Omaha argues that in addition to physician testimony on causation, Johnson had to produce testimony from an "expert qualified to address application of pesticide in the context of a nursing home" to establish the "correct dosage . . . to prevent a breach of the standard of care by allowing a brown recluse to harm a resident, without the pesticide harming the resident." It is hard for me to imagine how this expert could be anyone other than a professional exterminator, not the health care practitioner that the statute contemplates. And even if the court were to use the "good cause" exception in section 74.402(d) to qualify an exterminator as an expert on measures necessary to prevent spider infestation, I cannot imagine how the exterminator could be qualified to testify that the nursing home's practices breached a *medical* standard of care. *See Marks*, 319 S.W.3d at 664; *see also Diversicare*, 185 S.W.3d at 854 (suggesting that unsafe conditions unrelated to provision of health care might not be health care liability claims). The Court's imposition of Chapter 74 requirements in a way the Legislature never intended is what leads to this jarring result.

The Court's contorted reading of the statute will disserve both patients and health care providers. As the dissent in *Marks* warned, "[b]y 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." *Marks*, 319 S.W.3d at 686 (Guzman, J., concurring and dissenting). Health care providers will incur higher medical malpractice insurance premiums as insurers adjust their rates to account for more claims attributed to medical malpractice. *See Diversicare*, 185 S.W.3d at 862 (O'Neill, J., dissenting) (noting that providers carry both general and malpractice liability policies, and health care liability claim litigation expenses fall under the malpractice policy). This defeats the very purpose of the statute as expressed by the Legislature, "which is to reduce the cost of medical malpractice insurance in Texas so that patients can have increased access to health care." *Marks*, 319 S.W.3d at 686 (Guzman, J., concurring and dissenting) (citing a previous version of the statute). The uncertain line between premises liability and medical malpractice claims also means that premises liability insurance premiums could be adversely affected. Above all, continuing uncertainty will lead to increased litigation costs, forcing plaintiffs to procure multiple expert reports in cases involving no medical expertise or true health care related claims.

Because the Court's decision will spawn uncertainty and extend health care liability claim treatment to claims that are not "inseparabl[y] and integral[ly]" related to the rendition of medical services, *Marks*, 319 S.W.3d at 664, without regard to legislative intent, I am compelled to respectfully express my dissent.

Debra H. Lehrmann
Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0244

BASIC CAPITAL MANAGEMENT, INC., AMERICAN REALTY TRUST, INC., TRANSCONTINENTAL REALTY INVESTORS, INC., CONTINENTAL POYDRAS CORP., CONTINENTAL COMMON, INC., AND CONTINENTAL BARONNE, INC., PETITIONERS,

v.

DYNEX COMMERCIAL, INC. AND DYNEX CAPITAL, INC., RESPONDENTS

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

Argued September 10, 2009

JUSTICE HECHT delivered the opinion of the Court.

This is an action for breach of a commitment to provide financing for future real estate investments. The borrowers were to be entities that would be formed to hold each investment separately as opportunities arose. We hold that the corporate owners of those entities were third-party beneficiaries of the commitment, and that consequential damages for the lender's breach of the commitment were foreseeable. We reverse the judgment of the court of appeals[1] and remand the case to that court for further consideration.

[1] 254 S.W.3d 508 (Tex. App.–Dallas 2008).

I

Basic Capital Management, Inc. managed publicly traded real estate investment trusts in which it also owned stock, including American Realty Trust, Inc. ("ART") and Transcontinental Realty Investors, Inc. ("TCI").[2] We refer to the three collectively as petitioners. Respondent Dynex Commercial, Inc. provided financing for multi-family and commercial real estate investors.[3]

ART and TCI held investment property through wholly owned "single-asset, bankruptcy-remote entities" — SABREs, for short. A SABRE, as the term for which it stands suggests, is an entity that owns a single asset and whose solvency is independent of affiliates. Lenders like Dynex commonly require a SABRE as a borrower so that in the event of default, the collateral can be recovered more easily than from a debtor with multiple assets and multiple creditors.[4]

After several months of discussions and negotiations, Dynex agreed to loan three TCI-owned SABREs[5] $37 million to acquire and rehabilitate three commercial buildings — one each — in New

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[2] Another real estate investment trust managed by Basic and involved in the events leading to this case, Continental Mortgage and Equity Trust, Inc., merged into TCI after litigation began. For simplicity, we ascribe Continental's pre-suit actions to TCI. In 1998, the time period relevant to this case, Basic had assets of about $3 billion, ART about $1.3 billion, Continental about $426 million, and TCI about $445 million.

[3] Dynex Commercial, Inc. underwrote, closed, and serviced loans funded by Dynex Capital, Inc., also a respondent in the case. Our references to Dynex are to Dynex Commercial.

[4] *See*, *e.g.*, *In re Gen. Growth Props., Inc.*, 409 B.R. 43, 49 n.15 (Bankr. S.D.N.Y. 2009) ("Sometimes referred to as a 'single-purpose entity' or 'bankruptcy remote entity,' an SPE has been described by one commentator as 'an entity, formed concurrently with, or immediately prior to, the closing of a financing transaction, one purpose of which is to isolate the financial assets from the potential bankruptcy estate of the original entity, the borrower or originator.' David B. Stratton, *Special-Purpose Entities and Authority to File Bankruptcy*, 23-2 AM. BANKR. INST. J. 36 (March 2004). 'Bankruptcy-remote structures are devices that reduce the risk that a borrower will file bankruptcy or, if bankruptcy is filed, ensure the creditor procedural advantages in the proceedings.' MICHAEL T. MADISON, ET AL., THE LAW OF REAL ESTATE FINANCING, § 13:38 (2008).").

[5] The three, Continental Poydras Corp., Continental Common, Inc., and Continental Baronne, Inc., were plaintiffs in the trial court, but the jury awarded them no damages. They are petitioners in this Court, but they do not complain of the verdict or make any arguments apart from TCI's.

Orleans if Basic would propose other acceptable SABREs to borrow $160 million over a two-year period.[6] The agreements were eventually formalized in letters. The New Orleans Agreement was between Dynex and TCI and provided in part:

> Dynex Commercial, Inc. (Lender) herein agrees to provide financing for the acquisition and/or rehabilitation of the captioned three (3) properties located in New Orleans, Louisiana under the following terms and conditions:
>
> 1. BORROWER: Three (3) single asset, bankruptcy remote borrowing entities, acceptable to Lender . . . .

TCI accepted the agreement as "borrower", although it is not a SABRE. The $160 million commitment ("the Commitment") was between Dynex and Basic. It also stated that each borrower would be a "Single Asset, Bankruptcy Remote Borrowing Entity acceptable to Lender". The SABREs would be owned by ART or TCI. "First and foremost," Dynex stressed, "the two transactions [were] intertwined."

Dynex loaned TCI's three SABREs the money to acquire the New Orleans buildings and funded a $6 million loan presented by Basic under the Commitment. But then market interest rates rose, making the terms of the Commitment unfavorable to Dynex. Dynex refused to provide further funding for improvements to the New Orleans buildings or to make any other loans under the Commitment.

Petitioners sued Dynex for breach of the Commitment, alleging that as a result, transactions that would have qualified for funding were financed elsewhere at higher rates or not at all. Petitioners claimed damages for interest paid in excess of what would have been charged under the

[6] Dynex contends that the commitment period was only eighteen months. The difference is immaterial to our opinion.

Commitment and for lost profits from investments for which financing could not be found. TCI also sued Dynex for breach of the New Orleans Agreement. Dynex counterclaimed against petitioners for fraud.

ART and TCI alleged that they "were intended beneficiaries of the $160 million Commitment because their wholly owned subsidiaries would own the properties and borrow the funds advanced by Dynex Commercial under the commitment." Dynex controverted this claim, pleading that ART and TCI "lack[ed] standing to assert claims under the alleged $160 million loan commitment". Dynex and petitioners filed cross-motions for partial summary judgment on the issue, and the trial court granted petitioners' motion. Based on its ruling, the trial court issued an order *in limine* forbidding reference to the standing arguments before the jury.

After a trial of over a month, the jury returned a petitioners' verdict. The jury found that Dynex breached the Commitment, resulting in $256,233.25 lost profits for Basic, $25,367,090 lost profits for ART and TCI, and $2,183,287 increased costs in obtaining alternate financing for ART and TCI. The jury also found that TCI lost $252,577 profits as a result of Dynex's breach of the New Orleans Agreement.[7]

Dynex moved for judgment notwithstanding the verdict. Among other things, Dynex re-urged what it had earlier called its standing argument: that ART and TCI could not recover damages for breach of the Commitment, nor TCI for breach of the New Orleans Agreement, because neither was a party to, nor a third-party beneficiary of, those agreements. Dynex also argued that Basic

[7] The jury found that petitioners' reasonable attorney fees were $1.95 million through trial and $150,000 for any appeal.

could not recover lost profits for breach of the Commitment because such consequential damages were not reasonably foreseeable when the Commitment was made. The trial court granted the motion and rendered a take-nothing judgment for Dynex.

Petitioners appealed. The parties raised a number of issues, but the court of appeals found two to be dispositive and focused on them.[8] First, it agreed with Dynex that ART and TCI were not third-party beneficiaries of the Commitment, nor TCI of the New Orleans Agreement.[9] Both agreements, the court reasoned, were expressly made for the benefit of the borrowers — the SABREs that ART or TCI were to create as occasion arose — and any benefit to ART and TCI was at most indirect and therefore unrecoverable.[10] Petitioners countered that Dynex was contending, in essence, that ART and TCI were "not entitled to recover in the capacity in which [they sued]", a matter Dynex had not raised by a verified pleading as required by Rule 93(2) of the Texas Rules of Civil Procedure,[11] and therefore could not assert. The court of appeals rejected petitioners' argument.[12]

Second, the court held that Basic could not recover lost profits as consequential damages for Dynex's breach of the Commitment because there was no evidence that Dynex knew, when it made the Commitment, what specific investments would be proposed, or that other financing would not

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[8] 254 S.W.3d 508 (Tex. App.–Dallas 2008).

[9] *Id*. at 518, 524.

[10] *Id*. at 517-518. The court also concluded that ART and TCI had failed to plead that they were actually parties to the Commitment because Basic had been acting as their agent. *Id*. at 518.

[11] *Id*. at 514; TEX. R. CIV. P. 93(2) ("A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit. . . . 2. That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.").

[12] 254 S.W.3d at 515, 524.

be obtainable.[13] Having concluded that there was no basis for any recovery by ART and TCI, the court did not consider Dynex's challenges to their damage claims.[14] The court affirmed the trial court's judgment.

We granted the petition for review.[15]

II

We consider first whether ART and TCI can recover for breach of the Commitment, and TCI for breach of the New Orleans Agreement, as third-party beneficiaries.

We agree with the court of appeals that Dynex's failure to file a verified denial under Rule 93(2) does not preclude it from contesting ART's and TCI's right to recover as non-parties. Though the requirement of a verified denial to challenge a plaintiff's capacity to recover has long been part of Texas civil procedure,[16] the case law is somewhat confused about when the requirement applies.[17] The issue is made more difficult here because Dynex pleaded its challenge as lack of standing, which

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[13] *Id*. at 521-522.

[14] *Id*. at 522 & n.16.

[15] 52 Tex. Sup. Ct. J. 599 (Apr. 17, 2009).

[16] Act of May 13, 1846, 1st Leg., R.S., § 31, 1846 Tex. Gen. Laws 363, 371, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1669, 1677 (Austin, Gammel Book Co. 1898); *Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 56 (Tex. 2003); ("When capacity is contested, Rule 93 requires that a verified plea be filed unless the truth of the matter appears of record."); *Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996) ("We have not hesitated in previous cases to hold that parties who do not follow rule 93's mandate waive any right to complain about the matter on appeal.").

[17] *See Schoellkopf v. Pledger*, 739 S.W.2d 914, 920-921 (Tex. App.–Dallas 1987) ("It is something of an understatement to say that the cases have not been entirely consistent in determining whether a defendant must have filed a verified denial of the plaintiff's right to recover in the capacity in which he sues in order to complain on appeal that the plaintiff failed to prove ownership of the cause of action asserted." (citing cases)), *rev'd*, 762 S.W.2d 145, 146 (Tex. 1988) (per curiam) (stating elliptically that "[t]he rule means just what it says").

need not be raised by verified denial.[18] These problems need not detain us here. Regardless of whether the issue is properly denominated standing, as the parties seemed to think in the trial court, or capacity, as petitioners have argued on appeal, the *substance* of Dynex's assertion — that ART and TCI cannot recover for Dynex's breaches of its agreements because they were not parties to the agreements — was addressed in cross-motions for summary judgment and adjudicated prior to trial. Not only was the matter raised by Dynex in its motion without objection,[19] it was raised by petitioners themselves in their own motion, and then adjudicated in their favor. At that point, there was no longer any reason for a verified pleading,[20] and the trial court's post-trial about-face did not resurrect the pleading requirement.

The law governing third-party beneficiaries is relatively settled:

> The fact that a person might receive an incidental benefit from a contract to which he is not a party does not give that person a right of action to enforce the contract. A third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit.

* * *

[18] *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005) ("Unlike standing, however, which may be raised at any time, a challenge to a party's capacity must be raised by a verified pleading in the trial court.").

[19] *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991) ("In this case, Respondents moved for summary judgment based on the affirmative defense of no consideration. Although Respondents did not plead the affirmative defense upon which their motion for summary judgment relies, they did expressly rely on this affirmative defense in their motion for summary judgment. Because Roark failed to direct the trial court's attention to the absence of the pleading in his written response or before the court rendered judgment, this complaint may not be raised on appeal.").

[20] *See Schoellkopf*, 739 S.W.2d at 921 ("The purpose of requiring that certain matters be denied by verified pleadings or waived is to eliminate from trial issues not seriously contested.").

> In determining whether a third party can enforce a contract, the intention of the contracting parties is controlling. A court will not create a third party beneficiary contract by implication. The intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied. Consequently, a presumption exists that parties contracted for themselves unless it clearly appears that they intended a third party to benefit from the contract.[21]

And of course, "[w]hen a contract is not ambiguous, the construction of the written instrument is a question of law for the court."[22]

Dynex knew that the purpose of the Commitment was to secure future financing for ART and TCI, real estate investment trusts that Basic managed and in which it held an ownership interest. Basic was never to be the borrower. On the contrary, the Commitment expressly required that the borrowers be SABREs acceptable to Dynex. Nor was Basic to own the SABREs. Dynex knew that Basic's business was to manage the investment trusts that created and owned the SABREs as part of their investment portfolio. The requirement that all borrowers be SABREs was for Dynex's benefit, to provide more certain recourse to the collateral in the event of default.

As a practical matter, the parties knew that it would likely not be a SABRE that would enforce the Commitment. By its very nature as a single-asset entity, a SABRE would not be created until an investment opportunity presented itself, and without financing, there would be no investment. It would be unreasonable to require ART and TCI to have created SABREs for no business purpose, merely in order that those otherwise inert entities could sue Dynex.

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[21] *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999) (citations and internal quotation marks omitted).

[22] *Id*. at 650.

The court of appeals was concerned that the benefit to ART and TCI was indirect in the sense that it flowed through the SABRE-borrowers.[23] We certainly agree that as a general proposition, a corporate parent is not a third-party beneficiary of its subsidiary's contract merely by virtue of their relationship. But here the benefit to each SABRE not only inured to its parent, the transaction was so structured to benefit Dynex. SABRE-borrowers provided a mechanism for ART and TCI to hold investment property directly but in a way that would provide Dynex greater security. If Dynex and Basic did not intend the Commitment to benefit ART and TCI directly, then the Commitment had no purpose whatever.

Dynex and Basic could have prevented any doubt about their intentions by expressly stating in the Commitment that it was to benefit ART and TCI. Perhaps they did not do so because it seemed to go without saying. But we need not speculate. The Commitment "clearly and fully spelled out" the benefit to ART and TCI because their role was basic to Dynex's and Basic's agreement.

Dynex insists that ART's and TCI's failure to request a jury finding on whether they were third-party beneficiaries is fatal to their recovery on that theory. But as we noted above, the proper construction of an unambiguous contract is a matter of law. The Commitment itself, and the undisputed evidence regarding its negotiation and purpose,[24] establish that ART and TCI were third-party beneficiaries.

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[23] 254 S.W.3d at 517-518.

[24] *See Banker v. Breaux*, 128 S.W.2d 23, 24 (Tex. 1939) (stating that the contracting parties' intention, which is of controlling importance, must be ascertained from their agreement "in the light of the attending circumstances").

Dynex argues that the New Orleans Agreement consisted of the promissory notes signed by each of TCI's three SABREs, and that TCI was not a third-party beneficiary of the obligations set out in those notes. But the notes were executed pursuant to a commitment by Dynex that TCI itself signed. As a party to the commitment that provided the New Orleans Agreement financing for its SABREs, TCI was a third-party beneficiary of the Agreement.

Accordingly, we conclude that ART and TCI were entitled to recover for Dynex's breach of the Commitment and the New Orleans Agreement.

III

We turn to the second issue addressed by the court of appeals: whether Basic is precluded from recovering lost profits as consequential damages for breach of the Commitment because Dynex could not reasonably foresee them. Foreseeability is a fundamental prerequisite to the recovery of consequential damages for breach of contract.

> Consequential damages are those damages that result naturally, but not necessarily, from the defendant's wrongful acts. They are not recoverable unless the parties contemplated at the time they made the contract that such damages would be a probable result of the breach. Thus, to be recoverable, consequential damages must be foreseeable and directly traceable to the wrongful act and result from it.[25]

The foreseeability requirement finds its most familiar expression in the venerated case of *Hadley v. Baxendale*. Baxendale, a common carrier, failed to timely deliver Hadley's steam engine crankshaft to engineers for repairs, and Hadley sued for lost profits from his mill as a result of the

[25] *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998) (per curiam) (citations and internal quotation marks omitted).

delay. The court disallowed recovery of the damages because Baxendale had no reason to know delay would have such consequences. The correct rule, according to the court, was this:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.[26]

The *Restatement (Second) of Contracts* states the rule as follows:

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or
>
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
>
> (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.[27]

Dynex contends that when it issued the Commitment, it could not have foreseen that its breach would cause Basic to suffer lost profits because it had no idea what specific investments Basic would propose or that alternative financing for them would be unavailable. The court of appeals agreed, concluding that Dynex could not be liable for Basic's lost profits unless it

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[26] 9 Exch. 341, 354, 156 Eng. Rep. 145, 151 (1854).

[27] RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

> knew, at the time it entered into the [Commitment]: (1) that the contracted financing was for a specific venture; and (2) that in the event of its breach the borrower probably would be unable to obtain other financing in a manner that would permit the borrower to carry out that venture.[28]

Certainly, a general knowledge of a prospective borrower's business does not give a lender reason to foresee the probable results of its refusal to make the loan. But Dynex cites no authority, and we are aware of none, for the proposition that the consequences of a lender's breach of a loan commitment are not reasonably foreseeable unless the lender knew, at the time the commitment was made, not only the nature of the borrower's intended use of the money, but the specific venture in which the borrower intended to engage. One case, *National Bank of Cleburne v. M.M. Pittman Roller Mill*,[29] is to the contrary. There, the Bank breached its agreement to loan the Mill $14,000 to buy wheat, and the Mill sued for the profits it would have made from the resale.[30] The trial court rendered judgment for the Mill, but the commission of appeal reversed because there was no evidence that the Bank knew the Mill intended to resell the wheat.[31] Had there been such evidence, however, the Bank need not have known to whom the Mill intended to sell the wheat.

> If, as found by the trial court, it was in contemplation of the parties at the time of the contract that [the Mill] was to engage in the business of buying and selling wheat with the hope of deriving a profit therefrom, it would be entitled, under proper pleading, to recover whatever net profits it could show that it would have made had the terms of the contract been complied with. If [the Bank] knew at the time it obligated itself to loan the $14,000 that the [Mill] intended to use this sum in

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[28] 254 S.W.3d at 520.

[29] 265 S.W. 1024 (Tex. Comm'n App. 1924, holding approved).

[30] *Id*.

[31] *Id*. at 1024, 1026.

> purchasing wheat to be sold for a profit, it could not excuse itself from liability for its wrong in breaching its contract on the plea that at the time of the contract it was uncertain whether there would be any profits at all. If it contracted that [the Mill] should reap the benefit of profits, should there be any, it should be required to pay whatever damages [the Mill] could show had been sustained by being deprived of such profits.[32]

Although this Court approved only the holding and judgment of the commission of appeals, we nevertheless regard its reasoning as sound. To be liable for the consequential damages resulting from a breach of a loan commitment, the lender must have known, at the time the commitment was made, the nature of the borrower's intended use of the loan proceeds but not the details of the intended venture.

There is no question Dynex knew that Basic's purpose in arranging the $160 million Commitment was to ensure financing for ART's and TCI's real estate investments. Dynex's executive vice president testified: "We were aware . . . that they were involved in significant commercial and multifamily endeavors [and] were constantly buying, selling, improving, doing the normal and usual things that a real estate developer does to enhance values." Dynex was in the business of providing capital for large real estate transactions and had entered into a number of other similar loan arrangements. For months, Dynex discussed with Basic its intended uses of the financing and negotiated detailed requirements for the loans to be made under the Commitment, including the specification that the borrowers by SABREs. In sum, the evidence establishes that Dynex clearly knew how the Commitment would be used. Indeed, it would be surprising if Dynex had agreed to lend Basic $160 million without such knowledge.

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[32] *Id*. at 1025.

Dynex certainly knew that if market conditions changed and interest rates rose, its refusal to honor the Commitment would leave Basic having to arrange less favorable financing. Because that is in fact what happened, Dynex argues that it had no reason to expect that Basic's increased financing costs would price some investments beyond reach, resulting in opportunities lost altogether. But we cannot infer from Basic's ability to arrange for alternate financing in a few instances that it could always do so, and nothing in the record supports such a counterintuitive proposition. Certain that its breach would increase Basic's costs, Dynex cannot profess blindness to the foreseeability that its breach would also cost Basic business.

Which is not to say that it actually did. The court of appeals held that the lost profits Basic claims as consequential damages were not foreseeable to Dynex at the time the Commitment was made, and on this issue we disagree. Dynex also argues, in this Court as in the court of appeals, that even if lost profits were foreseeable, they were not sustained. The court of appeals did not address that argument, and neither do we. It, among many others that the parties have raised, we leave for further consideration by the court of appeals on remand.

* * *

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

Nathan L. Hecht
Justice

Opinion delivered: April 1, 2011

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.

JUSTICE LEHRMANN did not participate in the decision.

We deny Gilbert Texas Construction's motion for rehearing. We withdraw our opinion of June 4, 2010 and substitute the following in its place.

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.

We address two issues. The first 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. The second issue is whether Gilbert is entitled to recover its settlement payment under an estoppel theory. We hold it is not.

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, 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.

DART provided insurance for the project through an Owner Controlled Insurance Program. Gilbert's primary 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]

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[1] Various interveners eventually joined the suit, including RTR's property insurers and persons who had offices in the flooded building.

[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.

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 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 defendants moved for summary judgment on the basis of immunity. The trial court granted the motions for summary judgment except for RTR's claims against Gilbert for 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 Gilbert was not prejudiced by Underwriters' actions and Underwriters is not required to pay damages to Gilbert under an estoppel theory.[5]

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).

[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.

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

[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.

noted above, Texas courts of appeals have reached different conclusions about the exclusion's effect, as have other state and federal courts.

The principles 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 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 contract with DART and Gilbert does not claim there are facts that could result in its being liable under some 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]

[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.

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

[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. & 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).

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 interpretation of the policy accords with longstanding principles of 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

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[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); *See also 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).

[10] Prior to 1986, the CGL policy was called the Comprehensive General Liability Insurance Policy.

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 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. 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 or unless the insured would have liability in the absence of the contract or agreement.

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 or that any liability it might have had to RTR arose from some source other than the breach of contract claim. Thus, RTR's only claim that remained pending against Gilbert fell 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)); *see 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.").

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 the 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. *Id.* at 4-5. 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 contract. 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]

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, (2) Underwriters did not assume Gilbert's defense, and (3) Gilbert was not prejudiced by Underwriters' actions. 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

[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 its particular 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.

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 asserts that Underwriters directed Gilbert to seek summary judgment on RTR's tort claims based on governmental immunity, but did not inform Gilbert of Underwriters' position that the insurance policy did not cover breach of contract claims. Gilbert contends it was prejudiced because Underwriters' actions deprived it of the opportunity to make an informed decision about which risk to take: (1) assert the immunity defense and risk Underwriters' denying coverage for the

breach of contract claim, or (2) refuse to assert the immunity defense and risk Underwriters' denying coverage because Gilbert breached the cooperation clause.[12]

The court of appeals concluded that Underwriters did not assume control of Gilbert's defense. 245 S.W.3d at 37. We need not address whether Underwriters assumed control of the defense, however, because we conclude that even if Gilbert was deprived of the opportunity to make an informed decision as it claims, it was not prejudiced by the deprivation because in the final analysis, Gilbert did not have coverage for the contract claim regardless of whether it asserted the immunity defense as Underwriters directed it to do.

Gilbert primarily relies on our decision in *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973), to support its claim of prejudice. *Tilley* involved a suit in which Employers sought a declaratory judgment that it did not have coverage for a personal injury suit in which Joe Tilley was a defendant. When Tilley reported that he had been sued, Employers and Tilley entered into a standard non-waiver agreement and Employers retained an attorney to defend him. *Id.* at 554. Employers questioned whether Tilley had timely reported the accident on which the suit was based, but it did not specifically advise Tilley that a conflict of interest existed because of the late notice issue. Nor did the defense attorney advise Tilley that the attorney had a conflict of interest in that he was simultaneously defending Tilley and gathering coverage information favorable to Employers. *Id*. Employers later denied coverage, in part, on the basis of evidence developed by the defense

[12] We assume the validity of Gilbert's argument. However, both Grau and Gilbert's claims manager testified that at a mediation before the hearing on Gilbert's summary judgment motion one of Underwriters' attorneys told Grau the breach of contract claim might not be covered if summary judgment were granted on the basis of immunity.

attorney. *Id.* We held, largely on public policy grounds, that Tilley was prejudiced by Employers' actions and Employers was estopped to deny coverage. *Id.* at 561.

The facts of this case are not similar to those present in *Tilley*, and the prejudice Tilley suffered is different from the type of prejudice Gilbert claims. First, unlike the insurer in *Tilley*, Underwriters did not have a duty to defend Gilbert, nor did it retain Gilbert's defense attorney, Grau. There is no claim by Gilbert that Grau simultaneously defended Gilbert and represented Underwriters in regard to coverage, had a conflict of interest with Gilbert, developed and provided evidence to Underwriters that harmed Gilbert's coverage position without advising Gilbert, or in any other way breached his duty to Gilbert. To the contrary, Grau advised Gilbert to obtain coverage counsel and Gilbert knew Grau was not involved in coverage issues. Further, the suit with RTR was supervised by Gilbert's in-house claims manager who had over twenty-six years of experience in insurance claims and was monitored by in-house attorneys of Gilbert's parent corporation. Second, Underwriters consistently advised Gilbert during the pendency of RTR's case that coverage would be based on the actual facts underlying RTR's claims as they were determined to exist.

Gilbert does not explain how it was prejudiced by being unable to make an informed decision about whether to assert immunity when the ultimate risk to Gilbert under either choice—whether asserting immunity or refusing to assert immunity—was the same. While Gilbert claims that if it did not assert immunity Underwriters would have denied coverage for lack of cooperation, there is no evidence that Gilbert would have had coverage for the claims even if it had refused to assert the immunity defense. Gilbert does not contest that the facts established in RTR's suit showed that all the contractors were immune. Further, there is no evidence that, regardless of whether Gilbert

asserted immunity, Underwriters would have changed its position that coverage would be determined based on the facts of RTR's claim. Gilbert's lack of prejudice is reflected in a statement made by an attorney for its parent company. The attorney acknowledged that it likely would not have mattered whether Gilbert raised and pursued the issue of governmental immunity because the trial court ruled that governmental immunity extended to all the contractors. *See D.R. Horton-Tex., Ltd.*, 300 S.W.3d at 744 (noting that the duty to indemnify is determined by the facts as they are established in the underlying suit); *Pine Oak Builders, Inc.*, 279 S.W.3d at 656. Thus, Underwriters did not have coverage for RTR's claims regardless of whether Gilbert would have breached the policy's cooperation clause if it had refused to assert immunity, a question on which we express no opinion.

In sum, there is no evidence that if (1) Underwriters had advised Gilbert of Underwriters' belief that the breach of contract claim would not be covered if Gilbert succeeded in obtaining summary judgment on RTR's tort claims and (2) Gilbert had chosen not to pursue the summary judgment, then Underwriters would have settled the claim on behalf of Gilbert or been liable to indemnify Gilbert for the settlement. Thus, there is no evidence that Gilbert was prejudiced by not being able to make an informed decision as it claims.

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: December 17, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0248

CARMELITA P. ESCALANTE, M.D., E. EDMUND KIM, M.D.,
EDGARDO RIVERA, M.D., AND FRANKLIN C. WONG, M.D., PETITIONERS,

v.

DONITA ROWAN AND JAMES NIESE, RESPONDENTS

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

PER CURIAM

Respondents Donita Rowan and her husband filed suit against petitioners Dr. Carmelita P. Escalante, Dr. E. Edmund Kim, Dr. Edgardo Rivera, and Dr. Franklin C. Wong, physicians at University of Texas M.D. Anderson Cancer Center, alleging the doctors were negligent in failing to diagnose and treat the recurrence of Rowan's cancer. The doctors moved to dismiss the suit under section 101.106(f) of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.106(f), claiming that the suit was based on conduct within the general scope of their employment and that the cause of action could have been brought against M.D. Anderson.

The trial court denied the doctors' motion to dismiss, and they filed an interlocutory appeal. While the appeal was pending, the doctors filed a motion for summary judgment on other grounds,

which the trial court granted. The court of appeals affirmed the denial of the motion to dismiss and reversed the summary judgment. 251 S.W.3d 720, 722 (Tex. App.–Houston [14th Dist.] 2008).

While this case has been pending on appeal, we have decided *Franka v. Velasquez*, ___ S.W.3d ___ (Tex. 2011), holding among other things that, for purposes of section 101.106(f), a tort action is brought "under" the Texas Tort Claims Act, even if the government has not waived its immunity for such actions. ___ S.W.3d at ___. In light of *Franka*, we grant the doctors' petition for review, and without hearing oral argument, reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings. TEX. R. APP. P. 59.1.

Opinion delivered: January 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0262

ROY KENJI YAMADA, M.D., PETITIONER,

v.

LAURA FRIEND, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SARAH ELIZABETH FRIEND, DECEASED, AND LUTHER FRIEND, INDIVIDUALLY, RESPONDENTS

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

Argued March 10, 2009

JUSTICE JOHNSON delivered the opinion of the Court.

In this appeal we address whether claims against a health care provider based on one set of underlying facts can be brought as both health care liability claims subject to the Texas Medical Liability Act (TMLA) and ordinary negligence claims not subject to the TMLA. We hold that they cannot.

Sarah Friend collapsed at a water park and later died. As a result of her death her parents sued several parties, including Roy Yamada, M.D. Sarah's parents alleged that Dr. Yamada negligently advised the water park about safety procedures and placement of defibrillators. They did not file an expert report as is required by the TMLA for health care liability claims.

The court of appeals held that the Friends' allegations that Dr. Yamada's actions violated medical standards of care were health care liability claims and the Friends were required to comply with provisions of the TMLA as to those claims. The Friends do not dispute that holding. The court also held, however, that the Friends' allegations that the same actions by Dr. Yamada violated ordinary standards of care and were not subject to the TMLA.

We hold that because all the claims against Dr. Yamada were based on the same underlying facts, they must be dismissed because the Friends did not timely file an expert report. When the underlying facts are encompassed by provisions of the TMLA in regard to a defendant, then all claims against that defendant based on those facts must be brought as health care liability claims. Application of the TMLA cannot be avoided by artfully pleading around it or splitting claims into both health care liability claims and other types of claims such as ordinary negligence claims.

I. Background

A. Trial Court

The city of North Richland Hills owns and operates North Richland Hills Family Water Park. In July 2004, twelve-year-old Sarah Friend was waiting in line for one of the water park rides when she collapsed. Personnel from the water park and North Richland Hills Fire Department administered emergency aid and she was then transported to a hospital where she died from a heart condition.

Sarah's mother and father, Laura[1] and Luther Friend, sued the City and several individual defendants. They alleged that Sarah's death was proximately caused by the defendants' failure to timely and properly evaluate and care for her after she collapsed. The Friends' allegations focused on the failure of water park personnel to use an automated external defibrillator (AED) in attending to Sarah.

The Friends eventually joined Dr. Yamada as a defendant. They alleged that he (1) was a licensed medical doctor who specialized in emergency medicine; (2) "had a duty to exercise ordinary care and act as an emergency medicine physician of reasonable and ordinary prudence under the same or similar circumstances"; (3) "was responsible for and provided medical consultative advice and recommendations to and for the various safety practices and procedures" at the water park prior to and as of the date Sarah collapsed; (4) "had a duty under Texas law to exercise ordinary care and act as an emergency medicine physician of reasonable and ordinary prudence" in providing services to the water park; and (5) breached "that duty" by (a) failing to timely, properly, and adequately provide services to the water park and (b) committing "other acts or omissions of negligence or wrongdoing." There was never a doctor-patient relationship between Dr. Yamada and Sarah.

The Friends did not file an expert report pursuant to Texas Civil Practice and Remedies Code section 74.351 after they sued Dr. Yamada, so he filed a motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a), (b). The Friends' response specified that their claims were based on Dr. Yamada's provision of medical consultative advice and recommendations in regard to various safety

[1] Laura sued individually and as representative of Sarah's estate.

practices and procedures at the water park. The trial court denied Dr. Yamada's motion and he appealed. *See id.* § 51.014(a)(9) (authorizing interlocutory appeal from an order denying a motion to dismiss for lack of an expert report).

B. Court of Appeals

The court of appeals noted that the only alleged acts or omissions on which the Friends based their claims against Dr. Yamada were his failure to properly provide advice and recommendations to the City about its safety practices, including the placement and maintenance of AEDs. ___ S.W.3d ___, ___. It determined that the pleadings stated claims for negligence based on breach of an emergency medicine physicians' standard of care, but also stated claims for ordinary negligence. *Id.* at ___. The appeals court reasoned that medical testimony is not required to establish the proper placement of AED devices, thus such claims were not health care liability claims because the alleged negligence was not based on advice directly related to acts performed or furnished by a health care provider to Sarah during her medical care, treatment, or confinement. The court held that the trial court properly refused to dismiss the claims based on allegations of ordinary negligence. *Id.* at ___. However, the court also held that the pleadings alleging Dr. Yamada gave negligent advice about where to locate AEDs were health care liability claims to the extent they alleged Dr. Yamada had a duty to act as an emergency physician under the circumstances and he breached that duty. The court held that the Friends' failure to file an expert report required dismissal of the claims based upon allegations of breach of an emergency room physician's standard of care. *Id.* at ___. Thus, the court of appeals held that the same acts and omissions by Dr. Yamada formed the basis of both

health care and non-health care claims based on pleadings alleging that the acts and omissions breached different standards of care.

C. Positions of the Parties

The Friends did not file a petition for review. But Dr. Yamada did and we granted it. 52 Tex. Sup. Ct. J. 331, 333 (Feb. 13, 2009).

Dr. Yamada asserts that the court of appeals erred in two ways. First, he argues the court construed the definition of health care liability claim based on a breach of accepted standards of safety too narrowly. Second, he asserts the court impermissibly allowed "claim splitting" by holding that the same underlying facts gave rise to an ordinary negligence claim, which the court held could continue, and a health care liability claim, which the court dismissed. The difference between the claims, Dr. Yamada urges, is nothing more than artful pleading.

In their brief, the Friends specify that Dr. Yamada's connection to Sarah's death was his consultative services in regard to placement of life-saving devices such as the AEDs. They do not dispute the court of appeals' characterization of their claims as alleging only that Dr. Yamada failed to properly provide advice and recommendations to the City about its safety practices. And they agree that the court of appeals "correctly . . . reversed the trial court's order denying Petitioner Dr. Yamada's motion to dismiss [their] claims that are based on a standard of medical care and dismissed those claims with prejudice." However, they argue that their ordinary negligence claim should not be dismissed because it is not in essence a health care liability claim. The Friends first assert that their ordinary negligence claim is not for breach of standards of medical care or health care as those terms are defined in the TMLA. Next, they argue that to be a health care liability claim

for breach of an accepted standard of safety under the TMLA, the claim must be for an act or omission directly related to health care, which their ordinary negligence claim is not. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

We agree with Dr. Yamada in part.[2] The court of appeals' holding that the Friends asserted health care liability claims against Dr. Yamada is unchallenged and all their claims were based on the same facts. The Friends' claims against Dr. Yamada cannot be split into health care and non-health care claims by pleading that his actions violated different standards of care; all their claims must be dismissed.

II. Claims Under the TMLA

The TMLA requires the trial court to dismiss a suit asserting health care liability claims against a physician or health care provider if the plaintiff does not timely file an expert report as to that defendant. *Id.* § 74.351. The TMLA defines "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 or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

Id. § 74.001(a)(13).

Whether a claim is a health care liability claim depends on the underlying nature of the claim being made. *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004) (addressing former TEX. REV. CIV. STAT. art. 4590i, *repealed by* Act of June 2, 2003, 78th Leg., ch. 204, § 10.09, 2003

[2] Our decision makes it unnecessary to consider whether the court of appeals properly construed the TMLA's language regarding breaches of accepted standards of safety. It is also unnecessary to consider the effect, if any, of the lack of a doctor-patient relationship between Dr. Yamada and Sarah.

Tex. Gen. Laws 847, 884). Artful pleading does not alter that nature. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005); *Garland Cmty. Hosp.*, 156 S.W.3d at 543.

III. Discussion

In *Diversicare*, Maria Rubio was the victim of a sexual assault at a nursing home. 185 S.W.3d at 845. Rubio filed suit against the nursing home based in part on claims that the home failed to hire and train appropriate personnel to monitor Rubio, failed to provide twenty-four-hour nursing services from a sufficient number of qualified nursing personnel to meet her nursing needs, hired incompetent staff who were unqualified to care for her, and failed to establish and implement appropriate safety policies to protect its residents. *Id.* The concurring and dissenting justices in *Diversicare* concluded that Rubio asserted a premises liability claim against the nursing home independent of her health care liability claim. *Id.* at 857-58 (Jefferson, C.J., concurring in part, and dissenting in part) (pointing to Rubio's claims that the home failed to protect her by failing to implement safety precautions and establish appropriate corporate safety, training, and staffing policies); *id.* at 861-66 (O'Neill, J., dissenting) (construing Rubio's claim that the facility failed to use ordinary care to protect her from a known danger to be a premises liability claim). The Court rejected the view that Rubio could allege a claim for premises liability independent of her healthcare liability claim 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., 156 S.W.3d at 543 ("Plaintiffs cannot use artful pleading to avoid the MLIIA's requirements when the essence of the suit is a health care liability claim.").

Because the Friends do not challenge the court of appeals' holding that their claims against Dr. Yamada are in part health care liability claims and based on facts covered by the TMLA, the question before us is whether claims based on the same facts can alternatively be maintained as ordinary negligence claims. We hold that they cannot.

Despite agreeing that the court of appeals correctly dismissed their health care liability claims based on the acts and omissions of Dr. Yamada, the Friends allege that his conduct can also be measured by ordinary standards of care as opposed to standards that require specific expertise in health care. But it would be hard to find a health care liability claim in which some action by the health care provider or physician arguably would not be within the common knowledge of jurors, and thus would support a claim for ordinary negligence. This case is a prime example of such a claim. The Friends assert that the same actions and omissions by Dr. Yamada are governed by both standards requiring expert testimony to establish—one of the factors that can be considered in determining whether a claim is a health care liability claim—and standards that do not require expert testimony.

The Friends reference other examples in their brief. In *Institute for Women's Health, P.L.L.C. v. Imad*, 2006 Tex. App. Lexis 1182 (Tex. App.—San Antonio Feb. 15, 2006, no pet.), an embryologist dropped a tray of embryos and destroyed all of them except one. The Friends note their agreement with the holding that the claims against the embryologist were health care liability claims because the specific acts and omissions of the embryologist were an inseparable part of the health

and medical transaction. But even though the carrying of the tray was an inseparable part of the health and medical services, the care required in carrying a tray of embryos without dropping it could have been asserted as ordinary negligence because the care required to carry a tray—whether one carrying embryos or something else such as a child's lunch—is not generally outside the common knowledge of jurors.

The Friends also reference *Valley Baptist Medical Center v. Azua*, 198 S.W.3d 810 (Tex. App.—Corpus Christi 2006, no pet.). There a hospital employee was assisting a patient into a wheelchair. The employee allegedly failed to block the wheels of the wheelchair and the patient was injured when the wheelchair moved as the patient was attempting to sit in it. *Id.* at 814. It certainly could be argued, as Azua did, that expert testimony is not necessary to establish the need to secure a wheelchair so it will not move when an ill patient tries to sit down in it. Nevertheless, the Friends note their agreement with the court of appeals' holding that the Azua's claim, although pled as an ordinary negligence claim, was a health care liability claim. *Id.*

Clearly, particular actions or omissions underlying health care liability claims can be highlighted and alleged to be breaches of ordinary standards of care. But if the same underlying facts are allowed to give rise to both types of claims, then the TMLA and its procedures and limitations will effectively be negated. Plaintiffs will be able to entirely avoid application of the TMLA by carefully choosing the acts and omissions on which to base their claims and the language by which they assert the claims.

Our prior decisions are to the effect that if the gravamen or essence of a cause of action is a health care liability claim, then allowing the claim to be split or spliced into a multitude of other

causes of action with differing standards of care, damages, and procedures would contravene the Legislature's explicit requirements. *Diversicare*, 185 S.W.3d at 854. Those decisions dictate the outcome here. The Friends' allegations that Dr. Yamada's actions breached ordinary standards of care did not change either the substantive basis or the nature of the claims.

IV. Conclusion

Based on the unchallenged holding of the court of appeals that the Friends' claims based on Dr. Yamada's actions encompassed health care liability claims, all their claims should have been dismissed because they did not file an expert report. We affirm the court of appeals' judgment to the extent it reversed the trial court's order and dismissed some of the Friends' claims. We reverse the court of appeals' judgment to the extent it affirmed the trial court's order denying Dr. Yamada's motion to dismiss. Because Dr. Yamada requested his attorney's fees and costs in the trial court under Texas Civil Practice and Remedies Code section 74.351(b)(1), we remand to that court with instructions to dismiss all the Friends' claims against Dr. Yamada and consider his request for attorney's fees and costs.

Phil Johnson
Justice

OPINION DELIVERED: December 17, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0265

CITY OF DALLAS, PETITIONER,

v.

VSC, LLC, RESPONDENT

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

Argued January 8, 2010

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE WILLETT, and JUSTICE LEHRMANN.

JUSTICE WAINWRIGHT delivered a dissenting opinion, joined by JUSTICE JOHNSON and JUSTICE GUZMAN.

We expect our government to retrieve stolen property and return it to the rightful owner. What happens, though, when a person claims an interest in property the government has seized? In this case, the City of Dallas seized vehicles, which it alleged were stolen, from a company that was entitled to petition for their return. *See* TEX. CODE CRIM. PROC. art. 47.01a(a). Instead of pursuing its statutory remedy, the company sued, alleging that its interest in those vehicles had been taken without just compensation. We hold that the availability of the statutory remedy precludes a takings claim. We reverse the court of appeals' judgment and render judgment dismissing this suit.

I. Background

Beginning in the summer of 2002 and continuing through 2004, the City's police department seized a number of vehicles from VSC, a licensed vehicle storage facility.[1] VSC initially alleged that the City seized 326 vehicles.[2] City police officers testified that all of the seized vehicles had been reported stolen or otherwise displayed indicia of theft, such as altered vehicle identification numbers. VSC's records confirmed that many of these vehicles had been reported stolen.

Several days after the initial seizure, VSC sued the City, asserting a lien for fees related to the vehicles' storage and contending that the City's actions amounted to an unconstitutional taking. The City removed the suit to federal court, which took jurisdiction over all but the takings claim,[3] which it remanded to state court along with the related declaratory judgment action.[4] The City filed a plea to the trial court's jurisdiction on several grounds, which that court denied. The court of

[1] *See* TEX. OCC. CODE ch. 2303. A vehicle storage facility is a parking facility that is used to store or park at least ten vehicles each year. *Id.* § 2303.002(8)(B). The chapter does not regulate vehicles parked with the consent of the owner. *Id.* § 2303.003(a). VSC's license to operate as a vehicle storage facility was revoked sometime after the occurrence of the facts that form the basis of this case.

[2] The precise total is disputed, with the City claiming that 324 vehicles were seized. In any event, VSC ultimately abandoned its claims to 47 of the seized vehicles and another 25 or 27 were either not seized or were the result of duplications or inaccuracies in VSC's records.

[3] VSC alleges a taking under both the Texas and United States Constitutions. Where the parties have not argued that there are any material differences between the state and federal versions of a constitutional provision, we typically treat the two clauses as congruent. *See New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 150 (Tex. 2004).

[4] *See VSC, LLC v. City of Dallas*, No. 3:04-CV-1046-D (N.D. Tex. Feb. 23, 2005) (order remanding some claims to state court and retaining jurisdiction over others). The federal court retained jurisdiction over VSC's constitutional claims alleging an unlawful search and seizure, as well as its pendent state-law tort claims. *See id.*

appeals affirmed with respect to all but one issue.[5] 242 S.W.3d 584, 599. We granted the petition for review. 53 Tex. Sup. Ct. J. 13, 15 (Oct. 23, 2009).[6]

II. VSC's Takings Claim

A. The Statutory Remedy

Texas law permits a police officer to seize, without a warrant, vehicles that reasonably appear to have been stolen. TEX. TRANSP. CODE § 501.158(a) (permitting the warrantless seizure of allegedly stolen vehicles if an officer has probable cause). Vehicles seized under that authority are treated as stolen for purposes of custody and disposition. *Id.* § 501.158(b). But it may turn out that the property was not stolen at all, that it has multiple owners, or that it is subject to other claims, like a lien or leasehold interest. For these and other reasons, the Legislature enacted chapter 47 of the Code of Criminal Procedure, which protects a person's claimed interest in seized property. When there is a dispute as to property ownership, an officer possessing allegedly stolen property must secure it until the court directs its disposition. TEX. CODE CRIM. PROC. art. 47.01(a). That officer must file with the court a schedule of the property and its value and must "notify the court of the names and addresses of each party known to the officer who has a claim to possession of the seized property." *Id.* art. 47.03.

Because the officer may not know the identity of all persons with a claim to possession, the statute provides that any person with a property interest may assert that interest directly with the

[5] The court of appeals held that the trial court abused its discretion in denying the plea with respect to VSC's claim that the City took, damaged, or destroyed VSC's property for a private purpose. 242 S.W.3d 584, 596. VSC does not challenge that ruling here.

[6] We called for the views of the Solicitor General, who submitted a brief on behalf of the State of Texas as amicus curiae.

court.[7] *Id.* art. 47.01a(a) ("[U]pon the petition of an interested person" a judge "may hold a hearing to determine the right to possession of the property."). During that hearing "any interested person" may present evidence establishing ownership. *Id.* art. 47.01a(c). The individual proving the superior right to the property is entitled to its return, subject to the State's use of it in prosecuting related crimes.[8] *Id.* arts. 47.01a(a)(1)-(a)(2), 47.04. Occasionally—perhaps frequently—the property is never claimed and the government either sells or destroys it. *Id.* arts. 18.17, 47.06. If the property is sold, its true owner may recover the proceeds. *Id.* arts. 18.17(e), 47.07.[9]

Here, forty-seven of the seized vehicles were the subject of chapter 47 proceedings initiated by the City and adjudicated in municipal court. The court awarded some of the cars to VSC, some to the cars' owners, and others to the owners on the condition that VSC's fees were first satisfied. Thus, in many cases, VSC regained possession of the vehicles that the City had seized, and in others it was awarded compensation. VSC concedes that this procedure, when properly used, adequately protects its interests. As such, VSC has not brought takings claims with respect to the vehicles for which municipal court hearings were held.

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[7] Though chapter 47 proceedings are typically brought in municipal court, that venue is not exclusive. *See* TEX. CODE CRIM. PROC. § 47.01(d). Claims under chapter 47 may be brought in the same suit as other claims.

[8] A chapter 47 proceeding initiated in municipal or justice court may be appealed to a county court or statutory county court, where they are "governed by the applicable rules of procedure for appeals for civil cases in justice courts to a county court or statutory county court." TEX. CODE. CRIM. PROC. 47.12(b). Matters appealed to county court are tried de novo. TEX. R. CIV. P. 574b.

[9] The owner of property sold pursuant to chapter 47 may recover the proceeds of the sale under the same circumstances as may the owner of property sold under the abandoned and unclaimed property statute. TEX. CODE CRIM. PROC. art. 47.07. Thus, the real owner must file a claim for the proceeds "not later than the 30th day after the date of [the property's] disposition." *Id.* art. 18.17(e).

For the other 270 vehicles, VSC claims that it does not know how the City disposed of them—or if it did. Though VSC could have initiated chapter 47 proceedings to assert its interest in the vehicles, it argues here that if the City wished to dispose of the vehicles, it was required to give VSC notice prior to hearings on their disposition. Any failure to do so, VSC argues, amounts to an unconstitutional taking of its asserted lien interest.[10] We disagree and hold that because VSC had actual knowledge of the vehicles' seizure—VSC knew the cars were seized from its lot, and it knew who seized them—it was required to pursue the chapter 47 proceedings.[11] We hold further that VSC must have utilized those procedures before a takings suit can be viable.

The constitution waives immunity for suits brought under the Takings Clause,[12] but this does not mean that a constitutional suit may be brought in every instance. The Legislature's broad authority to prescribe compensatory remedies for takings is well-established, so long as those methods comply with due process and other constitutional requirements. *See, e.g.*, *Secombe v. R.R. Co.*, 90 U.S. 108, 117-18 (1874) (holding that the Legislature has broad authority to create eminent

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[10] We assume without deciding that a licensed vehicle storage facility may have a garageman's lien in a stored vehicle and that a garageman's lien may exist in stolen property. *See* TEX. PROP. CODE § 70.003(c) (providing for a lien in vehicles "left for care" with a garageman). The City disputes both of these contentions.

[11] The dissent provides a number of quotations from VSC's pleadings to argue that VSC did ask for chapter 47 relief in the trial court. While VSC asked to be declared an interested party entitled to notice under chapter 47, it pointedly *did not* seek a hearing. To the contrary, VSC disclaimed any responsibility to file under chapter 47 and argued, as it continues to argue here, that it was the City's sole responsibility to seek such hearings. Likewise, VSC's response to the City's plea to the jurisdiction focused solely on its takings claim—the only claim asserted in its live pleading. This does not amount to a request for chapter 47 relief. VSC was required to protect its alleged property interest by seeking relief under chapter 47. The statute authorized VSC to seek such relief, and the reasons for its failure to do so are irrelevant. *Cf.* ___ S.W.3d at ___ (suggesting that VSC failed to request a hearing because it "did not believe that it could bring a claim under Chapter 47").

[12] *See Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980) ("The Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use.").

domain procedures). When the Legislature creates such a statutory procedure, recourse may be had to a constitutional suit only where the procedure proves inadequate, for it is not the taking of property, as such, that raises constitutional concerns, but the taking of property *without just compensation*. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The [Takings Clause] does not proscribe the taking of property; it proscribes taking without just compensation.").[13] When there exists provision for compensation—or, as here, for the property's return—a constitutional claim is necessarily premature. *See id.* at 194-95 ("If the government has provided an adequate process for obtaining compensation, and if resort to that process '[yields] just compensation,' then the property owner 'has no claim against the Government' for a taking." (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984)) (alteration in original)); *see also Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) (refusing to pass upon a takings claim because of the existence of a statute "afford[ing] a plain and adequate remedy"); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) (holding that governmental action

[13] The dissent contends that *Williamson County*'s state-court litigation requirement does not apply here because that decision was based on federalism concerns not present in this case. ___ S.W.3d at ___. We believe, though, that the Court's reasoning has direct relevance. *Williamson County* requires complainants alleging a taking to file inverse condemnation suits in state court before bringing suit in federal court. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton State Bank*, 473 U.S. 172, 186 (1985). The Court began with the basic proposition that the Takings Clause only prohibits takings without just compensation. *Id.* at 194. Citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court explained that it had already interpreted this to mean that "taking claims against the Federal Government are premature until the property owner has availed itself of" remedial statutory procedures. *Williamson Cnty.*, 473 U.S. at 195. The Court further held that a state-court inverse condemnation claim *was* a *Ruckelshaus*-type remedial procedure, and that a property owner therefore could not bring a *federal* takings claim until he had proceeded in state court. *Id.* at 195-96. This second holding has been criticized, as it has made it more difficult for property owners to bring takings claims against state governments in federal courts. *See San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., concurring) (arguing that *Williamson County*'s state-court litigation rule should be reconsidered).

Our holding today, however, relies only on *Williamson County*'s primary observation that utilization of a remedial scheme for recovery of property logically precedes a takings claim. As the Court acknowledged, this is a proposition implicit in the Takings Clause and well-supported by precedent.

was not unconstitutional because "the complainant can recover just compensation under the Tucker Act in an action at law . . . [and t]he compensation which he may obtain in such a proceeding will be the same as that which he" is entitled to under the constitution); *Crozier v. Fried. Krupp Aktiengesell-Schaft*, 224 U.S. 290, 306-07 (1912) (rejecting a constitutional challenge on the basis of the Takings Clause because the relevant statute provided a compensatory mechanism).[14]

Immediately following the vehicles' seizure, however, when VSC filed its district court lawsuit, VSC had a legal avenue through which it could potentially regain possession or compensation. As the dissent acknowledges, operation of the chapter 47 procedure might have "moot[ed] VSC's takings claim." ___ S.W.3d at ___. This is significant, because if a remedial procedure might have obviated the need for a takings suit, then the property simply had not, prior to the procedure's use, been taken *without just compensation*. Because VSC could seek possession or compensation through a remedial statutory scheme, it could not ignore that scheme in favor of initiating a constitutional takings suit.

Hays v. Port of Seattle, 251 U.S. 233 (1920), is a good illustration of this rule. There, the Supreme Court refused to permit a claimant to bring a takings suit, despite the fact that the government had seized his property for a public purpose. *Hays*, 251 U.S. at 238. The Court emphasized that the state provided a procedure by which the claimant could seek just compensation. *Id.* ("[T]his statute constitutes an adequate provision for assured payment of any compensation due

[14] The Supreme Court later explained that the existence of a statutory remedy in *Crozier* made the government's taking of property in that case constitutionally unobjectionable. *See William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtis Marine Turbine Co.*, 246 U.S. 28, 44-45 (1918) ("[T]he provisions of the statute affording a right of action and compensation were adequate to justify the exercise" of the government's power.).

to complainant . . . ."). Thus, the Supreme Court held that there could be no taking because the claimant bypassed the compensatory procedure.

As in *Hays*, the claimant here alleges that a taking has occurred. As in *Hays*, the Legislature has provided a procedure capable of "constitut[ing] an adequate provision," *id.*, for compensation—here, actual possession. And, as in *Hays*, the claimant here has ignored the compensatory scheme in favor of a constitutional claim. Thus, we reject VSC's taking claim because it did not pursue an established remedy to recover its claimed interest in the seized property.[15]

B. Notice

VSC suggests, however, that chapter 47 is constitutionally infirm because it does not require that the City notify claimed owners of these proceedings. Disputes about proper notice invoke procedural due process, not the Takings Clause. In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005), the Supreme Court observed that takings and due process are distinct inquiries and held that due process claims must be addressed first because whether there has been proper notice is a question "logically prior to and distinct from" whether there has been a taking. The Takings Clause guarantees compensation "in the event of *otherwise proper interference* amounting to a taking." *Id.*

[15] *See also Ruckelshaus*, 467 U.S. at 1013 n.16 (holding that a statutory procedure that provides just compensation "nullif[ies] any claim against the Government for a taking"). In *Ruckelshaus*, Monsanto claimed that the Environmental Protection Agency (EPA) had taken without just compensation certain trade secrets that it was required to submit during the approval process for insecticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *Id.* at 998. The alleged taking occurred when the EPA used some of Monsanto's trade secrets in assessing the permit applications of other companies' insecticides. *Id.* However, under FIFRA, Monsanto was entitled to compensation from the companies to whose benefit its trade secrets were applied, which it could seek through a statutory arbitration process. *Id.* at 995. The Court held that Monsanto's takings claims were unripe because it had not yet arbitrated its claims, noting that "[i]f a negotiation or arbitration pursuant to [FIFRA] were to yield just compensation . . ., then Monsanto would have no claim against the Government for a taking." *Id.* at 1013.

(internal quotations omitted). If due process is violated due to failure of notice, however, "that is the end of the inquiry" because "[n]o amount of compensation can authorize such action." *Id.* Thus, VSC's failure-of-notice claim is more properly considered as alleging a due process violation than a taking. Regardless, we believe that VSC's actual notice of the vehicles' seizures was constitutionally sufficient and that it therefore had the burden of pursuing the chapter 47 remedy.

In *Mullane v. Cent. Hannover Bank & Trust Co.*, 339 U.S. 306 (1950), the Supreme Court concluded that due process is satisfied if notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The *Mullane* Court focused on the requirement that the parties be actually notified of an action that might affect their interests. *Id.* at 315 ("The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract . . . ."). The Supreme Court recognized "the impossibility of setting up a rigid formula as to the kind of notice that must be given," holding that the "notice required will vary with circumstances and conditions." *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956).

In *City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999), the Supreme Court held that actual notice is constitutionally sufficient notice of a remedial procedure when that procedure is easily discoverable. There, the police seized personal property from Perkins's home under a valid search warrant. *West Covina*, 525 U.S. at 236. The police did not suspect Perkins of a crime but, rather, were pursuing a former boarder who was purportedly involved in a homicide. *Id.* As required by statute, the police left Perkins a warrant that listed the seized property and named the

issuing magistrate and executing officer. *Id.* at 236-37. Rather than seek a court order, Perkins sued the officers and alleged that the remedies for the property's return did not satisfy due process. *Id.* at 237-38. The Supreme Court distinguished *Mullane*, writing that while individualized notice of the seizure itself is necessary,

> [n]o similar rationale justifies requiring individualized notice of state-law remedies which, like those at issue here, are established by published, generally available state statutes and case law. Once the property owner is informed that his property has been seized, he can turn to these public sources to learn about the remedial procedures available to him. The City need not take other steps to inform him of his options.

Id. at 241. The notice contained in the search warrant was sufficient process and Perkins was then required to initiate proceedings for the property's return. *Id.* at 242-44.

The facts in this case mirror those in *West Covina*. The police legally seized VSC's property, and VSC was aware of what property was seized and by whom. The Legislature provided a statutory remedy for the return of the property that was easily discoverable from public sources. *See* TEX. CODE CRIM. P. ch. 47.[16] Having given constitutionally sufficient notice of the seizures, the City was under no obligation to invite VSC to initiate chapter 47 proceedings.[17]

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[16] Even if it failed to participate in the chapter 47 proceedings, VSC might have had, in certain cases, a second post-deprivation option available to it. *See* TEX. CODE CRIM. PROC. arts. 18.17(e), 47.07.

[17] VSC, having notice of the vehicles' seizure, should have initiated chapter 47 proceedings, both to notify the government that it was asserting an interest in the vehicles and to determine its interest in them. VSC failed to do so. After *West Covina*, federal courts have held that where a claimant fails to take advantage of a State's post-deprivation procedures, that claimant cannot then complain of the State's subsequent disposition of the property. *See, e.g.*, *Revell v. Port Auth. of N.Y. & N.J.*, 598 F.3d 128, 139 (3rd Cir. 2010) (affirming summary judgment against the claimant because "he did not take advantage of state procedures available to him for the return of his property"); *Mora v. City of Gaithersburg*, 519 F.3d 216, 230 (4th Cir. 2008) ("Mora has had, and continues to have, notice and an opportunity to be heard in Maryland, and he cannot plausibly claim that Maryland's procedures are unfair when he has not tried to avail himself of them."); *McKinney v. Chidley*, 87 F. App'x 615, 617 (9th Cir. 2003) (memo. op.) (affirming summary judgment against claimant because he admitted that he did not follow State procedures for recovering property).

We also note that the dissent's position on notice could severely hamper law enforcement. We assume for the

III. Declaratory Judgments

The City filed a plea to the trial court's jurisdiction as to several declarations requested by VSC.[18] The trial court denied the plea, and the court of appeals affirmed despite the fact that VSC had by then lost its license to operate a vehicle storage facility and therefore could no longer store the type of vehicles involved in this suit. The court of appeals noted that VSC's requested declarations were not by their terms limited to nonconsensually-towed vehicles, and on this basis it refused to grant the plea. 242 S.W.3d at 597. This, however, conflicts with our rule that a declaratory judgment action may lie only where there is a "substantial controversy involving genuine conflict of tangible interests."[19] *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) (internal quotations omitted). But with regard to the sort of vehicles VSC may still store, there is no apparent conflict at all, and as such the relief sought is highly speculative and theoretical, incapable of settling any actual controversy between the parties. *See id.*; *State ex rel. McKie v. Bullock*, 491 S.W.2d 659, 660 (Tex. 1973) (holding that there could be no declaratory judgment action where a declaration would not settle an actual controversy between the parties).

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purposes of this case that VSC does in fact have a property interest in its alleged liens on the seized vehicles, although the State strenuously disputes this proposition. But in a case like this, where the precise contours of property rights are unclear, it is difficult to charge the government with the duty of notice. The dissent's rule would subject political subdivisions to takings liability in cases in which they did not even know property rights existed. Because VSC's actual notice was sufficient here, however, we need not reach this issue.

[18] VSC sought declarations that (1) it was entitled to fees for stolen vehicles, (2) the City lacked authority to seize allegedly stolen vehicles from VSC, and (3) VSC was entitled to notice and a hearing under chapter 47.

[19] We have conflicts jurisdiction over this case based on section 22.225(c) of the Government Code as it existed at the time this action was filed, which grants us jurisdiction where the court of appeals' decision would overrule a decision of this Court if both had been decided by the same court. *Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 867 (Tex. 2001); *see also* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.02, 2003 Tex. Gen. Laws 847, 848 (codified at TEX. GOV'T CODE § 22.225).

IV. Conclusion

VSC received all of the process to which it was entitled. A party cannot claim a lack of just compensation based on its own failure to invoke a law designed to adjudicate such a claim. We reverse the court of appeals' judgment and render judgment dismissing the case. TEX. R. APP. P. 60.2(c).

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0265

CITY OF DALLAS, PETITIONER,

v.

VSC, LLC, RESPONDENT

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

Argued January 8, 2010

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON and JUSTICE GUZMAN, dissenting.

A peace officer may take possession without a warrant of property in the hands of innocent third parties if he or she has probable cause to believe it may have been stolen. *See* TEX. TRANSP. CODE § 501.158 (a) ("A peace officer may seize a vehicle or part of a vehicle without a warrant if the officer has probable cause to believe that the vehicle or part: (1) is stolen; or (2) has had the serial number removed, altered, or obliterated."). The government holds such property, at times at private storage facilities, until its usefulness, if any, as evidence in a judicial proceeding is over and the actual owner is determined. Under such circumstances, we expect our government to preserve and protect individuals' property and dispose of it only when allowed by law and with notice to the property's owners. In this case, a third party with a protectable interest in property that was seized sought, among other things, injunctive relief in state district court to prohibit the government from

disposing of that interest and declaratory relief seeking recognition of its rights in the property. During the pendency of the lawsuit, the government not only physically removed more of the property, but also disposed of the property subject to the original suit without notice or compensation to the third party. The third party had a storage lien on confiscated vehicles to secure its right to be paid for the storage services it provided.

The Court holds that because the third party failed to pursue remedies through a vague, incomplete, and likely constitutionally infirm statutory procedure, its recovery is precluded in the original suit filed in district court requesting the same relief the Court says it must seek as a prerequisite to a takings claim. The Court, on an issue not raised by the parties, dismisses VSC's claims for its failure to specifically plead a claim (1) usually initiated in municipal court that is not a required prerequisite, (2) that the City argued at the trial court and the court of appeals was unavailable for VSC to seek during the pendency of a lawsuit, covering the same conduct, and (3) where VSC sought equivalent relief through injunctions and declaratory judgment actions. I would hold that VSC sought the relief under Chapter 47 of the Code of Criminal Procedure that the Court holds is a prerequisite to an inverse condemnation claim. VSC satisfied that prerequisite with its pleadings. And on the merits, I would hold that there are fact questions as to whether and how the City disposed of the vehicles at issue and affirm the trial court's denial of the plea to the jurisdiction. I therefore respectfully dissent.

I. Factual and Procedural Background

The Court's brief recitation of the facts omits important information regarding the substance and timing of VSC's claims and the government's actions regarding VSC's property. In 2002, VSC

operated a Vehicle Storage Facility licensed in accordance with the Vehicle Storage Facility Act (VSFA), which authorized VSC to receive and store vehicles towed to its lot without the owners' consent. TEX. OCC. CODE §§ 2303.001–.305. In 2002 the Dallas Police Department (DPD), directed by the City of Dallas (City), entered VSC's property and took possession of fifty vehicles from VSC's storage lot. VSC stored the vehicles towed there. Four days after the first fifty vehicles were seized, VSC sought a temporary restraining order in state district court against the City, presumably to prevent seizures of any more vehicles. Eventually, the City filed proceedings under Chapter 47 of the Texas Code of Criminal Procedure to determine possession of the allegedly stolen vehicles. *See* TEX. CODE CRIM. PROC. arts. 47.01–.12. VSC participated in a hearing before a municipal court judge pursuant to article 47.01a. *See id.* art. 47.01a. The municipal court awarded eighteen of the vehicles to their owners. Fourteen of those eighteen awards were contingent upon the owners paying VSC the storage fees due. The municipal court awarded the remaining thirty-two vehicles to VSC.[1]

Even though its district court action remained pending, VSC contends that the City seized a total of 276 additional vehicles, and that the City stored some of the seized vehicles, released some to their owners, and sold the rest, but failed to pay VSC any storage fees collected from those sales. The City admitted that it seized 326 vehicles from VSC's lot. The City does not indicate whether it used Chapter 47 hearings to dispose of these additional vehicles, and the record does not provide the answer. VSC asserts that the City did not notify it of any hearings on the remaining 276 vehicles and did not advise VSC of how it had disposed of any of the vehicles. Moreover, the City allegedly

[1] VSC does not seek damages for the loss of any of the fifty vehicles subject to the Chapter 47 hearings.

did not inform the municipal court that VSC was an interested party or had asserted a right to possession, as required by statute. *See id.* art. 47.03 ("The officer shall notify the court of the names and addresses of each party known to the officer who has a claim to possession of the seized property."). The City does not challenge these assertions, and they are taken as true for purposes of this appeal of the plea to the jurisdiction.

VSC contends that it notified the City that it had a property interest in the vehicles and requested notice of any hearings. It further claims it had "a legitimate and recognized property interest" in the seized vehicles that the City destroyed by disposing of the vehicles without notice to VSC. The City does not dispute that it did not pay VSC any storage fees on the vehicles. At the trial court and court of appeals, the City asserted that because VSC was not the owner of the vehicles, it was not entitled to notice of Chapter 47 hearings.

VSC's suit against the City in state court was amended multiple times, eventually alleging various state and federal causes of action. In its Fourth Amended Petition, filed just before the case was removed to federal court,[2] VSC alleged, among other things, that it was an "interested person" for purposes of Chapter 47, that it had a possessory property interest in the seized vehicles, and that the City's actions constituted a taking under state and federal law. It sought injunctive relief, damages, and declaratory relief. VSC pled that the trial court "should specifically make a determination as to the rightful possession of the seized vehicles still in Defendants' possession and

[2] The City removed the case to federal district court. At VSC's request, the federal court remanded three of the causes of action to the state court and abated the remaining federal claims until disposition of the state court litigation. The third cause of action, a takings claim for private use, is not at issue because the court of appeals dismissed it. Neither party appeals that decision.

Plaintiff's property interest in these vehicles as well as vehicles recovered by Plaintiff in the future . . . ."

Later, in VSC's Sixth Amended Petition, the live petition for this appeal, VSC alleged that the City had disposed of the remaining 276 vehicles. Nonetheless, it still sought, contrary to the Court's suggestion, relief under Chapter 47. VSC alleged that the City "intentionally entered onto Plaintiff's property and seized vehicles to which Plaintiff had a superior right to possess and in which Plaintiff had a recognized property interest," that it was entitled to notice under Chapter 47, that the Court should declare its superior rights in the vehicles and that the City lacks authority to seize and dispose of the vehicles, and that it was entitled to damages for the City's alleged taking of its interest in the vehicles.

Two claims are the subject of this appeal. One alleges that the City's seizure and subsequent disposition of the vehicles without notice to VSC was a taking of VSC's property interest in the vehicles for public use and violated VSC's right to just compensation under the Texas and United States Constitutions. TEX. CONST. art. I, § 17; U.S. CONST. amends. V, XIV § 1. The second cause of action sought a declaratory judgment against the City related to its towing policies and its entitlement to storage fees.

The City filed a plea to the jurisdiction, asserting VSC could not state a valid takings claim and that VSC alleged no other basis to waive the City's governmental immunity. The City did not allege at the trial court that VSC's claims were unripe or otherwise not justiciable because VSC failed to request a hearing under Chapter 47. The trial court denied the plea to the jurisdiction, and the City brought an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8)

(permitting interlocutory appeals from a court order that grants or denies a plea to the jurisdiction by a governmental unit). The court of appeals affirmed the trial court ruling as to the "public use" state and federal takings claims[3] and affirmed the denial of the plea as to VSC's declaratory judgment action. 242 S.W.3d 584, 599 (Tex. App.—Dallas 2008, pet. granted). The City appealed, and we granted review.

The City argues that the trial court did not have jurisdiction because VSC does not have a valid property interest in the seized vehicles to assert a state takings claim. It argues that even if there is a property interest, the seizures themselves were not compensable takings. Although the parties discussed the applicability of Chapter 47 at oral argument, in its briefing to this Court the City did not argue that Chapter 47 was a prerequisite to suit or that its plea to the jurisdiction should be granted for VSC's failure to exhaust any presuit procedure. However, today the Court avoids the issues raised by the parties and instead holds that the plea to the jurisdiction should be granted, not because VSC cannot state a takings claim, but because its takings claim is precluded by VSC's failure to seek relief under Chapter 47. A close examination of Chapter 47 will help to understand the extent of the Court's error.

II. Chapter 47

A. Structure and Use of Chapter 47

[3] VSC contended, in the alternative, that the seizures constituted a taking of private property for a "private use." The court of appeals reversed the trial courts' denial of the plea on this claim, which is not before us.

Various statutes provide that a peace officer may seize property that has been, or appears to be, stolen. *E.g.*, TEX. TRANSP. CODE § 501.158(a). Chapter 47 of the Texas Code of Criminal Procedure provides a mechanism for return of that property. When an officer seizes property,

> he shall immediately file a schedule of the same . . . with the court having jurisdiction of the case, certifying that the property has been seized by him, and the reason therefor . . . [and] shall notify the court of the names and the addresses of each party known to the officer who has a claim to possession of the seized property.

TEX. CODE CRIM. PROC. art. 47.03. If the ownership of the property is disputed, the officer "shall hold it subject to the order of the proper court." *Id.* art. 47.01(a). If no criminal trial is pending, an appropriate judge, which may include a district judge, county court judge, statutory county court judge, magistrate, or justice of the peace "may hold a hearing to determine the right to possession of the property, upon the petition of an interested person, a county, a city, or the state." *Id.* art. 47.01a(a). Following the hearing, the judge may award the property "to whoever has the superior right to possession," or to the state, pending resolution of the criminal case. *Id.* "If it is shown in a hearing that probable cause exists to believe that the property was acquired by theft or by another manner that makes its acquisition an offense and that the identity of the actual owner of the property cannot be determined," the court may award possession to the state for official purposes, for disposition as unclaimed property, or for destruction. *Id.* art. 47.01a(b).

Chapter 47 is different from civil forfeiture, which applies to seized property that was used in the commission of a crime. *See* TEX. CODE CRIM. PROC. arts. 59.01–.14. While Chapter 47 gives a small framework for the quick disposition of property "alleged to have been stolen," it leaves important gaps in its procedure. *Id.* art 47.01. For example, the chapter does not refer to a party

filing a "petition" or initiating a "civil action," but only that an interested party may request a "hearing." It does not require notice to interested parties, as the civil forfeiture statute does. *Cf. id.* art. 59.04(b) (requiring that, to institute civil forfeiture proceedings, the state's attorney "shall cause certified copies of the notice to be served on [relevant] persons in the same manner as provided for the service of process by citation in civil cases"). Chapter 47 is schizophrenic in what the judicial officer may determine, whether it is the person who "has the superior right to possession," *id.* art. 47.01a(a)(1), or who is the "actual owner" of the property, *see id.* arts. 47.01(a), .02(b), .04. *Compare Universal Underwriters Grp. v. State*, 283 S.W.3d 897, 900 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("[U]nder article 47.01a, the trial court determines 'superior right to possession,' rather than ownership."), *and Perry v. Breland*, 16 S.W.3d 182, 189 (Tex. App.—Eastland 2000, pet. denied) ("The justice court had no jurisdiction . . . to determine ownership [of the property at issue] . . . ."), *with Allstate Ins. Co. v. Troy's Foreign Auto Parts*, No. 05-00-01239-CV, 2001 WL 840613, at *3 (Tex. App.—Dallas July 26, 2001, pet. denied) ("[Chapter 47] provides the court with the power to direct the property be restored to the owner. In addition, the right to possession without legal ownership would render the possession useless . . . . The municipal court has jurisdiction to award both possession and title . . . ." (citations omitted)). And it certainly does not include any expression that Chapter 47 is the *exclusive* method of determining ownership, or a right to possession. "Nothing in the statute suggests that Chapter 47 provides the exclusive forum for establishing ownership." *Tipton Int'l, Inc. v. Davenport*, No. 10-02-00242-CV, 2004 WL 1474663, at * 3 (Tex. App.—Waco June 30, 2004, no pet.).

Because of the lack of specificity and comprehensive scheme, the only way to view Chapter 47 is as a *process* rather than a *proceeding*, applicable to a number of different judicial forums. Chapter 47 provides that a district, county court, statutory county court judge, or a justice of the peace or municipal judge with magistrate jurisdiction may "hold a hearing" to determine disposal of allegedly stolen property. TEX. CODE CRIM. PROC. art. 47.01a(a)(1). It is not surprising that our courts of appeals have dealt with Chapter 47 claims not only brought as stand-alone claims, but also as independent tort claims and counterclaims brought by the state in tort and constitutional civil rights actions against it. *See York v. State*, 298 S.W.3d 735, 741 (Tex. App.—Fort Worth 2009, pet. filed) (alleging takings violation through improper disposal of trailer under Chapter 47); *Universal Underwriters*, 283 S.W.3d at 899 (noting that the state filed a "Petition for Disposition of Stolen Property" under Chapter 47); *Allstate Ins. Co.*, 2001 WL 840613, at *1 ("Seeking possession of [the property] under article 47.01a [the parties] attended a hearing . . . ."); *City of Pasadena v. De Los Santos*, No. 01-98-00104-CV, 1999 WL 339335, at *1 (Tex. App.—Houston [1st Dist.] May 27, 1999, pet. denied) (dismissing appeal from a trial court order holding that the city was entitled to possession of property in action wherein citizens sued city for civil rights violations for wrongful seizure and tort claims, and the city counterclaimed for possession of the property under article 47.01a). No wonder that the City did not claim that a separate action under Chapter 47 was a prerequisite to suit. And no wonder that VSC argued, and the City disputed, that it was entitled to a declaration from the trial court that VSC is an entity with a "claim to possession of the seized

property" and entitled to notice under article 47.03. 242 S.W.3d at 599 (noting, and not reaching, the City's contention that VSC is not entitled to notice under Chapter 47).[4]

B. The Court's Chapter 47 Prerequisite

But despite this, the Court contends that VSC loses its case here because it did not take advantage of the "statutory remedy" of Chapter 47. There is a ripeness requirement for federal takings claims based on state action. In general, for a federal takings claim to be ripe, the owner of the allegedly taken property must (1) obtain a final decision regarding the application of the regulations to the property at issue from the government entity charged with implementing the regulations, and (2) utilize state procedures for obtaining just compensation. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985).[5] There is some

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[4] The Court says that the dissent's position could hamper law enforcement. That misconstrues the dissent. First, to be clear, this case does not involve property subject to civil forfeiture because of its use in the commission of a crime, notwithstanding the Court's reliance on forfeiture cases. That is not at issue and no one argues it is. The vehicles were towed to a private, licensed storage facility (VSC) for safekeeping. Second, the Court chastises the dissent saying "it is difficult to charge the government with the duty of notice." __ S.W.3d __. Actually, the Court's quibble is with the statute. Chapter 47 mandates, presumably to allow for notice of the proceeding, that when an officer seizes property alleged to have been stolen, he shall "immediately file a schedule of the same . . . [and] notify the court of the names and addresses of each party . . . who has a claim to possession of the seized property." TEX. CRIM. PROC. CODE art. 47.03. Moreover, federal courts have held that, even in forfeiture cases, if the government intends to make permanent the deprivation of property seized at the time of an arrest, adequate notice is required. *United States v. Cardona-Sandoval*, 518 F.3d 13, 16 (1st Cir. 2008) (concerning personal items destroyed nearly two years after confiscation); *see Matthias v. Bingley*, 906 F.2d 1047, 1052 (5th Cir. 1990). Simply knowing that the government confiscated the property at some time in the past is insufficient.

[5] The first part of the *Williamson County* rule (most applicable to regulatory takings) ensures that there is a regulatory interpretation about the scope of the regulation for the court to determine whether the regulation goes "too far." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998). It has been applied to state court takings claims. But the second part—the exhaustion requirement the Court sees as determinative—has not been applied to state takings. "Ordinarily, a plaintiff must seek compensation through *state inverse condemnation proceedings* before initiating a takings suit in *federal court*, unless the State does not provide adequate remedies for obtaining compensation." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 n.8 (1997) (emphasis added) (citation omitted). In other words, in deference to the state and the Fifth Amendment's protection against the state depriving property "without just compensation," to state a claim under the Fifth Amendment, a state *court* action must come first. That is exactly what VSC did in this case.

authority to suggest that the *Williamson County* requirements apply to physical takings as well as the more common regulatory taking scenarios. *See Severance v. Patterson*, 566 F.3d 490, 496–97 (5th Cir. 2009). But *Williamson County* and its progeny do not apply in this situation.

The Court's only substantial authority[6] for its proposition that Chapter 47 precludes a takings claim is one distinguishable case. In *Hays v. Port of Seattle*, a contractor entered in to a "cost plus" contract with the Commissioner of Public Lands of the State of Washington to excavate waterways, secured by a lien upon the shorelands. 251 U.S. 233, 234 (1920). After the contractor began work, the Commissioner wanted to change plans, and when neither party provided new plans, the work stalled. *Id.* at 235. Seventeen years later, the Washington state legislature enacted statutes establishing the Port of Seattle and vested title to a port authority, which took over the waterway and performed its own excavation. *Id.* at 236. Hays brought a bill in equity, seeking to enjoin the legislature's act, as he alleged that it impaired his contract and took property without due process. *Id.* at 237–38. On the contract claim, the Supreme Court essentially held that he had abandoned the

[6] The Court cites a number of federal appellate court opinions for the proposition that "where a claimant fails to take advantage of a State's post-deprivation procedures, that claimant cannot then complain of the State's subsequent disposition of the property." ___ S.W.3d ___ n.17. The cases are inapposite. *Revell v. Port Authority of New York* is a case in which the appellate court held that because the plaintiff failed to file a state tort lawsuit for conversion or a writ of replevin before seeking remedies in federal court for deprivation of property without due process. 598 F.3d 128, 139 (3d Cir. 2010). VSC's requests for injunctive and declaratory relief certainly qualifies in that case. Likewise, in *Mora v. City of Gaithersburg*, the Fourth Circuit held that a plaintiff's § 1983 procedural and substantive due process claim seeking the return of firearms was "like a state law claim dressed up in due process clothing," and thus declined to exercise supplemental jurisdiction over the claims. 519 F.3d 216, 231 (4th Cir. 2008). Once again, we are in state court, VSC's constitutional claims are takings, not due process, and VSC did assert claims of injunctive and declaratory relief against the governmental entities. *McKinney v. Chidley* is an unpublished Ninth Circuit case in which the panel merely recites that the pro se plaintiff "did not follow California state law procedures for recovering property" and awarded summary judgment to the law enforcement officials. No. 03-56068-CV, 87 F. App'x 615, 617 (9th Cir. 2003) (unpublished mem. op.). These cases do not address a state inverse condemnation claim, address a plaintiff's attempt for injunctive relief and request to be named as an "interested person" in the state court procedure for return of property, or are otherwise applicable to VSC.

contract. *Id.* at 237. On the deprivation of property without due process claim, the Court held that Hays was barred from relief by laches. *Id.* at 238–39. It noted that, if he had not delayed, he could have filed a claim under what was a similar tort claim / state inverse condemnation proceeding under the then-active statute. *Id.* at 238. The Court held that such a procedure "satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking." *Id.* The case is simply an early example of the *Williamson County* rule.

I see no legally determinative distinction in this context between protecting one's property rights by requesting a hearing before a municipal judge under Chapter 47 and promptly filing an injunction action in district court after the original seizures. Surely such a lawsuit, when there is nothing in Chapter 47 that makes it the exclusive remedy or establishes it as a prerequisite to a takings claim, is sufficient under *Williamson County*. This is not an inverse condemnation regulatory taking claim, where an administrative agency must determine the scope of the regulation as a prerequisite to suit. Nor is this a lawsuit commanded by the Legislature to be an "exclusive" remedy for a particular wrong. Chapter 47 comprehends a lawsuit, in one form or another.

The Court's holding creates a new rule preferring one type of civil claim over another, when no governing statute or case law has heretofore required it. It suggests that "[c]laims under chapter 47 may be brought in the same suit as other claims," ___ S.W.3d ___ n.7, but provides no analysis why its rule that *precludes* the civil claims brought by VSC *permits* claims specifically under Chapter 47.

C. VSC's Pleadings and Chapter 47

Even assuming that the Court is correct in its assertion that Chapter 47 is somehow a prerequisite to other types of tort actions (which no party argues, no courts have held, and which the court of appeals precedent cited above demonstrates is simply not how the procedure works), I would hold that VSC sufficiently asserted its rights. The Court claims that "VSC, having notice of the vehicles' seizure, should have initiated chapter 47 proceedings, both to notify the government that it was asserting an interest in the vehicles and to determine its interest in them. VSC failed to do so." ___ S.W.3d___ n.17. The Court simply ignores VSC's lawsuit and pleadings in reaching this unsupported conclusion.[7]

First, VSC sought a temporary restraining order. It later sought injunctive relief against the City, requesting, among other things, prohibitions against the City from "[o]rdering the release of any vehicle (in Plaintiff's possession) for a reduced fee or charge" and from "releasing vehicles seized from Plaintiff that Plaintiff is authorized by law to possess and in which Plaintiff has a recognized property interest without requesting a hearing under Chapter 47 of the Texas Code of Criminal Procedure and including Plaintiff as an interested party and notifying Plaintiff of the hearing." It sought declaratory relief, including a declaration that VSC "is the rightful possessor of

[7] The Court contends that VSC did not adequately pursue its Chapter 47 remedies and failed to raise them in its response to the City's plea to the jurisdiction. The record shows otherwise. After the City filed its plea to the jurisdiction (on June 24, 2005) in the state district court case, VSC filed its Sixth Amended Petition (on July 25, 2005) continuing to seek a declaratory judgment for Chapter 47 relief and compensation for a taking, as I specifically set out in Section I above. The Sixth Amended Petition did not contain the specific requests for possession that were in earlier pleadings because VSC believed, and pled, that the City had already disposed of all the vehicles. However, in its response (filed on July 27, 2005) to the City's plea, VSC again asserted its "property interest and/or lien for towing, storage, other fees and taxes" with respect to the vehicles taken, that "VSC is an interested party with a claim to possession entitled to notice and a hearing pursuant to Chapter 47 of the Texas Code of Criminal Procedure," that it brings the claim for a declaration of "its rights under Chapter 47"and that the City committed a taking for which VSC is entitled to just compensation. Certainly, in a notice pleading jurisdiction (and perhaps even if not), VSC's pleadings raise the issue of its rights and remedies under Chapter 47. Discovery hearings were held but we cannot discern from the record whether hearings were held to address the merits of VSC's complaints.

seized vehicles currently in possession of" the City, and that VSC "has a property interest in the seized vehicles and is an interested person entitled to a Chapter 47 property hearing on vehicles seized" by the City. VSC requested relief in the nature of Chapter 47 (even though, as discussed above, it shouldn't have to) by specifically requesting the court "make a determination as to the rightful possession of the seized vehicles still in Defendants' possession and Plaintiff's property interest in these vehicles . . . ." I see no significant difference between such a request for relief and a request to "hold a hearing to determine the right to possession of the property, upon the petition of an interested person." TEX. CODE CRIM. PROC. art. 47.01a(a). At a minimum, VSC "notif[ied] the government that it was asserting an interest in the vehicles" and requested a "determin[ation of] its interest in them." ___ S.W.3d ___ n.17. Particularly because VSC most likely did not believe that it could bring a claim under Chapter 47, and particularly because the City argued—up until oral argument before this Court—that VSC was not entitled even to *notice* of a Chapter 47 hearing—it is difficult to imagine what the Court would have had VSC do. Under our rules of notice pleading, VSC satisfied the prerequisites the Court musters. It does not deserve to have its claims dismissed.

Of course, a claimant may not simply sit on his rights for an unreasonable time period, knowing that the government has seized his property, and then claim that the government has taken his property when it has been sold. A claimant has some duty to investigate the status of his property and take reasonable steps to secure it from the government or receive just compensation for the taking. *See, e.g., Hallco Tex., Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 74 & n.38 (Tex. 2006) (Hecht, J., dissenting) (discussing Texas cases applying limitations periods or laches to regulatory takings claims); *see also, e.g., Waddy v. City of Houston*, 834 S.W.2d 97, 102 (Tex. App.—Houston

[1st Dist.] 1992, writ denied) (recognizing that an action for inverse condemnation of property is barred after the ten-year period necessary to acquire land by adverse possession, but an inverse condemnation action for damage to property is governed by the two-year statute of limitations).

VSC was not dilatory in protecting its rights. VSC promptly sought an injunction against the City. Thereafter, VSC participated in several Chapter 47 proceedings disposing of seized vehicles prior to seizure of the vehicles at issue in this proceeding. VSC was notified of the proceedings, and in most cases the municipal court either returned the vehicles to VSC or to the owners subject to the payment of fees owed to VSC. These proceedings protected VSC's property rights and ensured that VSC's liens were not improperly destroyed. Although VSC did not know it and the City disputed it, VSC could have included an explicit request for the trial court to hold a hearing pursuant to Chapter 47, but did not do so. On the other hand, the City could have filed a counterclaim in district court seeking possession and disposition of the vehicles, but it evidently did not do so. *See De Los Santos*, 1999 WL 339335, at *1. Instead, according to VSC, the City unilaterally determined that VSC did not have an interest in the vehicles entitling VSC to notice of any Chapter 47 proceedings and, notwithstanding the pendency of a lawsuit over the same vehicles, disposed of the vehicles by either returning them to their owners or selling them and keeping the proceeds. It is difficult to understand why the Court requires a party to file a separate civil action, or to use "magic words" in its petition invoking a malleable and incomplete procedure to enforce rights covered by a civil action as a prerequisite to filing the already-pending litigation.

D. Due Process

The Court states that "VSC suggests . . . that chapter 47 is constitutionally infirm because it does not require that the City notify claimed owners of these proceedings. Disputes about proper notice invoke procedural due process, not the Takings Clause." ___ S.W.3d___. VSC is not claiming a violation of due process, and the City has not argued that Chapter 47 is a prerequisite to a takings claim. It is the Court's invocation of a prerequisite to Chapter 47 that does that. Rather, in its active petition, VSC's complaint was about its money—it alleged that the City intentionally seized property for a public purpose in which VSC had a property interest and suffered damages. A claim for deprivation of due process cannot be the basis for a takings claim.

However, for the reasons articulated above, if Chapter 47 were required as a prerequisite to suit, I disagree that Chapter 47 "complies with both the Texas and United States Constitutions" to protect VSC's property interests. Although any interested party may request a hearing under Chapter 47, the existence of the Chapter 47 proceeding itself would not immunize a governmental entity from takings liability.[8] The proceeding may result in returning the vehicle to VSC (and thus potentially mooting VSC's takings claim), and the municipal court may return a vehicle to an owner subject to the owner paying VSC's fees (also potentially mooting VSC's takings claim). Yet, no provision of Chapter 47 specifically deals with ownership of the vehicle or of the lien that is created when VSC properly takes possession of a vehicle and provides notice as required by the Property Code. Likewise, while article 47.03 requires that an officer provide notice to the relevant court "of

[8] Chapter 47 is not a forfeiture statute. The vehicles at issue in Chapter 47 proceedings, while they may have been stolen, are not contraband, instrumentalities of crime, or proceeds of criminal activity. The purpose of Chapter 47 is to return stolen property to its rightful owner. The government may dispose of the property, not because the property is "tainted" and should be taken from the public domain, with the proceeds going to the state, but only when the state, after some reasonable search, cannot ascertain the property's owner. To use Chapter 47 to circumvent the procedure for seizing contraband, a much higher threshold of proof for the state, would raise serious constitutional concerns.

the names and addresses of each party known to the officer who has a claim to possession of the seized property," nothing in Chapter 47 requires that the court or anyone else provide notice to the vehicle's owner or any other person with an actual interest in the seized vehicle and/or of the hearing. This facial infirmity in the statute has been recognized and addressed informally by municipal court judges who indicate in their Bench Book for Chapter 47 hearings that such notice should be given. TEXAS MUNICIPAL COURTS EDUCATION CENTER, 2008 BENCH BOOK 45 (2008); *cf.* TEX. CODE CRIM. PROC. art. 47.03. As discussed above, I believe that disposing of property without notice to the property owner would raise serious due process concerns. But those concerns arise only if a Chapter 47 hearing is a prerequisite to a takings suit.

The Court also states that once an owner or interested party's property has been legitimately seized by the government, the government need not give notice even years later that it is about to permanently dispose of the property. ___ S.W.3d ___. There are two responses to this position. First, it makes no sense. Even though criminal proceedings in which such property may be germane may take months or years, the Court indicates that the state might simply dispose of potentially valuable property after its usefulness for criminal prosecutions wanes or it has been determined not to have been stolen, without giving the owners or interest holders an opportunity to intervene. The property owners do not know when the confiscated property is no longer needed. After legitimately seizing private property, the government should give notice to the owners and interest holders before disposing of the property. Even in forfeiture cases, if "the government intends to make permanent the deprivation of property seized at the time of an arrest, whether through forfeiture or destruction of that property, adequate notice is required." *United States v. Cardona-Sandoval*, 518 F.3d 13, 16

(1st Cir. 2008); *see Matthias v. Bingley*, 906 F.2d 1047, 1052–53 (5th Cir. 1990). Second, VSC did file an injunction action in state district court to protect its interests in the property and asserted that the district court should determine ownership and possession of the vehicles. But the Court's holding makes that action useless.

The Court errs when it holds that a Chapter 47 proceeding is the only state adjudication that may serve as a prerequisite to a takings claim. It compounds its error by holding that VSC did not live up to its newly created standard in its pleadings in district court. I would hold that no such prerequisite exists, either in our case law on takings or in Chapter 47 itself, and I would not dismiss VSC's claims on that basis.

III. VSC's State Takings Claim

Because I would not hold that VSC's failure to seek possession of the vehicles specifically under Chapter 47 precludes its takings claim, I now proceed to analyze the merits of the dispute. The City asserts the trial court erred in denying its plea to the jurisdiction to VSC's takings claim. The City does not have immunity from a valid takings claim. *See Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001). However, if the plaintiff fails to allege a valid takings claim, the City retains its immunity from suit. *See id*. (affirming a grant of a governmental entity's plea to the jurisdiction where the plaintiff's constitutional takings claim failed). Whether particular facts constitute a taking is a question of law. *Id*. (citation omitted).

Article one, section seventeen of the Texas Constitution provides: "No 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. A takings claim

consists of three elements: (1) an intentional act by the government under its lawful authority, (2) resulting in a taking of the plaintiff's property, (3) for public use. *See Little-Tex Insulation Co.*, 39 S.W.3d at 598; *see also State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007); *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 (Tex. 2004).

The City challenges VSC's takings claims on four grounds: (1) VSC could not have a property interest in stolen vehicles; (2) the City did not seize VSC's liens or debts, only the vehicles; (3) the seizure was not for "public use"; and (4) the seizure occurred under the proper and reasonable exercise of the City's "police power" or some other exception to a takings claim.

A. VSC's Property Interest

I would hold, as the Court "assume[s]," ___ S.W.3d ___ n.10, that VSC had a cognizable property interest in the vehicles through the "garageman's lien" in the Property Code. "A garageman with whom a motor vehicle . . . is left for care has a lien . . . for the amount of the charges for the care, including reasonable charges for towing . . . to the garageman's place of business and excluding charges for repairs." TEX. PROP. CODE § 70.003(c). The Property Code does not define "garageman" or identify exactly what "care" is required for the lien to attach. The dictionary defines "care" as "protection; charge; temporary keeping as for the benefit of or until claimed by the owner." RANDOM HOUSE UNABRIDGED DICTIONARY (1987). Vehicle Storage Facilities must provide protection and keep vehicles for the benefit or until claimed by the owner. They must also provide reasonable storage efforts to protect vehicles, "such as locking doors, rolling up windows, and closing doors, hatchbacks, sunroofs, trunks, hoods, or convertible tops" and putting tarps over vehicles whose interiors are open to the elements. 16 TEX. ADMIN. CODE § 85.719(a), (b). Thus,

under the plain language of the Property Code, a vehicle storage facility that follows the requirements of the statute would qualify as a "garageman."

The City argues that the VSFA precludes VSC's claim to garageman's lien rights because only the VSFA determines the rights and interests of a "Vehicle Storage Facility." Although that act regulates the operation of "Vehicle Storage Facilities" which, among other things, store at least ten vehicles each year without the owners' consent, TEX. OCC. CODE §§ 2303.001–.003, .151–.161, no language in the VSFA excludes Vehicle Storage Facilities from the benefits of the garageman's lien. Further, the VSFA allows a vehicle storage facility to withhold a vehicle from its owner or operator "if the owner or operator of the vehicle does not pay the charges associated with delivery or storage of the vehicle . . . ." *Id.* § 2303.160(c). And the garageman's lien statute specifically recognizes that a garageman may come into possession of a vehicle not only through the consent of the owner of the vehicle but also "under a state law or city ordinance." TEX. PROP. CODE § 70.004(a). The VSFA specifically permits Vehicle Storage Facilities to retain possession of vehicles if an owner refuses to pay the storage charges, and the garageman's lien statute recognizes that a garageman can come into possession of a vehicle in a manner other than it being left by the owner. The two statutes are not mutually exclusive, but complementary.

Further, the garageman's lien statute can reasonably be read to include vehicles "left for care" by those other than the vehicles' owners. The statute uses the passive voice—"is left for care"—indicating that who leaves the vehicle with the garageman is inconsequential to whether the lien attaches. *Id.* § 70.003(c). The next section of the Property Code specifically contemplates a garageman's lien in favor of one who stores a vehicle without the owner's consent. "A holder of

a lien under Section 70.003 on a motor vehicle . . . who obtains possession . . . under a state law or city ordinance shall give notice . . . to the last known registered owner and each lienholder of record . . . ." *Id*.§ 70.004. The garageman's lien statute grants a lien to an entity, including a Vehicle Storage Facility, who came into possession of the vehicle lawfully. *See* TEX. PROP. CODE § 70.003(c) ("A garageman with whom a motor vehicle . . . is left for care has a lien . . . ."). VSC may acquire a garagemen's lien on vehicles "left for care" with them, regardless of whether they were left voluntarily or without the owners' consent.

I would hold that if VSC can show these vehicles were left for care with them and that they followed the proper procedures under both the VSFA and the Property Code, VSC establishes a valid garageman's lien in the vehicles and thus a valid property interest worthy of protection under the takings clause.

B. Liens and the Takings Clause

The City contends that even if VSC had a property interest in liens on the stored vehicles, the recovery by police of stolen vehicles cannot be the basis of a compensable taking. The City erects a strawman, contending that the vehicles were stolen.

First and foremost, there is no judicial determination in the record that any of the vehicles at issue were in fact stolen. There appears to have been a sufficient basis for DPD initially to obtain possession. *See* TEX. TRANSP. CODE § 501.158(b). However, whether the vehicles were stolen is a factual matter to be determined at the trial court. Because the City has not shown the vehicles to

have been stolen, the City's contention that a lien cannot attach to a stolen vehicle that has been innocently stored need not be addressed.[9]

The United States Supreme Court considered a similar takings claim in *Armstrong v. United States*, 364 U.S. 40 (1960).[10] In *Armstrong*, materialmen delivered materials to a prime contractor for use in constructing U.S. Navy personnel boats. Under state law, they obtained liens on the vessels. *Id*. at 41. The prime contractor defaulted on his obligations to the United States, and the government took title to and possession of the uncompleted hulls and unused materials. *Id*. The United States government argued that any destruction of the plaintiffs' liens could not constitute a taking due to the government's immunity. *Id*. at 47. The Court held:

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens . . . . Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.

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[9] The City has presented no case and I have not found any case from another jurisdiction holding that a garageman's lien for vehicle storage costs cannot attach to stolen vehicles that the City takes to a storage lot for safekeeping. Further, this holding is limited to *liens* created for the safekeeping of allegedly stolen property and is separate and apart from our precedent regarding transfer of *title* to stolen property by a thief to a subsequent purchaser. *Cf. McKinney v. Croan*, 188 S.W.2d 144, 146 (Tex. 1945) (recognizing the common law rule that a subsequent purchaser may not acquire title to stolen property from a thief) (citations omitted).

[10] The takings clauses in the United States and Texas Constitutions are comparable, though worded differently, and so Texas courts have looked to federal jurisprudence for guidance on the constitutionality of a taking. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004); *City of Austin v. Travis Cnty. Landfill Co.*, 73 S.W.3d 234, 238–39 (Tex. 2002); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1998). The most recent amendment to article I, section 17, limiting when the state may condemn land for private development, does not apply to this case. TEX. CONST. art. I, § 17.

Id. at 48–49. Thus, the state violates the takings clause by destroying valid liens on property for public use without just compensation. *See also United States v. Sec. Indus. Bank*, 459 U.S. 70, 75, 78 (1982) (holding that liens were property protected by the takings clause of the Fifth Amendment); *Ft. Worth Improvement Dist. No. 1 v. City of Fort Worth*, 158 S.W. 164, 168 (Tex. 1913) ("The word 'property,' as used in [article one, section seventeen of the Texas Constitution], is doubtless used in its legal sense, and means not only the thing owned, but also every right which accompanies ownership and is its incident.").

Whether the City destroyed VSC's liens is a question of fact that the trial court did not have an opportunity to decide, as that question is the subject of an interlocutory appeal of a plea to the jurisdiction. Rather, the question to this Court is whether VSC can overcome the City's plea to the jurisdiction and state a valid takings claim. According to its various pleadings, VSC alleges that the City, after seizing the vehicles, took one of three possible actions: (1) it stored the vehicles and is still storing them (though, by the time of the Sixth Amended Complaint, it seems that VSC believed that the City had disposed of all of the vehicles); (2) it returned the vehicles to their rightful owners; or (3) it sold the vehicles and kept the proceeds. In all three scenarios, VSC claims it was deprived of fees for its storage of the vehicles.

Regardless of whether VSC's lien is possessory or nonpossessory, VSC's lien could be foreclosed on, and VSC can pursue its lien rights for storage fees because it did not voluntarily relinquish possession of the vehicles. *See Paul v. Nance Buick Co.*, 487 S.W.2d 426, 427–28 (Tex. Civ. App.—El Paso 1972, no writ) (distinguishing between possessory and nonpossessory liens and

noting that even in possessory liens, the lien and right to possession are not lost if the property is relinquished voluntarily). VSC is free to pursue its property interests allegedly taken in the seized vehicles in its state district court case or under Chapter 47 of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. §§ 47.01a, .02.

It is unclear how the City disposed of these vehicles, a crucial question of fact as to whether VSC can assert a valid takings claim. VSC claims the City destroyed its liens on the vehicles. The City offers no evidence to rebut this claim nor even an assertion of the disposition of the vehicles. Therefore, a fact question remains, and I would hold that the trial court was correct to deny the City's plea to the jurisdiction.

C. Police Power

The City argues that the vehicle seizures were a valid exercise of police power exempted from takings liability.[11] The distinction between the state's eminent domain power and police power has been the subject of much consternation, and attempts to distinguish the powers can involve courts in a "sophistic Miltonian Serbonian Bog." *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004) (quoting *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978) (further quotation and citation omitted)).

In *DuPuy v. City of Waco*, this Court noted that the distinction is said to rest on "the relation which the property affected bears to the danger or evil which is to be provided against." 396 S.W.2d

[11] VSC has a valid takings claim only if the City destroyed its lien on the vehicles, so I only analyze the exemption arguments in that specific situation, *i.e.*, if VSC can show that the City sold the vehicles and kept the proceeds. I would not reach the question of whether the seizure of stolen vehicles in order to return them to their rightful owner is a valid exercise of police power for which no compensation is owed.

103, 107 n.2 (quotation omitted). Police power involves the regulation of property that harms the community in order to prevent the harm; eminent domain involves the taking or destruction of private property for public use. *Id*. at 107 n.3 (quotation omitted); *see also Tahoe-Sierra*, 535 U.S. at 323 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."). But as the Court conceded in *DuPuy*, "our refusal to compartmentalize an exercise of sovereignty as either police power or eminent domain for the resolution of problems arising under Article I, Sec. 17, of the Constitution rests upon the manifest illusoriness of distinctions between them." 396 S.W.2d at 107. On the other hand,

> it is universally conceded that when land or other property is actually taken from the owner and put to use by the public authorities, the constitutional obligation to make just compensation arises, however much the use to which the property is put may enhance the public health, morals or safety.

Id. at 107 n.3 (citations omitted). Put another way, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra*, 535 U.S. at 322 (citation omitted). The police power distinction may lead courts into a bog, but the law of physical takings rests on firm, dry land.

We have recognized that "[a] city is not required to make compensation for losses occasioned by the proper and reasonable exercise of its police power." *City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984). However, the state cannot commit a physical taking, by taking

or destroying property, and escape liability for compensation by merely "labeling the taking as an exercise of police powers." *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980). The City argues that its actions do not amount to a physical taking because even if VSC's liens were somehow taken, they are intangible property and thus cannot be *physically* taken. But the liens in *Armstrong* were the same type of property interest as those here, and as the Court stated there, "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and *is not a mere 'consequential incidence' of a valid regulatory measure*." 364 U.S. at 48 (emphasis added). The Court has affirmed this characterization of the government's destruction of liens in *Armstrong* as a physical taking. "The Government seeks to distinguish *Armstrong* on the ground that it was a classical 'taking' in the sense that the Government acquired for itself the property in question . . . . The classical taking is of the sort that the Government describes . . . ." *Sec. Indus. Bank*, 459 U.S. at 77–78. I see no reason why intangible and valuable property interests cannot be physically taken and why the police power exception provides a free pass when government officials try.

Further, while the reasonable, necessary, and proper application of the police power may excuse a governmental unit from providing just compensation, there is nothing here to suggest that there is any police power interest in the taking of VSC's liens. The valid exercise of the police power over potentially stolen vehicles does not extinguish an undisputed and legally applied lien on the vehicle. Thus, these seizures and alleged sales of the vehicles do not constitute the proper exercise of the police power over VSC's liens, and *Turtle Rock* is not applicable to the situation at bar, despite its perhaps broad language.

VSC alleges that the City seized vehicles from their storage facility, disposed of them (thereby destroying all property interest they had in the form of liens), and kept the proceeds for itself. These actions satisfy the basic elements of a physical taking—taking or destroying property for public use. As we have said, "[t]he social desirability of leaving government free to seek its own enrichment at the expense of those whom it governs under the guise that it has the power to regulate harmful conduct is not readily apparent." *Teague*, 570 S.W.2d at 393–94. The final destination of the seized vehicles is absent from the record, and we decline to speculate. But the City cannot avoid paying compensation to VSC by "labeling the taking as an exercise of police powers." *Steele*, 603 S.W.2d at 789.

D. Special Exception

Finally, the City argues that we should carve out a special exception to a physical takings claim for the recovery of stolen property.[12] The City focuses its analysis on cases confirming the absence of takings liability for civil forfeiture proceedings against "innocent" owners, citing *Bennis v. Michigan*, 516 U.S. 442 (1996), and *State v. Richards*, 301 S.W.2d 597 (Tex. 1957). But *Bennis* and *Richards*, civil forfeiture cases whose holdings rest on the unique nature of forfeiture as a criminal deterrent, are inapposite. Further, they affirm that an "innocent" owner's property cannot be forfeited when the property was taken without privity or consent. *Bennis*, 516 U.S. at 448–52 & n.5; *Richards*, 301 S.W.2d at 599–600.

[12] Again, because I would hold that VSC can only have a valid takings claim if the City destroyed their liens, I only analyze whether an exception should be made if VSC can show that the City sold the vehicles and kept the proceeds after seizure.

VSC has a valid lien, the loss of which may be compensable as a taking if the City, without notice, disposed of the vehicles and kept their proceeds. Because fact questions exist in this case, VSC has pled and submitted sufficient evidence to withstand the City's plea to the jurisdiction. I would thus hold that the immunity does not bar VSC's state takings claim at this stage.[13]

IV. Declaratory Judgment

The City asserts the trial court erred in denying its plea to the jurisdiction as to VSC's declaratory judgment action. "A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). Based on the declaratory relief requested in the currently pending Sixth Amended Petition and VSC's current status, I agree with the Court that "there is no apparent conflict at all, and as such the relief sought is highly speculative and theoretical, incapable of settling any actual controversy between the parties." ___ S.W.3d___ (citing *Bonham State Bank*, 907 S.W.2d at 467; *State ex rel. McKie v. Bullock*, 491 S.W.2d 659, 660 (Tex. 1973)). I therefore concur in the Court's judgment on the declaratory judgment claim. However, I do not believe such a holding forecloses VSC's Chapter 47-like claims related to possession of or rights in the past-seized vehicles.

V. Conclusion

[13] VSC also brought a federal takings claim. The City contends that VSC's federal takings claim is unripe until VSC has sought and been denied compensation in state court, and therefore the trial court lacks jurisdiction. "The fact that the federal constitutional guaranty is not violated if state law affords just compensation does not preclude both claims from being asserted in the same action. Recovery denied on the state takings claim may yet be granted on the federal claim, in the same action." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 646 (Tex. 2004). I would thus agree with the court of appeals that the trial court correctly denied the City's plea to the jurisdiction on this issue.

Evidence demonstrated that the City seized 276 vehicles VSC lawfully possessed and on which it had storage liens. VSC alleges that the City disposed of the 276 vehicles without notice of how, when, or where the disposal occurred. Although VSC immediately filed an injunction action in district court over the propriety of the City's seizures of its property and the payment of its storage fees for the vehicles, the Court holds that such action is useless in protecting VSC's property rights. I would hold that the trial court and court of appeals were correct to deny the City's plea to the jurisdiction. Even assuming the Court's prerequisites, I would hold that VSC's pleadings in the district court were sufficient to invoke the requested relief in Chapter 47 and thus VSC's entire case should not be barred. I would remand the case to the trial court to make a determination of the unanswered questions of fact and determine whether VSC's property was wrongfully taken.

I therefore respectfully dissent.

_____

Dale Wainwright
Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0419

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO, PETITIONER,

v.

KIA BAILEY AND LARRY BAILEY, RESPONDENTS

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

Argued October 7, 2009

JUSTICE HECHT delivered the opinion of the Court.

Section 101.106(f) of the Texas Tort Claims Act allows a plaintiff who has sued a government employee in what is considered to be his official capacity to avoid dismissal of the action by substituting the governmental employer as a defendant.[1] The question in this case is whether action against the substituted defendant is barred after limitations has run. The court of appeals answered no.[2] We agree, though for somewhat different reasons.

[1] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

[2] 261 S.W.3d 147 (Tex. App.—San Antonio 2008).

On April 15, 2004, Dr. Albert E. Sanders, a clinical assistant professor at the University of Texas Health Science Center at San Antonio, operated on Kia Bailey, age 32, to replace spinal fixation hardware previously implanted to correct for scoliosis that she developed as a child.[3] One of the pedicle screws he inserted broke through the medial wall, injuring the dural sac and impinging the nerves, resulting in a serious neurologic deficit. When Sanders realized what had happened, he notified the Center's risk manager that "an untoward event" had occurred and that Bailey had a potential claim.

Bailey and her husband, respondents here, sued Sanders on a health care liability claim[4] on July 14, 2005, and later added other defendants, but did not sue the Center, Sanders's employer, a governmental unit.[5] The Baileys' petition did not specify whether they were suing Sanders in his official capacity as a government employee or in his individual capacity, but the Attorney General was not served and did not appear as counsel on his behalf.[6] On August 25, 2006, several weeks

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[3] At age five, Bailey's right kidney was removed because of a Wilms tumor. Her radiation therapy led to scoliosis, and at age thirteen, a spinal fusion with instrumentation.

[4] TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13) ("'Health care liability claim' means a cause of action against a . . . physician for treatment . . . which proximately results in injury to . . . a claimant . . . .").

[5] State universities and their component entities are governmental units within the meaning of the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE § 101.001(3) ("'Governmental unit' means: (A) this state and all the several agencies of government that collectively constitute the government of this state . . . ; and (D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution."); *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 354 & n.5 (Tex. 2004); *Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994); *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976).

[6] Sanders appears to have been represented by private counsel.

after limitations had run on the Baileys' claim,[7] Sanders filed a motion asserting that the suit was, by law, against him in his official capacity, and requesting the trial court to order the Baileys to substitute the Center for him as the defendant or suffer dismissal of their action. Sanders based his motion on section 101.106(f) of the Texas Tort Claims Act, which states — with spacing inserted to aid the reader:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and
>
> if it could have been brought under this chapter against the governmental unit,
>
> the suit is considered to be against the employee in the employee's official capacity only.
>
> On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.[8]

In response, the Baileys did not contest the first condition — that Sanders had acted within the scope of employment. They argued that he could not invoke the statute because he had not established the second — that suit could have been brought under the Act against the Center — by which they meant that their suit was one for which the Act waived the Center's governmental immunity. In construing the second condition as they did, the Baileys relied in part on the court of

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[7] Limitations ran June 20, 2006. *See* TEX. CIV. PRAC. & REM. CODE § 74.251(a) (prescribing a limitations period of two years from the date of treatment); *id*. § 74.051(c) (tolling limitations for 75 days following notice of the claim).

[8] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

appeals' decision in *Franka v. Velasquez*, which we have since reversed.[9] None of their arguments is relevant to the issue that is now before us, and we mention them only in the margin. Important here is that the trial court ordered the suit against Sanders dismissed with prejudice unless the Baileys amended their pleadings to substitute the Center by September 24, 2006, and that the Baileys complied.[10]

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[9] *Franka v. Velasquez*, 216 S.W.3d 409 (Tex. App.–San Antonio 2006), *rev'd*, ___ S.W.3d ___ (Tex. 2011).

[10] In response to Sanders' motion, the Baileys argued that while they had certainly *alleged* that Kia Bailey's injuries were caused by the use of tangible personal property — a pedicle screw — and thus fell within the Act's waiver of immunity, their allegations had not been *proved*, and their claim might yet be held to be barred. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(2) ("A governmental unit in the state is liable for . . . personal injury and death [proximately] caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."). The Baileys also argued that the record did not establish whether the Act's pre-suit notice requirement had been met. *See id*. § 101.101 ("(a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. . . . (c) The notice requirements . . . do not apply if the governmental unit has actual notice . . . that the claimant has received some injury . . . ."). Finally, the Baileys argued that if the Center could no longer be sued without its consent, *see id*. § 101.106(b) ("The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents."), then section 101.106(f) violated the Open Courts provision of the Texas Constitution. TEX. CONST. art. I, § 13 ("All 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.").

After the Center answered the suit, the trial court issued an order dismissing Sanders and severed it from the case to make it final. The Baileys appealed. While the appeal was pending, the Baileys and the Center filed with the trial court an agreement under Rule 11, TEX. R. CIV. P., that:

"1. At the time of Dr. Albert Sanders' surgery on Kia Bailey on April 15, 2004, and all times thereafter concerning her care by Dr. Sanders, he was a paid, full time employee of Defendant University of Texas Health Science Center at San Antonio acting in the scope of his employment;

"2. Defendant University of Texas Health Science Center at San Antonio agrees not assert to its defense of Six (6) months notice under § 101.101(c) Texas Tort Claims Act; and

"3. In their lawsuit, Plaintiffs have plead a viable use of tangible property claim against Defendant University of Texas Health Science Center at San Antonio."

The basis for paragraph 2 appears to have been Sanders' notice to the Center's risk manager shortly after Bailey's surgery. *See also Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia ex rel. Vasquez-Arancibia*, 324 S.W.3d 544, 550 (Tex. 2010) (concluding that a physician's report to a medical center's risk manager, under the circumstances, provided actual notice of a patient's claim). Notwithstanding the parties' agreement that the Act's pre-suit notice

After the Center answered, the Baileys moved for partial summary judgment that their amended pleading substituting the Center, filed after limitations had run, related back to their original petition filed against Sanders and was therefore timely. The Center filed a cross-motion contending that the relation-back doctrine does not apply to the addition of a new party, and in any event, the statute of limitations for health care liability claims expressly applies "[n]otwithstanding any other law",[11] which includes the relation-back doctrine. Therefore, the Center argued, the Baileys' claim against it was barred by limitations. The Center did not contend that it had been prejudiced by the delay in being substituted for Sanders. The trial court granted the Center's motion, dismissed the Center from the case, and severed the order, making it final.

The court of appeals reversed.[12] It reasoned that even though the Baileys had sued Sanders in his individual capacity,[13] the Center "had actual knowledge of the Baileys' claim"[14] and "was not misled about the claim or disadvantaged by its substitution".[15] Because "[t]he purpose of limitations

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requirement was satisfied, the court of appeals held that section 101.106(f) requires substitution of a government defendant even if suit against it is barred for lack of pre-suit notice. *Bailey v. Sanders*, 261 S.W.3d 153, 157 (Tex. App.–San Antonio 2008). Although the Baileys' response to Sanders' motion had not mentioned limitations as an impediment to substitution, the court held that a health care liability claim may be brought under the Act, within the meaning of section 101.106(f), even if barred by limitations, because the limitations provision is not part of the Act. *Id*. The court held that section 101.106(b) could not be construed to defeat section 101.106(f) and was not implicated. *Id*. at 158. Finally, the court found no constitutional violation. *Id*. at 159. Consistent with paragraph 3 of the parties' Rule 11 agreement, based on injury resulting from the use of a pedicle screw, the court noted that the Baileys had pleaded "a claim that falls within the ambit of the Tort Claims Act's waiver of immunity." *Id*. at 158. The court affirmed Sanders' dismissal. *Id*. at 159.

[11] TEX. CIV. PRAC. & REM. CODE § 74.251(a).

[12] 261 S.W.3d 147 (Tex. App.—San Antonio 2008).

[13] *Id*. at 151.

[14] *Id*. at 152.

[15] *Id*.

[was] served in this case",[16] the court concluded that the relation-back doctrine should apply. Moreover, the court continued, applying the doctrine was necessary "to fulfill the purpose of section 101.106(f)".[17] Since the statute imposes no deadline for the employee to file a motion,

> a defendant may effectively bar the plaintiff's claims by filing a motion under section 101.106(f) after the limitations period. A defendant would be rewarded for dilatory conduct and the plaintiff penalized despite complying with the statutory requirements. We find great difficulty in accepting the notion that the Legislature intended this result.[18]

We granted the Center's petition for review.[19]

The statute of limitations for health care liability claims states in pertinent part: "*Notwithstanding any other law* . . . , no health care liability claim may be commenced unless *the action* is filed within two years" from the subject incident.[20] The Center argues that the relation-back doctrine is "any other law" and therefore cannot apply. But we stated in *Chilkewitz v. Hyson* that the opening phrase of the statute forecloses the application of only those laws that "extend[] the time within which a health care liability claim [can] be commenced".[21] There, we held that the statute did not preclude the application of Rule 28 of the Texas Rules of Civil Procedure, which simply allows

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[16] *Id*.

[17] *Id*. at 153.

[18] *Id*.

[19] 52 Tex. Sup. Ct. J. 911 (June 26, 2009).

[20] TEX. CIV. PRAC. & REM. CODE § 74.251(a) (emphasis added).

[21] 22 S.W.3d 825, 829 (Tex. 1999).

an entity to be sued in an assumed name,[22] because it did not affect "when limitations began to run or whether limitations could be tolled or interrupted".[23]

The relation-back doctrine does not affect the running of limitations on a cause of action; rather, it defines what is to be included in "the action" to which limitations applies. The common law took a very narrow view. Professor Wright and his co-authors tell us:

> At common law a litigant had very little freedom to amend the written pleadings other than to correct formal defects and remedy errors of oversight. Thus, an amendment that attempted to introduce a new cause of action or to change the form of the action — for example, from trespass to trespass on the case — would be disallowed.[24]

Our early view was similarly strict. In a 1901 case, we held that in a suit for breach of an express contract, a claim for breach of an implied contract, added by amended pleadings, was barred by limitations.[25] To avoid the bar of limitations, we said, "[i]t is not sufficient that the causes of action be similar in their nature, but they must be essentially identical."[26] The Legislature took a broader approach in 1931, enacting the rule that remains the law today:

> If a filed pleading relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or

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[22] TEX. R. CIV. P. 28 ("Any partnership, unincorporated association, private corporation, or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.").

[23] *Chilkewitz*, 22 S.W.3d at 830.

[24] CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 1471 (2010).

[25] *Phoenix Lumber Co. v. Houston Water Co.*, 61 S.W. 707, 709 (Tex. 1901).

[26] *Id*.

> grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.[27]

But narrow or broad, the purpose of the relation-back doctrine is to determine not *when*, but *on what* limitations runs. Because the doctrine does not impede the running of limitations on health care liability claims, it is not, under *Chilkewitz*, an "other law", the application of which is forbidden. Even apart from *Chilkewitz*, because the doctrine determines "the action" that must be timely filed, its application is a matter of necessity.

But contrary to the court of appeals' conclusion, the doctrine does not help the Baileys. We have observed that "[o]rdinarily, an amended pleading adding a new party does not relate back to the original pleading."[28] Misnomer is an exception, misidentification a more limited one.[29] The Baileys fall under neither. They did not misname or misidentify their defendant; they sued exactly whom they intended to sue: Sanders, and not the Center. The relation-back doctrine does not save their suit against the Center from its limitations defense.

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[27] TEX. CIV. PRAC. & REM. CODE § 16.068, recodifying former TEX. REV. CIV. STAT. ANN. art. 5539b, Act approved May 13, 1931, 42nd Leg., R.S., ch. 115, § 1, 1931 Tex. Gen Laws 194.

[28] *Alexander v. Turtur & Assoc., Inc.*, 146 S.W.3d 113, 121 (Tex. 2004).

[29] *In re Greater Houston Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325 & n.1 (Tex. 2009) (per curiam); *see also Stokes v. Beaumont, Sour Lake & W. Ry. Co.*, 339 S.W.2d 877, 877 (1960) (indicating that the relation-back doctrine as applied to new parties is governed by the common law rather than by statute). The federal rule is similar. *See* FED. R. CIV. P. 15(c)(1) ("An amendment to a pleading relates back to the date of the original pleading when: . . . (C) the amendment changes the party or the naming of a party against whom a claim is asserted, if [the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading] and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.").

But the Baileys do not need the doctrine. In effect, when the Baileys sued Sanders, they sued the Center. Section 101.106(f) provides that when a government employee is sued for conduct within the general scope of employment, as Sanders was, and the employer could have been sued under the Act — in tort, that is[30] — instead, "the suit is considered to be against the employee in the employee's official capacity only."[31] So while the Baileys may have intended to sue Sanders in his individual capacity, as the court of appeals concluded they did, section 101.106(f) did not allow them that choice. Under the statute, it matters not that the Baileys may not have been aware of Sanders' government employment when they sued him; only the fact of his employment, eventually established, is important. Substitution of the Center as the defendant was not automatic; Sanders was required to file a motion. But the statute does not require a motion for a government employee to be considered to have been sued in his official capacity.

As we have said:

> It is fundamental that a suit against a state official is merely "another way of pleading an action against the entity of which [the official] is an agent." A suit against a state official in his official capacity "is not a suit against the official personally, for the real party in interest is the entity." Such a suit actually seeks to impose liability against the governmental unit rather than on the individual specifically named and "is, in all respects other than name, . . . a suit against the entity."[32]

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[30] *Franka v. Velasquez*, ___ S.W.3d ___ (Tex. 2011).

[31] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

[32] *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007) (quoting *Kentucky v. Graham,* 473 U.S. 159, 165-166 (1985)) (additional citations and emphasis omitted) (alterations in original).

A government employee has the same immunity from suit against him in his official capacity as his employer, unless he has acted *ultra vires*.[33] Even then, "the suit is, for all practical purposes, against the state."[34]

Under section 101.106(f), the Baileys' suit against Sanders was, in all respects other than name, a suit against the Center. In requiring a government employer to be substituted on the employee's motion, the statute is silent on whether the employer may complain of prejudice from the delay in being named a party. In this case, the Center has made no such complaint. When the Center was substituted as the defendant in Sanders' place, there was no change in the real party in interest. Consequently, the Center cannot prevail on its defense of limitations.

For these reasons, the court of appeals' judgment is

Affirmed.

Nathan L. Hecht
Justice

Opinion delivered: January 21, 2011

[33] *City of El Paso v. Heinrich*, 284 S.W.3d 366, 380 (Tex. 2009) ("With the limited *ultra vires* exception . . . , governmental immunity protects government officers sued in their official capacities to the extent that it protects their employers."); *Koseoglu*, 233 S.W.3d at 844 ("When a state official files a plea to the jurisdiction, the official is invoking the sovereign immunity from suit held by the government itself.").

[34] *Heinrich*, 284 S.W.3d at 373.

IN THE SUPREME COURT OF TEXAS

NO. 08-0421

THE STATE OF TEXAS, ET AL., PETITIONERS,

v.

PUBLIC UTILITY COMMISSION OF TEXAS, ET AL., RESPONDENTS

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

Argued October 6, 2009

JUSTICE WILLETT delivered the opinion of the Court.

This complex case poses several vexing questions regarding Texas utility-deregulation laws and the Public Utility Commission's application of those laws. In short, numerous parties — the State of Texas, utility companies, municipal groups, consumer groups, and others — challenge the Commission's interpretations of various cost-recovery provisions in Chapter 39 of the Utilities Code. As detailed below, we affirm the court of appeals' judgment in part, reverse it in part, and remand to the PUC for further proceedings consistent with this opinion.

I. Background

A. Overview of Chapter 39[1]

The Legislature in 1999[2] overhauled the Public Utility Regulatory Act (PURA or Act) to create a "fully competitive electric power industry" in Texas.[3] As part of this restructuring, utilities were required, not later than January 1, 2002, to split into three distinct units: (1) a power-generation company, (2) a retail electric provider, and (3) a transmission and distribution utility.[4] After that date, retail consumers could choose among competing retail providers.[5] Rates charged by the transmission and distribution utility continue to be regulated by the Public Utility Commission (PUC or Commission).[6]

The Legislature recognized that utilities had made investments in power-generation assets that produced a reasonable return under the existing regulated environment "but might well become uneconomic and thus unrecoverable in a competitive, deregulated electric power market."[7] The Act

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[1] This overview closely tracks the overview set out in our recent decision in a related Chapter 39 case, *Texas Industrial Energy Consumers v. CenterPoint Energy Houston Electric, LLC*, 324 S.W.3d 95, 97–100 (Tex. 2010).

[2] Act of May 27, 1999, 76th Leg., R.S., ch. 405, 1999 Tex. Gen. Laws 2543–2625; *see also City of Corpus Christi v. Pub. Util. Comm'n*, 51 S.W.3d 231, 237 (Tex. 2001).

[3] TEX. UTIL. CODE § 39.001(a). *See also City of Corpus Christi*, 51 S.W.3d at 237.

[4] TEX. UTIL. CODE § 39.051(b).

[5] *Id.* § 39.102(a).

[6] *See id.* §§ 39.201–.205; *In re TXU Elec. Co*, 67 S.W.3d 130, 132 (Tex. 2001) (Phillips, C.J., concurring) ("Because the generating companies and retail electric providers must use the existing power lines to move electricity from the plant to the retail customer's home or business, the transmission and delivery companies will remain regulated monopolies.").

[7] *CenterPoint Energy, Inc. v. Pub. Util. Comm'n*, 143 S.W.3d 81, 82 (Tex. 2004).

thus allows utilities to recover these "stranded costs," which consist generally of "the portion of the book value of a utility's generation assets that is projected to be unrecovered through rates that are based on market prices."[8]

The Act deregulated the market in phases. Retail rates were frozen from September 1, 1999 until January 1, 2002.[9]

Section 39.201 directed transmission and distribution utilities to file, on or before April 1, 2000, proposed tariffs that included "nonbypassable delivery charges" to retail electric providers.[10] It also directed the PUC to approve rates as of January 1, 2002.[11] The nonbypassable delivery charges included a "competition transition charge" (CTC) based on an estimate of stranded costs projected to exist at the end of the freeze period on December 31, 2001.[12] The CTC is "nonbypassable" in "that with limited exceptions, all retail electric customers in an existing utility's service area will pay charges to allow that utility to recover stranded costs regardless of whether those customers purchase their electricity from that utility, switch to one of its competitors, or generate their own electricity."[13] In estimating stranded costs, utilities were required to use the

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[8] *City of Corpus Christi*, 51 S.W.3d at 237–38; *see also* TEX. UTIL. CODE §§ 39.001(b)(2), .251(7), .252(a).

[9] TEX. UTIL. CODE § 39.052.

[10] *Id.* § 39.201(a), (b).

[11] *Id.* § 39.201(d).

[12] *Id.* § 39.201(b), (d), (g).

[13] *City of Corpus Christi*, 51 S.W.3d at 238 (citing TEX. UTIL. CODE § 39.252).

"ECOM" model,[14] an estimation model earlier used in a 1998 PUC report to the Legislature.[15] Section 39.201(h) required the PUC to rerun the ECOM model using "updated company-specific updates." Provision is made in Section 39.201 for a utility to recover estimated stranded costs at any time after the start of the freeze period on September 1, 1999 by issuing bonds and using a "transition charge" (TC) to service the bonds,[16] or by imposing a CTC.[17] However, no such charges were imposed because the Commission concluded after the updated ECOM calculations that no utility would incur stranded costs.[18]

Under Section 39.262, utilities were required, after January 10, 2004, to file with the PUC a reconciliation of stranded costs and the previous estimate of stranded costs that had been used in determining rates under Section 39.201.[19] Section 39.262 further directed the PUC to conduct a "true-up proceeding" and enter a final order adjusting the CTC to reflect the ultimate valuation of stranded costs.[20] "If, based on the proceeding, the competition transition charge is not sufficient, the

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[14] TEX. UTIL. CODE § 39.201(h).

[15] *See id.* § 39.262(i). "ECOM" stands for excess costs over market, *see id.* § 39.254, and is another term for stranded costs. The PUC began using an ECOM computer model in 1996. *See In re TXU Elec. Co.*, 67 S.W.3d 130, 160 (Tex. 2001) (Hecht, J., dissenting). The PUC presented a 1998 ECOM Report to the Legislature. *See id.*; TEX. UTIL. CODE §§ 39.254, .262(i).

[16] *See* TEX. UTIL. CODE §§ 39.201(i), .262(c), .301.

[17] *Id.* § 39.201(i).

[18] *CenterPoint Energy*, 143 S.W.3d at 91.

[19] TEX. UTIL. CODE § 39.262(c).

[20] *Id.* § 39.201(*l*), .262(c).

commission may extend the collection period for the charge or, if necessary, increase the charge."[21] The adjusted CTC is applied to the nonbypassable delivery rates of the transmission and distribution utility.[22]

In addition to adjustments for stranded costs, the PUC is directed at the true-up proceeding to make other adjustments to the nonbypassable delivery charges of the transmission and distribution utility. The parties refer to these other costs as "non-stranded costs." These adjustments can result in an increase or decrease in the amount or collection period of the CTC.[23]

From January 1, 2002 until January 1, 2007, affiliated retail electric providers were required to charge rates six percent below average rates that were in effect on January 1, 1999, subject to certain adjustments including a fuel factor.[24] This price is known as the "price to beat." After January 1, 2002, each affiliated power-generation company is required to file a final fuel reconciliation that calculates a final fuel balance as of December 31, 2001.[25]

To foster competition, utilities or their unbundled power-generation companies were required, at least 60 days before January 1, 2002, to conduct a "capacity auction" that sold entitlements to at least 15 percent of the utilities' generation capacity.[26] The obligation continued

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[21] *Id.* § 39.201(*l*).

[22] *Id.* §§ 39.201(*l*), .262(c). Alternatively, stranded costs may be securitized. *Id.* § 39.262(c).

[23] *Id.* § 39.262(g).

[24] *Id.* § 39.202(a).

[25] *Id.* § 39.202(c).

[26] *Id.* § 39.153(a).

until the earlier of 60 months after the date customer choice was introduced or the date the Commission determined "that 40 percent or more of the electric power consumed by residential and small commercial customers within the affiliated transmission and distribution utility's certificated service area before the onset of customer choice [was] provided by nonaffiliated retail electric providers."[27]

Under Section 39.262(d), the Act directs the affiliated power-generation company at the true-up proceeding to reconcile and either bill or credit the transmission and distribution utility for the net sum of (1) the former integrated utility's final fuel balance,[28] and (2) a balance parties refer to as the "capacity auction true-up balance" or the "wholesale clawback," consisting of the difference between the price of power realized at the capacity auctions and the power cost projections used in the ECOM model.[29]

Section 39.262(e) directs the affiliated retail electric provider at the true-up proceeding to credit the affiliated transmission and distribution utility for "any positive difference between the price to beat under Section 39.202, reduced by the nonbypassable delivery charge established under 39.201, and the prevailing market price of electricity during the same time period."[30] This credit is sometimes called the "retail clawback."

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[27] *Id.* § 39.153(b).

[28] *Id.* §§ 39.202(c), .262(d)(1).

[29] *Id.* § 39.262(d)(2).

[30] *Id.* § 39.262(e). This credit is subject to a cap. *Id.*

B. Proceedings Below

Pursuant to Chapter 39, Reliant Energy, Inc., an integrated electric utility, separated into three entities:

- CenterPoint Energy Houston Electric, LLC (CenterPoint) — the transmission and distribution utility,[31]
- Reliant Energy Retail Services, LLC (RERS) — the retail electric provider,[32] and
- Texas Genco, LP (Genco or TGN) — the power-generation company.

These three entities filed an application with the PUC to determine stranded costs and other true-up balances pursuant to Section 39.262.[33] Numerous parties, including the State of Texas, intervened. The intervenors consist of electricity consumers and consumer groups. In this proceeding (the true-up proceeding), the PUC made many factual and legal determinations, some of which are now before us on appeal. The PUC determined that CenterPoint was entitled to recover approximately $2.3 billion in stranded costs and other non-stranded costs. The PUC entered a final order on rehearing (Order) in the true-up proceeding.[34] One Commissioner dissented on a single

[31] More specifically, under the business separation plan, Reliant Energy, Inc. survives as CenterPoint Energy, Inc., a publicly traded holding company. CenterPoint Energy, Inc. owns CenterPoint Energy Houston Electric, LLC, the transmission and distribution utility.

[32] More specifically and as discussed below, under the business separation plan, Reliant Energy, Inc. created Reliant Resources, Inc., a publicly traded company that became the parent of Reliant Energy Retail Services, LLC, the retail electric provider.

[33] CenterPoint and Genco remain petitioners to this appeal, and for convenience are sometimes referred to collectively as CenterPoint.

[34] *Application of CenterPoint Energy Houston Electric, LLC, Reliant Energy Retail Servs., LLC, and Tex. Genco, LP to Determine Stranded Costs and Other True-Up Balances Pursuant to PURA § 39.262*, PUC Docket No. 29526 (Dec. 17, 2004) (Order), *available at* http://interchange.puc.state.tx.us (item no. 2286).

issue, as discussed below.

CenterPoint and various intervenors appealed the Order to district court. The district court affirmed the Order except as to two issues, one of which, concerning the capacity auction true-up, is discussed below. Both sides appealed to the court of appeals,[35] which affirmed the district court on numerous issues, but reversed the district court on a stranded cost issue and a capacity auction issue discussed below. We granted three petitions for review filed by CenterPoint,[36] a group of intervenors[37] who filed a joint petition, and the State of Texas. The State of Texas and the other petitioner-intervenors (collectively the Intervenors) subsequently filed joint briefing on the merits.

II. Discussion

A. Standards of Review

Generally, "[a]ny party to a proceeding before the commission is entitled to judicial review under the substantial evidence rule."[38] Chapter 39 also provides that the true-up order is subject to review under Chapter 2001 of the Government Code, the Texas Administrative Procedure Act (APA).[39] The APA looks to the scope of review "as provided by the law under which review is

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[35] 252 S.W.3d 1.

[36] Issues determined in the Order pertinent to the retail electric provider, RERS, such as the retail clawback, are not appealed to this Court, and hence that entity is not a party.

[37] Gulf Coast Coalition of Cities, Houston Council for Health and Education, City of Houston and Coalition of Cities, and Texas Industrial Energy Consumers.

[38] TEX. UTIL. CODE § 15.001.

[39] *Id.* § 39.262(j).

sought,"[40] which in this case is the substantial evidence standard. Under substantial evidence review of fact-based determinations, "[t]he issue for the reviewing court is not whether the agency's decision was correct, but only whether the record demonstrates some reasonable basis for the agency's action."[41]

The APA also provides in Section 2001.174 that, under substantial evidence review, the court may reverse the agency's order where the agency has made a prejudicial error of law,[42] or where the order is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."[43] Questions of statutory construction are questions of law and are reviewed de novo.[44] We have noted that an agency's interpretation of the statute it administers is entitled to serious consideration so long as it is reasonable and does not conflict with the statute's language.[45] However, "the PUC may not exercise what is effectively a new power" in addition to powers expressly conferred by statute or necessary to accomplish its express duties "on the theory that such a power is expedient for administrative purposes."[46]

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[40] TEX. GOV'T CODE § 2001.172.

[41] *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999).

[42] Section 2001.174(2) authorizes the court to reverse the agency decision if it is "in violation of a constitutional or statutory provision," "in excess of the agency's statutory authority," or "affected by other error of law."

[43] TEX. GOV'T CODE § 2001.174(2)(F).

[44] *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008).

[45] *Id.* at 632.

[46] *City of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 441 (Tex. 2002).

B. Stranded Cost True-Up

1. Market Value

By statutory definition, stranded costs are based on the difference between the book value of generation assets and the market value of these assets.[47] Section 39.251(7) provides that for purposes of establishing stranded costs in the true-up proceeding, "market value is established through a market valuation method under Section 39.262(h)."

Section 39.262(h) provides that the affiliated power-generation company shall establish the market value of its generation assets using one or more of four methods: the sale of assets method, the stock valuation method, the partial stock valuation (PSV) method, and the exchange of assets method.[48]

CenterPoint complains that the PUC erred in refusing to employ the PSV method. CenterPoint attempted to establish the market value of its generation assets and resulting stranded costs under this method, found in subsection (h)(3). This method may be employed if "at least 19 percent, but less than 51 percent, of the common stock of [Genco] is spun off and sold to public

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[47] More precisely, Section 39.251(7) defines stranded costs as

> the positive excess of the net book value of generation assets over the market value of the assets, taking into account all of the electric utility's generation assets, any above market purchased power costs, and any deferred debit related to a utility's discontinuance of the application of Statement of Financial Accounting Standards No. 71 ("Accounting for the Effects of Certain Types of Regulation") for generation-related assets if required by the provisions of this chapter. For purposes of Section 39.262, book value shall be established as of December 31, 2001, or the date a market value is established through a market valuation method under Section 39.262(h), whichever is earlier, and shall include stranded costs incurred under Section 39.263.

Section 39.263 pertains to certain environmental cleanup costs.

[48] A fifth method, found in Section 39.262(i), pertains to the valuation of certain nuclear assets.

investors through a national stock exchange, and the common stock has been traded for not less than one year."[49] If these conditions are met, "the resulting average daily closing price of the common stock over 30 consecutive trading days chosen by the commission out of the last 120 consecutive trading days before the [stranded cost filing] shall be presumed to establish the market value of the common stock equity in [Genco]."[50] The PUC may accept this valuation or it may convene "a valuation panel of three independent financial experts to determine whether the percentage of common stock sold is fairly representative of the total common stock equity or whether a control premium exists for the retained interest."[51] As the court of appeals noted, with a partial stock spinoff, the control retained by the parent company "might increase the value of the stock privately held, rendering the average closing price of the publicly-traded stock an inaccurate measure of the true value of the stock."[52]

CenterPoint contends that the PSV method was appropriately employed because CenterPoint distributed 19.0447 percent of Genco stock to CenterPoint shareholders, and retained ownership of the rest, on January 6, 2003. CenterPoint listed Genco on the New York Stock Exchange, where the stock publicly traded. CenterPoint contends and offered evidence that it chose a stock dividend to existing shareholders in lieu of an initial public offering (IPO) because market conditions at the time would have made an IPO difficult. It further contends and offered evidence that it sold slightly over

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[49] TEX. UTIL. CODE § 39.262(h)(3).

[50] *Id.*

[51] *Id.*

[52] 252 S.W.3d at 17.

19 percent of the stock because that percentage complied with the statute and also allowed CenterPoint and Genco to benefit from consolidated tax returns. A parent and subsidiary may file consolidated returns if the parent owns at least 80 percent of the stock in the subsidiary.[53]

The Commission conceded in its Order that it "may not substitute its judgment for a properly conducted market valuation of generation assets determined under PURA §§ 39.262(h) and (i)." It further recognized that utilities are "required to follow one of the four methods in PURA § 39.262(h) to determine the market value of generation assets for purposes of stranded-cost recovery." Section 39.252(a) indeed provides that a utility is "allowed to recover all of its net, verifiable, nonmitigable stranded costs," but Section 39.252(d) makes clear that "nothing in this section authorizes the commission to substitute its judgment for a market valuation of generation assets determined under Sections 39.262(h) and (i)."

Nevertheless, the PUC concluded that the PSV method could not be employed by CenterPoint. The PUC noted a lack of proof that 19 percent of Genco shares had ever been sold on a national exchange. Focusing on the statutory language that the PSV method relies on a block of stock that "is spun off and sold to public investors through a national stock exchange," it concluded that while the required amount of stock was "spun off" to public investors, it was not "sold" to public investors. It noted that "CenterPoint did not conduct an initial public offering of [Genco] shares." It further noted that "[t]here was no public involvement in valuing the distribution of [Genco's] stock," and that "a distribution of stock is not a sale of stock."

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[53] *See* 26 U.S.C. § 1504. According to CenterPoint, one advantage of a consolidated return is that the parent can offset one subsidiary's losses against another subsidiary's gains.

Because the PUC found that the PSV method could not be used and that no other statutorily prescribed method was available, it embarked on an effort to establish market value based on a number of "data points," including the announced sale of Genco (discussed below), market value estimates chosen by the valuation panel convened under subsection (h)(3), and other information. The valuation reached using this hybrid method resulted in a stranded cost recovery $258 million smaller than the recovery requested by CenterPoint under the PSV method. On this issue, the trial court and the court of appeals[54] agreed with the PUC.

CenterPoint, on the other hand, reads the statute to require that (1) 19 percent of Genco's stock be spun off, and (2) this block trade on a national exchange. It contends that so long as this block is publicly traded, it is being "sold to public investors through a national exchange" under the statute, and the market value of all of Genco's stock can be determined, subject to a control premium adjustment for the retained interest as provided in the statute.

The PUC argues that CenterPoint failed to prove that 19 percent of Genco's common stock sold on a national stock exchange. Assuming that this is a statutory requirement for the partial stock valuation method, it would be satisfied if the spin-off[55] of Genco's stock is a "sale" of securities

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[54] 252 S.W.3d at 16–34.

[55] The SEC explains, "In a 'spin-off,' a parent company distributes shares of a subsidiary to the parent company's shareholders." SEC Staff Legal Bulletin No. 4 (Sept. 16, 1997). "[A] spin-off is effected by the parent's board of directors declaring a dividend of the subsidiary shares payable to the parent's stockholders." Bruce Hawthorn et al., *Planning and Structuring Spin-Offs and Subsidiary Offerings*, *in* CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 185, 209 (2001). "[I]n its purest form, a spinoff involves the creation of a separate ownership structure for a business through the distribution of stock of a subsidiary to the existing stockholders of a parent corporation as a dividend." Steven Ostner, *Spinoffs Discover New Life: Energized Shareholders Seek Enhanced Value*, 210 N.Y. L.J. 11, 11 (1993). "[T]he spin-off device involves the distribution by a corporation to its shareholders of another corporation's securities held by the distributing corporation." Simon M. Lorne, *The Portfolio Spin-Off and Securities Registration*, 52 TEX. L. REV. 918, 919 (1974) (footnote omitted).

under PURA. However, PURA does not define a "sale" of securities.[56] There are no Texas cases

[56] The Texas Securities Act, TEX. REV. CIV. STAT. art. 581-4(E), defines "sale" as follows:

> The terms "sale" or "offer for sale" or "sell" shall include every disposition, or attempt to dispose of a security for value. The term "sale" means and includes contracts and agreements whereby securities are sold, traded or exchanged for money, property or other things of value, or any transfer or agreement to transfer, in trust or otherwise.

As with the federal securities statutes, the Texas definition of "sale" of a security is broad, including "every disposition" and "any transfer or agreement to transfer." *See Tex. Capital Sec., Inc. v. Sandefer*, 58 S.W.3d 760, 775 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) ("[The Texas Legislature] broadly defined 'sale,' 'sell,' and 'security.'"); 11 WILLIAM V. DORSANEO & PETER WINSHIP, TEXAS LITIGATION GUIDE § 171.03[1][a] (interpreting the statute as including a "for value" requirement). No Texas court has addressed whether a stock distribution though a stock dividend constitutes a "sale," although a court has said that the exercise of a stock option will constitute a "sale" under the Texas Act. *See Key Energy Servs., Inc. v. Eustace*, 290 S.W.3d 332, 342–43 (Tex. App.—Eastland 2009, no pet.) ("[T]he grant of an employee stock option on a covered security is a sale of that security.").

The Securities Act of 1933 defines "sale" of a security as including "every contract of sale or disposition of a security or interest in a security, for value." 15 U.S.C § 77b(a)(3). "The term 'offer to sell', 'offer for sale', or 'offer' shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." *Id.* The Securities Exchange Act of 1934 defines "sale" of a security to include "any contract to sell or otherwise dispose of." *Id.* § 78c(a)(14).

Some federal courts have determined that a spin-off through a stock distribution constitutes a "sale" under both the 1933 Securities Act and the 1934 Securities Exchange Act. *Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1343–44 (2d Cir. 1974) (discussing 1934 Act); *S.E.C. v. Datronics Eng'rs, Inc.*, 490 F.2d 250, 253–54 (4th Cir. 1973) (discussing 1933 Act); *S.E.C. v. Harwyn Indus. Corp.*, 326 F. Supp. 943, 953–54 (S.D.N.Y. 1971) (same); *see also S.E.C. v. Sierra Brokerage Servs. Inc.*, 608 F. Supp. 2d 923, 940–44 (S.D. Ohio 2009) (considering "gifts" of securities to former directors and shareholders as "sales" where defendant schemed to create public companies without registration and then later transfer control for a fee). Other federal circuits have held to the contrary. The Fifth Circuit has held that an asset-for-stock exchange is not a "sale" within the meaning of Section 10(b) of the 1934 Act where the parties are not at arms length. *Rathborne v. Rathborne*, 683 F.2d 914, 918 (5th Cir. 1982) ("[A] transfer of securities from a wholly controlled subsidiary to its parent or between two corporations wholly controlled by a third does not amount to a statutory purchase or sale."); *see also Blau v. Mission Corp.*, 212 F.2d 77, 80 (2d Cir. 1954) (determining stock-exchanges between corporations with shared ownership were not "sales" within the meaning of Section 16(b) of the 1934 Act because the transaction was "a mere transfer between corporate pockets"). Several more recent cases declined to characterize spin-offs as sales, often considering the earlier cases' reasoning as a means to prevent backdoor IPOs without registration and making information available to the public. *See Isquith v. Caremark Int'l, Inc.*, No. 94 C 5534, 1997 WL 162881, at *6 (N.D. Ill. March 26, 1997) (distinguishing *Harwyn* and *Datronics* as SEC enforcement actions, as opposed to shareholder suits), *aff'd*, 136 F.3d 531 (7th Cir. 1998); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 676 F. Supp. 458, 475 (S.D.N.Y. 1987) (noting that outside *Harwyn* and its progeny, "[t]here has been no other case demonstrating acceptance of such a broad view of 'value'"); *Fed. Ins. Co. v. Campbell Soup Co.*, No. Civ.A. 131-04, 2004 WL 1631405, at *9–13 (N.J. Sup. Ct. Law Div. July 2, 2004) ("Notwithstanding the[] broad statutory definition[], however, courts have still found that spin-offs generally do not constitute a sale of securities. . . . [T]his court finds that in all of the cases cited, the courts which did find a purchase and sale were struggling to do so in order to insure a remedy for a wrong . . . or the mischief of an unsympathetic defendant . . . would not go without a federal remedy."); *see also In re Adelphia Commc'ns Corp. Sec. & Derivatives Litig.*, 398 F. Supp. 2d 244, 260 (S.D.N.Y. 2005).

In 1997, the SEC issued a Staff Legal Bulletin No. 4, which attempted to explain the SEC's view of spin-offs in regards to registration under the 1933 Act. SEC Staff Legal Bulletin No. 4 (Sept. 16, 1997). The Bulletin begins by

that decide whether a stock spin-off constitutes a "sale" under Texas securities laws, and while the federal case law seems to suggest a trend, it is far from unanimous on the issue. We need not answer this question because we resolve this valuation issue utilizing the sale of assets method.

Like CenterPoint, Intervenors contend that the PUC acted outside of its statutory authority in determining fair market value under a method not prescribed in Section 39.262. They contend the PUC should have used the sale of assets method found in Section 39.262(h)(1). This provision[57] states that if the utility sells all of its generation assets "in a bona fide third-party transaction under a competitive offering, the total net value realized from the sale establishes the market value of the generation assets sold."

During the true-up proceeding, under a signed agreement dated July 21, 2004, CenterPoint agreed to sell Genco, which held all of the joint applicants' generating assets, to private equity firms. This agreement, styled the "Transaction Agreement," was made known to the PUC and admitted into the administrative record. The Genco shares held by CenterPoint were sold for $45.25 per share and other shares sold for $47 per share. These prices are higher than the value of $42.425 per share

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stating the general requirement that a subsidiary must register if the spin-off is a "sale." *Id.* The subsidiary does not have to register, and thus it logically follows no "sale" occurs, if: (1) the parent shareholders do not provide consideration for the spun-off shares; (2) the spin-off is pro-rata to the parent shareholders; (3) the parent provides adequate information about the spin-off and the subsidiary to its shareholders and the trading markets; (4) the parent has a valid business purpose for the spin-off; and (5) if the parent spins off "restricted securities," it held those securities for at least two years. *Id*.

[57] In its entirety Section 39.262(h)(1) states:

> Sale of Assets. If, at any time after December 31, 1999, an electric utility or its affiliated power generation company has sold some or all of its generation assets, which sale shall include all generating assets associated with each generating plant that is sold, in a bona fide third-party transaction under a competitive offering, the total net value realized from the sale establishes the market value of the generation assets sold. If not all assets are sold, the market value of the remaining generation assets shall be established by one or more of the other methods in this section.

chosen by the PUC under its extra-statutory method of determining fair market value. They are also higher than the price of $36.26 (plus a control premium of up to 10 percent) applicable to the PSV method. Intervenors urged the PUC to reject the use of the PSV method and to either deny any stranded cost recovery or to use the announced sale of Genco under the Transaction Agreement to determine stranded costs. They argue that the Transaction Agreement was a definitive agreement to sell the assets and was made months before the final Order issued on December 17, 2004. They contend that if the Transaction Agreement is used to determine the market value of the generation assets under the sale of assets method, the resultant market value is $253 million higher than the market value determined by the PUC, and the stranded cost recovery should be reduced by this same amount.

Although acknowledging the existence of the Transaction Agreement, the PUC concluded that "[t]he announced sale of [Genco] does not constitute a sale of assets under PURA § 39.262(h)(1) because the sale is not final and there is not sufficient evidence in the record to establish under the statute that the sale is a bona fide third-party transaction under a competitive offering."

We agree with Intervenors and CenterPoint that the PUC should not have used the extra-statutory method it employed in calculating market value. Section 39.262(h) specifies the permitted methods for determining market value. We need not decide if the PSV method could have been used if Genco had not been sold to private investors under the Transaction Agreement. Given that Genco actually did sell under that Agreement, we hold that the PUC should have used the sale of assets method to determine market value. There is no dispute that the Transaction Agreement closed under

its terms and Genco was sold to new owners.[58] Nor is there any dispute that CenterPoint was legally obliged to sell Genco under an agreement signed during the true-up proceeding. A November 9, 2004 CenterPoint press release, filed with the SEC, described the Transaction Agreement as a "definitive agreement." Nor does the PUC posit any compelling reason it could not have simply delayed issuing the Order if it felt the need for the Transaction Agreement to fully close and fund before it could serve as the basis for calculating market value. Its own rules provide that it can for good cause extend the deadline for issuing the true-up order.[59]

On remand the Commission should use the sale of assets method to determine market value. For several reasons Chapter 39 compels the use of this method in this case. First, Chapter 39 recognizes and the PUC Order repeatedly acknowledged in both its findings of fact and conclusions of law that "[m]arket value is defined as the value the assets would have if bought and sold in a bona fide third-party transaction on the open market under PURA § 39.262(h)." Section 39.251(4) indeed defines market value using these exact words. While other methods are provided to determine market value indirectly, we think the actual sale of all the generation assets under the Transaction Agreement provides the best measure of market value.

Second, since CenterPoint succeeded in selling Genco for an amount greater than the value of the company as measured by the PSV method or the extra-statutory method employed by the PUC, CenterPoint achieved a higher market value for the assets by completing the transaction than the

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[58] According to an SEC filing by CenterPoint, the sale of Genco's fossil generation assets was completed on December 15, 2004, two days before the PUC's Order was signed, and the sale of Genco's nuclear assets concluded in April 2005.

[59] 16 TEX. ADMIN. CODE § 25.263(e)(6).

market value derived from other methods. This higher market value translates to a lower measure of stranded costs, and is consistent with the utility's duty under Section 39.252(d) to "pursue commercially reasonable means to reduce its potential stranded costs," with Section 39.252(a)'s recognition that a utility should recover only "nonmitigable stranded costs," and with Section 39.262(a)'s requirement that utilities "may not be permitted to overrecover stranded costs through the procedures established by this section." CenterPoint reduced its stranded costs by executing and fully performing under the Transaction Agreement. The Commission should not ignore that agreement unless it had a sound factual or legal reason to do so, and none appears in this case. CenterPoint's own chief executive testified that "we're not trying to recover more money than we have on our books. And if we get it from the sale, as opposed to stranded investment, great. Matter of fact, I think that would help everybody."

Third, there is ample evidence in the record that the Transaction Agreement was indeed "a bona fide third-party transaction under a competitive offering" as specified in subsection (h)(1). A CenterPoint investment banker testified that the bidding process for Genco consisted of contacting 107 potential buyers; 90 expressed an interest in receiving a teaser letter; of those 90, confidentiality agreements were negotiated with 38; and 17 expressed an interest in bidding. Ten parties submitted "first round indicative interest proposals"; six of those ten had an opportunity to conduct a full due diligence review of Genco[60]; and three submitted final round bids. Moreover, the fact that the

[60] The banker testified that the six potential bidders

> had the opportunity to meet the management team. They had the opportunity to visit the sites. They had the opportunity to participate and review all the data in the data room. They had the opportunity to ask detailed questions, and they did ask lots of detailed questions. And they basically had the

process resulted in a price exceeding the stock price available under the alternative PSV method or the extra-statutory price used by the PUC compels the conclusion that it was sufficiently "bona fide" and "competitive" to serve the purposes of Chapter 39. The court of appeals recognized that since "[t]he actual market value used by the Commission was lower than the price offered" in the Transaction Agreement, "the apparent purpose of the statute would seem to have been satisfied despite the lack of evidence showing sufficient competitive circumstances."[61] And the PUC stated in its Order that it considered the Transaction Agreement prices as "data points" in making its hybrid valuation.

Fourth, as we read Chapter 39, it does not give any preference to the PSV method in this case simply because CenterPoint sought recovery of stranded costs under that method. We disagree with CenterPoint and the PUC to the extent that they argue the utility may choose the valuation method even when the method results in higher stranded costs than another readily available method. In these circumstances, the utility should not be allowed to increase its stranded costs by choosing the market valuation method that results in the smaller measure of market value. While Section 39.262(h) provides that "the affiliated power generation company shall quantify its stranded costs using one or more of the following methods," other provisions make clear that the PUC ultimately determines stranded costs under Chapter 39 and the rates and charges needed to recoup them.[62] The true-up procedure set out in Chapter 39 unmistakably assigns the Commission to act as an

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opportunity to do as much due diligence as needed to get to a final round proposal.

[61] 252 S.W.3d at 26 n.20.

[62] *See* TEX. UTIL. CODE §§ 39.201(*l*), .252(d), .262(g).

adjudicative body in "determining the amount of the utility's stranded costs"[63] and issuing a "final order"[64] in the true-up proceeding, subject to judicial review. The PUC cannot forego use of the sale of assets method if it is otherwise readily available simply because CenterPoint prefers another method that would increase its stranded costs.

2. Net Book Value

a. Excess Mitigation Credits Paid to RERS

The Act required utilities to undertake certain efforts to mitigate stranded costs in the 1998–2001 time frame. Section 39.254 directed utilities to use these efforts to reduce the book value of generation assets. Because stranded costs represent the difference between book value and market value, a reduction in the book value of generation assets had the effect of reducing stranded costs. The Act directed utilities to redirect depreciation expenses from transmission and distribution assets to generation assets, and to apply certain "excess earnings" to reduce the book value of generation assets.[65] The required mitigation is consistent with the principles that under Chapter 39 utilities "may not be permitted to overrecover stranded costs"[66] and are only allowed to recoup their "net,

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[63] *Id.* § 39.252(d).

[64] *Id.* § 39.262(j).

[65] *See id.* §§ 39.254, .256, .257. Chapter 39 does not actually use the term "excess earnings," but the parties, the PUC, and this Court have used the term as a shorthand expression for the earnings that are applied to reduce stranded costs under Sections 39.254 and other provisions. *See, e.g.*, *CenterPoint Energy*, 143 S.W.3d at 88. According to the PUC's brief, the excess earnings concept is tied to the Legislature's decision to freeze retail rates under Section 39.052: "Recognizing that a utility might earn more under those frozen rates than if new rates had been set using more current information," Section 39.254 "addressed those excess earnings" by providing that "excess earnings would be credited against stranded costs."

[66] TEX. UTIL. CODE § 39.262(a).

verifiable, nonmitigable stranded costs."[67]

Prior to January 1, 2002, CenterPoint engaged in mitigation efforts by redirecting $841 million in depreciation and applying $1.13 billion in excess earnings to reduce the net book value (NBV) of its generation assets.

Section 39.201(h) required the PUC to make a determination of estimated stranded costs based on the ECOM model using "updated company-specific inputs." As noted above, Section 39.201 provided for interim rates during the 2002–2003 period, until the calculation of final stranded costs in the Section 39.262 true-up proceeding. The projections indicated that CenterPoint would have no stranded costs.[68] As a result, the PUC concluded that CenterPoint should cease mitigation efforts and should issue "excess mitigation credits" (EMCs) to all retail electric providers, including its affiliate RERS. The EMCs were deducted from the transmission and distribution charges that retail electric providers paid CenterPoint.

The EMCs increased the NBV of CenterPoint's generation assets on a dollar-for-dollar basis. However, the PUC concedes that the ECOM model assumptions underlying the 2001 finding that CenterPoint would have no stranded costs — the finding that the PUC used to justify the EMCs — proved to be false. At the 2004 true-up proceeding, CenterPoint established that it had substantial stranded costs.

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[67] *Id.* § 39.252(a).

[68] Courts have noted that a surge in natural gas prices was one reason projections of stranded costs changed after the 1998 ECOM report. *E.g.*, *In re TXU Elec. Co.*, 67 S.W.3d at 134 (Phillips, C.J., concurring) ("TXU's investment in the Comanche Peak nuclear plant, once a liability, had now become profitable because the cost of generating electricity from natural gas plants exceeded that of generating electricity from nuclear plants.").

In a mandamus proceeding, CenterPoint objected to the order requiring EMCs. In that proceeding, the PUC represented to this Court in its briefing and at oral argument that CenterPoint could recoup the EMC payments in the true-up proceeding now under review if CenterPoint was ultimately determined to have stranded costs. This Court denied mandamus relief,[69] although three justices would have reached the merits and held the EMCs unlawful as unauthorized by Chapter 39.[70] The PUC terminated EMCs on April 29, 2005. In September 2005, the Third Court of Appeals held that the PUC exceeded its authority in ordering EMCs.[71]

In the true-up proceeding, CenterPoint contended all the EMCs it had already paid retailers could be recovered as stranded costs. CenterPoint argued it should not be penalized for following the PUC's mistaken decision to order the EMCs. Intervenor City of Houston argued that CenterPoint should not be allowed to recover $385 million in EMCs paid to its retail affiliate, RERS. The PUC rejected this argument, finding "no legal basis for the recommended disallowance" and declining to "penalize CenterPoint for following a Commission order." One commissioner dissented in part to the true-up Order, solely on this issue. The dissenting commissioner reasoned that the EMC payments to RERS amounted to "wealth transfers between two companies who knew they would be joint applicants in this true-up proceeding."

The trial court agreed with the PUC majority on this issue. The court of appeals, however,

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[69] *In re TXU Elec. Co.*, 67 S.W.3d at 131.

[70] *Id.* at 150 (Hecht, J., dissenting).

[71] *City of Corpus Christi v. Pub. Util. Comm'n*, 188 S.W.3d 681, 684, 691 (Tex. App.—Austin 2005, pet. denied).

agreed with the dissenting commissioner and held that CenterPoint could not recoup the EMCs paid to RERS. Although the court of appeals assumed that CenterPoint and RERS are "completely separate entities,"[72] it reasoned that "joint true-up applicants are prohibited from overrecovering [stranded costs] as a single unit" by Section 39.262(a), which generally prohibits the overrecovery of stranded costs.[73]

We reverse the court of appeals and affirm the PUC on this issue. We need not decide whether the PUC could ever order excess mitigation credits. Even if the PUC theoretically possessed the legal authority to order EMCs, as a factual matter the PUC should not have done so in this case. The credits were ordered only because the ECOM model incorrectly predicted that CenterPoint would have no stranded costs. CenterPoint should recover whatever stranded costs it would have recovered if the EMCs had never been paid. EMCs paid to RERS had the same dollar-for-dollar impact on CenterPoint's stranded costs as EMCs paid to unaffiliated retailers. Intervenors concede in their brief that as to EMC payments generally, "[f]or every dollar of EMC payments made, CenterPoint wrote up its NBV by one dollar, thus increasing potential stranded costs," and that as to EMC payments to RERS in particular, "every dollar that CenterPoint paid to [RERS] resulted in CenterPoint writing up NBV by an equal amount." In either case, the purpose of the EMCs was to increase the NBV of CenterPoint's generation assets. The PUC did not err, therefore, in declining to adjust stranded costs by disregarding any of the EMCs paid by CenterPoint, and Intervenors fail to demonstrate a sound legal or factual basis for deducting the EMCs that were paid to RERS.

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[72] 252 S.W.3d at 38.

[73] *Id.* at 39.

We cannot agree with the court of appeals that the payment of EMCs to CenterPoint's affiliate RERS merits special treatment. Chapter 39, in its express measures for recovering stranded costs and preventing the over-recovery of stranded costs, makes no distinction between affiliated and unaffiliated electric retailers that would warrant special treatment of the EMCs paid to RERs. The EMCs were simply an interim and ultimately unwarranted effort to reverse what the PUC perceived to be an over-recovery of stranded costs before the final true-up. There is no express statutory provision allowing such credits, as the Third Court of Appeals noted in holding that Chapter 39 did not permit them. However, Section 39.201 does provide for the transmission and distribution utility to impose competition transition charges, based on interim estimates of stranded costs. Section 39.107(d) provides that these charges are made to "a customer's retail electric provider." These provisions make no exception or distinction for an affiliated retail electric provider. If the interim CTCs result in an over-recovery of stranded costs, Sections 39.201(*l*) and 39.262(c) provide for the transmission and distribution utility to refund stranded costs by reducing the CTCs or rates charged to retail providers. Again, in providing for these refunds Chapter 39 makes no statutory distinction between affiliated and unaffiliated retailers, and Chapter 39 indeed generally requires that such distinctions not be drawn when billing retail electric providers and their customers.[74]

Because the EMCs, by design, had the effect of increasing the NBV of generation assets regardless of whether they were directed to an affiliated or unaffiliated retail electric provider, and because such an increase in NBV correspondingly increased the amount of stranded costs under the

[74] *See, e.g.*, TEX. UTIL. CODE §§ 39.107(e), .203.

relevant provisions of Chapter 39, the PUC did not err in refusing to reduce stranded costs by the portion of the EMCs paid to RERS.

b. The RRI Option

CenterPoint and Intervenors complain that the PUC erred in its treatment of the "RRI Option." Under the business separation plan, Reliant Energy, Inc. conveyed its generation assets to a subsidiary, Genco. Reliant Energy changed its name to CenterPoint. As discussed above, CenterPoint spun off approximately 19 percent of the shares of Genco to CenterPoint's shareholders. CenterPoint also spun off a company named Reliant Resources, Inc. (RRI), by selling approximately 20 percent of the shares in RRI in an initial public offering, with CenterPoint retaining about 80 percent of RRI.[75] RRI, in turn, owned the affiliated retail electric provider, RERS.

As part of the business separation plan, which the PUC approved in a separate proceeding, RRI received an option to purchase CenterPoint's shares in Genco. The Option expired on January 24, 2004. The Option price was set at the price for Genco that was to be determined at the true-up proceeding.

Under its "primary holding" that rejected the use of the PSV method, the PUC employed an extra-statutory method that considered various "data points" for determining market value, as described above. Under this holding, the PUC concluded that its method of calculating fair market value accounted for the effect of the RRI Option. It therefore held under its primary holding that no adjustment to NBV relating to the RRI Option was necessary. The trial court and the court of

[75] In 2002, CenterPoint distributed its remaining ownership in RRI to CenterPoint's shareholders.

appeals[76] affirmed this decision. Under its "alternative holding," the PUC calculated true-up amounts assuming that the fair market value was properly calculated under the PSV method. As explained above, we conclude that neither the primary nor the alternative holding can be sustained, because the sale of assets method must be used — and not the extra-statutory method used in the primary holding or the PSV method used in the alternative holding.

Intervenors complain that if the Court agrees with the primary holding rejecting the use of the PSV method, the PUC nevertheless erred in refusing to make a requested deduction from the NBV calculation to reflect the RRI Option. We need not reach this issue because we reject the primary holding. CenterPoint complains that if as it contends the PSV method must be used, the PUC erred in concluding under its alternative holding that an adjustment should be made to NBV to reflect the RRI option. Again, this issue is moot because we reject the use of the PSV method.

However, Intervenors argue that "[r]egardless of how market value is determined," an adjustment to NBV should be made for the RRI Option. Insofar as Intervenors argue an adjustment to NBV should be made for the RRI Option even if we agree with them that the sale of assets method should be used to determine market value,[77] we reject this argument.

The PUC reasoned in its alternative holding that if it is required to use the PSV method of calculating market value, an adjustment should be made to NBV to reflect the RRI option. It made

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[76] 252 S.W.3d 32–34.

[77] Intervenors repeatedly complain that an NBV adjustment should be made for the RRI Option under the primary holding as well as the alternative holding. However, they also argue more generally that this adjustment should be made "regardless of how market value is determined." In their brief on the merits and petition for review, they ask that we sum dollar amounts for the alleged errors of the PUC in failing to use the sale of assets method and to adjust for the RRI Option, suggesting that these amounts should be stacked if the sale of assets method is used.

the adjustment under PURA Section 39.252(d), which provides:

> An electric utility shall pursue commercially reasonable means to reduce its potential stranded costs, including good faith attempts to renegotiate above-cost fuel and purchased power contracts or the exercise of normal business practices to protect the value of its assets. The commission shall consider the utility's efforts under this subsection when determining the amount of the utility's stranded costs; provided, however, that nothing in this section authorizes the commission to substitute its judgment for a market valuation of generation assets determined under Sections 39.262(h) and (i).

Applying this provision, the PUC found that CenterPoint had received no compensation for the Option conveyed to RRI and that the Option placed restrictions on the management and operations of Genco that "were not commercially reasonable and did not represent normal business practices."

The PUC could consider the commercial reasonableness of the RRI Option in determining NBV. The PUC adjusted NBV in making the stranded cost determination, after finding that the conveyance of the Option was commercially unreasonable and did not represent normal business practices. Section 39.252(d) expressly directs the PUC, when making the stranded cost determination, to consider whether the utility used "commercially reasonable means" and "normal business practices" to reduce stranded costs. Since Section 39.252(d) bars the PUC from adjusting the market value component of stranded costs, it necessarily authorizes an adjustment to NBV, the other principal component of stranded costs.

CenterPoint points out that in an earlier proceeding approving the business separation plan, the PUC noted that the Option "was an integral part" of the plan and "meets the separation requirements in PURA § 39.051." Section 39.051, however, is the provision requiring the separation of the utility into three separate entities. The PUC's conclusion that the business separation plan

complied with this provision did not necessarily mean that CenterPoint had taken all reasonable efforts to minimize stranded costs under Section 39.252(d). Indeed, in the earlier proceeding the PUC expressly stated that it was not approving the RRI Option and other agreements that had not yet been finalized, and that its approval of the business separation plan "does not preclude a review in the 2004 true-up proceeding of whether [CenterPoint] pursued reasonable means to reduce its potential stranded costs."

The PUC considered evidence that the grant of the RRI option was not a normal business practice and had an adverse effect on the value of the generation assets. One of Genco's own SEC filings conceded that the Option limited Genco's ability to (1) merge with another company, (2) sell assets, (3) enter into long-term contracts, (4) engage in other businesses, (5) construct or acquire new plant or capacity, (6) engage in certain hedging activities, (7) encumber assets, (8) issue new securities, (9) pay special dividends, and (10) engage in certain transactions with affiliates. The report states that these restrictions "may adversely affect our ability to compete with companies that are not subject to similar restrictions." The PUC also considered expert testimony that the Option was very unusual and did not represent normal business practices, gave RRI an incentive to reduce the value of Genco, was viewed negatively in the investment community, and limited Genco's upside potential. The last point seems obvious, since RRI could derail an outside offer for Genco above the option price by exercising the Option, assuming that RRI had the funds. CenterPoint's own financial advisor on the spinoff of Genco acknowledged in a presentation that the "RRI option limits upside potential." Michael Gorman, a witness for Intervenors, opined that the Option was unreasonable because it "essentially transferred significant control of [Genco] to RRI," which then had "an

incentive to minimize the value of" Genco, an incentive "diametrically opposite of [CenterPoint's] obligation to protect the value of [Genco] and mitigate stranded costs." Another witness for Intervenors, William Purcell, testified that the Option "gave RRI in effect the right of first refusal to buy" Genco, which "acted as a deterrent for [Genco or CenterPoint] to receive independent third party purchase bids or indications of interest — and, accordingly, was a drag on [Genco's] stock price."

Gorman calculated the "intrinsic value" of the Option at approximately $330 million. He made further adjustments to this figure that the PUC rejected because they did not reflect the value the Option would have had in an arms-length transaction. The PUC valued the Option at $330,314,000 and determined the NBV should be reduced by this amount, and further grossed up this amount by an additional $177,874,089 to reflect accumulated deferred federal income taxes.

Summarizing Gorman's approach (and ignoring that the PUC only agreed with part of his methodology), the Option was priced at the market price to be determined under the PSV method, with an adjustment for a control premium of up to 10 percent to be determined by the PUC, as Section 39.262(h)(3) specifies. Gorman, however, believed that the actual control premium should be 30 percent, based on premiums over market prices paid in corporate acquisitions of similar companies. The difference between the 30 percent market premium and statutory premium was therefore 20 percent. Gorman determined that Genco's future market value at the Option exercise date would approximately equal its book value of $2.9 billion, took 20 percent of that number ($580 million) to reflect the 20 percent difference in control premiums, took 81 percent of that figure to reflect CenterPoint's ownership in Genco ($469.8 million) and then discounted that value back to

the date the Option was granted to arrive at $330 million as the Option's "intrinsic value."

We have reviewed the administrative record and conclude that while substantial evidence supports the PUC's conclusions that the Option was not commercially reasonable and for a time depressed the value of Genco stock, no adjustment should be made to NBV if the sale of assets method is used.

The PUC apparently believed that the $330 million dollar figure derived from Gorman's testimony reflected the negative impact of the Option on the market value of Genco. In a subheading on "Market Value," the PUC found that "the entire [market] valuation process was not commercially reasonable," and accordingly made an adjustment to NBV as required by Section 39.252(d). Further, the PUC explained that no adjustment to market value under its primary holding was needed because the stock price selected under that method, which included consideration of the market control premium, "takes into consideration the operational constraints placed upon [Genco] by the Option and the control premium." When it turned to NBV, the PUC made an adjustment for the Option because of its effect on market value, reasoning that "Gorman calculated the amount of the option's below-market pricing by taking the difference between the 10 percent maximum control premium RRI would have had to pay if it had exercised the option, and an average industry control premium of 30 percent, which RRI would likely have had to pay in a bona fide third-party transaction." The PUC apparently concluded that the Option depressed the market value of Genco stock by $330 million, since under Gorman's testimony, as analyzed and accepted in part by the PUC, this amount arguably reflected the difference between what a third-party bid for the company might have brought and the ceiling on market value imposed by the Option.

However, this analysis breaks down if the sale of assets method is used, because the actual sale of Genco took place months after the Option expired. The Option expired in January 2004, and the sale of Genco assets occurred in December 2004 and April 2005. There is no evidence that the Option had an impact on the value of the assets sold under the Transaction Agreement. As the PUC notes in its brief to this Court, "The announced future sales price for Genco occurred months after the Option expired. Moreover, the sale itself resolved the uncertainty about the future of the company. Thus, that price was unaffected by the unreasonableness of the expired Option." The court of appeals similarly noted that the offer to purchase Genco in the Transaction Agreement "came several months after the option expired and after the restrictions placed upon Genco by the option had ended. As a result, any detrimental effect on Genco's value resulting from the option should have dissipated."[78] Further, there is some empirical support for concluding that the sale of Genco long after the Option expired was not affected by the Option, even if the market value of the company had earlier been depressed by it. As CenterPoint notes in a post-submission brief, "The $508 million deduction for the grossed-up Option under the alternate holding using the PSV method would reduce CenterPoint's stranded-cost recovery by virtually the same amount — $511 million — as the sale-of-assets method Intervenors advocate."

Intervenors nevertheless argue that if CenterPoint had sold the Option instead of imprudently giving it away, the sale of that asset could have been used to reduce net book value and thus mitigate stranded costs. But this simply assumes that the Option could have been sold. There was no

[78] 252 S.W.3d at 34.

evidence that RERS or any third party was interested in purchasing the Option, nor is there any evidence that any party would have actually paid the "intrinsic value" Gorman calculated if the Option had been put up for sale. On the contrary, CenterPoint offered evidence of "extremely difficult market conditions" at the time of the business separation that included the Option, which necessitated the spinoff of Genco to existing CenterPoint shareholders in lieu of an IPO. In their briefing to this Court, Intervenors criticize CenterPoint for its decision to go forward with the business separation at a time when "the wholesale energy markets were in disarray as a result of action undertaken by Enron in California. Nearly all generation company stocks had lost significant value."

Accordingly, on remand, the PUC should not make an adjustment to NBV for the RRI Option in conjunction with its use of the sale of assets method to determine market value.

c. Depreciation

CenterPoint complains that the PUC erred in reducing stranded costs attributable to depreciation on generation assets. The PUC reduced CenterPoint's stranded costs by reducing the NBV of its generation assets by approximately $378 million, a figure representing depreciation on those assets for years 2002 and 2003. The PUC reasoned that this adjustment was necessary to prevent an excessive recovery of stranded costs. It noted that under Section 39.262(a), a utility "may not be permitted to overrecover stranded costs through the procedures established by this section," which governs the final stranded cost and capacity auction true-ups.

Specifically, the PUC found it inappropriate

for the joint applicants to recover the remaining book value of generation assets

> through stranded-costs recovery while at the same time being guaranteed a level of revenue through the capacity auction that, by design, covers a portion of this same book value. To allow recovery of a portion of the book value through both stranded-costs recovery and the capacity auction true-up is, plain and simple, a double recovery of this portion of book value, and therefore, an overrecovery of stranded costs.

The PUC therefore held that an "adjustment" to NBV must be made in the stranded cost calculation to prevent the perceived "double recovery." The trial court and the court of appeals[79] agreed with this result.

We agree with CenterPoint that the Commission misread the relevant provisions of Chapter 39. As explained above, Chapter 39 requires both a stranded cost true-up and a capacity auction true-up. Nothing in the world of business or accounting requires both true-ups to transition a regulated industry to a more competitive market. But the Legislature provided for both and requires both. As we noted in our earlier *CenterPoint* decision, "the Legislature chose not to include the capacity auction true-up amount in its definition of stranded costs or to incorporate it into the methods it prescribes for calculating stranded costs."[80] The capacity auction true-up amount does not depend on the amount or existence of stranded costs, but on a specific formula set out in Section 39.262(d) and the Commission's rules thereunder that can result in a positive or negative number. "Stranded costs" is a different matter and a term of art defined by Chapter 39. In this case it essentially consists of the difference between the book value of the generation assets "*established*

[79] 252 S.W.3d at 62–70.

[80] *CenterPoint Energy*, 143 S.W.3d at 99 (brackets omitted).

as of December 31, 2001" under Section 39.251(7)[81] and the market value of those assets, which are determined under the methods set out in Section 39.262. The PUC conceded in its Order that "stranded-costs recovery requires that book value be determined as of December 31, 2001."

On the other hand, as we have previously explained, the capacity auction true-up "guarantees consumers and power companies that the power company will receive no more and no less than a margin predetermined by the PUC in 2001 when the ECOM model was run in compliance with section 39.201."[82] This margin is determined by taking the difference between projected power sales and actual power prices "obtained through the capacity auctions."[83]

Critically, the capacity auction true-up amount is determined for the years 2002 and 2003. We have so stated, explaining that this true-up consists of "the difference between the price of power obtained through the capacity auctions and the power cost projections that were employed in the 2001 ECOM model for the years 2002 and 2003."[84] The PUC likewise recognized in its Order that the capacity auction true-up "ensures that an affiliated [power-generation company] with significant investment in generation assets will recover the power costs the PUC had projected, in the 2001 ECOM model, would be recovered for the 2002–2003 period." Its Substantive Rule 25.263(i) also defines precisely the formula for calculating the capacity auction true-up, based on "the difference between the price of power obtained through capacity auctions conducted for the years 2002 and

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[81] TEX. UTIL. CODE § 39.251(7) (emphasis added).

[82] *CenterPoint Energy*, 143 S.W.3d at 96.

[83] TEX. UTIL. CODE § 39.262(d)(2).

[84] *CenterPoint Energy*, 143 S.W.3d at 96.

2003 and the power cost projections for the same time period as used in the determination of ECOM for that utility in the proceeding under PURA § 39.201."[85]

The PUC apparently reasoned that the capacity auction true-up is based on the ECOM market revenue projections used to set interim rates in the 2001 Section 39.201 proceeding. As discussed further below, we agree with the Order that these revenue projections "assumed the continuation of regulation." Under traditional rate regulation, rates are set to allow the utility to recover a reasonable return on its capital investments.[86] Since these capital assets are depreciated over time on the books,[87] depreciation affects the NBV of the utility. The PUC apparently further reasoned that stranded costs must be based on book value as of the end of 2001, and this value includes generating plant assets that have not yet been depreciated further in years 2002 and 2003. Since the capacity auction true-up is based on revenue projections under rates intended to recoup investments in plants that are further depreciated in 2002 and 2003, the PUC apparently reasoned that the capacity auction true-up and the stranded costs true-up allowed for a "double recovery" of a portion of book value.

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[85] 16 TEX. ADMIN. CODE § 25.263(i). By way of further explanation, years 2002 and 2003 are used in the capacity true-up calculation because PURA Section 39.262(d)(2) requires a comparison of a revenue figure based on the capacity auctions and ECOM power cost projections "for the same time period." The capacity auctions were required to begin at least 60 days before the date of consumer choice, January 1, 2002. *See* TEX. UTIL. CODE § 39.153(a). ECOM power cost projections were run to determine interim tariffs in 2002 and 2003 under Section 39.201. *See id.* § 39.201(b)(1),(d), (g), (h), (*l*). The final true-up filing was initiated and completed in 2004. *See id.* § 39.262(c), (j). Therefore, the years 2002 and 2003 are the years that data are compared for purposes of the capacity auction true-up calculation.

[86] *See* TEX. UTIL. CODE § 36.051 ("In establishing an electric utility's rates, the regulatory authority shall establish the utility's overall revenues at an amount that will permit the utility a reasonable opportunity to earn a reasonable return on the utility's invested capital used and useful in providing service to the public in excess of the utility's reasonable and necessary operating expenses.").

[87] *See, e.g.*, *id.* § 36.053 ("Electric utility rates shall be based on the original cost, less depreciation, of property used by and useful to the utility in providing service.").

We think the Commission erred in its analysis. Any utility will eventually retire all of its stranded costs, or any other capital investment or portion thereof, if it survives deregulation and continues to operate at a profit for a sufficient period of time. "Depreciation" is a general term referring to the accounting practice of spreading an asset's cost over the projected useful life of the asset or some other period.[88] In this case, however, "stranded costs" is a purely legal term that depends entirely on how it is defined by statute. Under Chapter 39, stranded costs depend on book value as of the end of 2001. We agree with CenterPoint that "[i]t is indisputable that the NBV of generation assets as of December 31, 2001 would not reflect a reduction for depreciation attributable to 2002 and 2003." An "adjustment" to stranded costs to reflect further depreciation of power plant assets in 2002 and 2003 is not permitted because the PUC is not allowed to alter the statutory definition of stranded costs. The PUC's view that the adjustment is necessary to prevent a "double recovery" of stranded costs necessarily depends on its conclusion, in direct contravention of the statute, that stranded costs should be redefined to incorporate further depreciation of generation assets in 2002 and 2003, thereby reducing NBV and correspondingly reducing stranded costs. Statutory stranded costs always depend on the distance between two values — NBV and market value — both of which constantly change over time.[89] The PUC is constrained to determine those values as of the time periods selected by the Legislature.

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[88] As the PUC noted in its Order, "Stranded-costs recovery is simply a method to recover the book value of generation assets that would have been recovered through depreciation and amortization ordinarily over the life of the asset under traditional rate regulation."

[89] *See CenterPoint Energy*, 143 S.W.3d at 102 (Brister, J., dissenting) ("[W]ith stranded costs, a more apt analogy would be a system in which a jury returns a different verdict every day for a period of years, each one very different from the verdict the day before, and each one correct.").

Intervenors contend in their brief: "The problem the Commission addressed in the true-up award was that because NBV was frozen as of December 31, 2001, it could not be reduced by the $378 million in depreciation expense that CenterPoint indisputably collected through the capacity auction true-up as a contribution to its fixed costs." The problem with this analysis is that, by statutory definition, the NBV component of stranded costs is frozen as of December 31, 2001, and the PUC's adjustment effectively moved that date in violation of the statute.

d. Construction Work in Progress

Intervenors argue that the Commission erred in not requiring CenterPoint to meet ratemaking requirements for inclusion of construction work in progress (CWIP) in NBV. The court of appeals[90] and the district court agreed with the PUC on this issue, as do we.

Inclusion of CWIP increased stranded costs by about $110 million. The PUC's Substantive Rule 25.263(g)(2)(A)[91] provides that the NBV of generation assets includes "generation-related construction work in progress."

In addressing Intervenors' arguments, the PUC noted that "[n]o party claimed accounting mistakes or imprudence on any specific project included in CWIP," and found "there is no evidence of any accounting discrepancies or any failure to follow GAAP in connection with these balances." It recognized that under PURA § 36.054, applicable to general ratemaking, CWIP can be included in the rate base only if "(1) necessary for the utility's financial integrity and (2) not inefficiently or imprudently planned or managed." The PUC, however, declined Intervenors' request to apply these

[90] 252 S.W.3d at 45–48.

[91] 16 TEX. ADMIN. CODE § 25.263(g)(2)(A).

additional requirements because Chapter 39 is concerned with the unique matter of stranded costs measured by the difference between the NBV of generation assets and market value, while general ratemaking applies ratemaking standards to determine what amounts of book value may be included in the rate base and the appropriate rate of return on that rate base. It also noted that "[o]ne significant difference between a traditional rate case and this proceeding . . . is that whereas under traditional regulation a utility is allowed to file rate cases on a recurring basis into the future, this proceeding is strictly a one-time phenomenon." In other words, CWIP can be recovered under Section 36.054 in the exceptional case if the requirements of that provision are met; otherwise, the utility can simply seek recovery for the construction project in a future rate case. There is no analogous recurring procedure for the recovery of stranded costs.

Intervenors argue that under Section 39.260(a), "[t]he definition and identification of invested capital and other terms . . . that affect the net book value of generation assets . . . shall be treated in accordance with generally accepted accounting principles as modified by regulatory accounting rules generally applicable to utilities." The PUC did not agree that in the calculation of stranded costs this provision requires the application of Section 36.054's special rules regarding CWIP. It noted that Section 39.260(a) did not expressly incorporate those particular standards. The PUC further reasoned:

> [U]nlike a traditional rate case, there will be no future opportunity for the joint applicants to recover the CWIP costs that are subsequently moved into EPS [electric plant in service]. Second, including CWIP in NBV of generating assets is necessary for an apples-to-apples comparison of book value and market value, because the market value of CWIP is reflected in TGN's stock price. These additional arguments by CenterPoint further amplify the difference between a traditional rate case and this proceeding. For [these and other reasons], the joint applicants do not need to satisfy

> rate-case requirements for including CWIP in NBV in this proceeding. Accordingly, the Commission declines to exclude the $109,966,000 for nonenvironmental CWIP from NBV.

We cannot say the Commission's analysis is legally or factually flawed, and we defer to the Commission on this technical issue.

C. Capacity Auction True-Up

1. Capacity Auction Price

CenterPoint complains that the court of appeals and the PUC erred in concluding that an adjustment to the capacity auction price should be made in calculating the capacity auction true-up under Section 39.262(d). We agree with CenterPoint.

Genco became the affiliated power-generation company of CenterPoint in 2001. Section 39.153 required Genco to auction "at least 60 days before [January 1, 2002], entitlements to at least 15 percent of [its] Texas jurisdictional installed generation capacity."[92] The capacity auctions thus assured that power was available to new competitors in the deregulated retail electricity market. The PUC recognized in its Substantive Rule 25.381(b) that the purpose of the capacity auctions is to "promote competitiveness in the wholesale market through increased availability of generation and increased liquidity."[93]

Under Section 39.201, the PUC approved rates intended to cover expected stranded costs and other charges. Stranded costs were estimated based on "the ECOM administrative model"[94] the PUC

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[92] TEX. UTIL. CODE § 39.153(a).

[93] 16 TEX. ADMIN. CODE § 25.381(b).

[94] TEX. UTIL. CODE § 39.201(h).

ran in 2001.

Section 39.262(d)(2) required a capacity auction true-up at the final true-up proceeding. Section 39.262(d) states:

> The affiliated power generation company shall reconcile, and either credit or bill to the transmission and distribution utility, the net sum of:
>
> (1) the former electric utility's final fuel balance determined under Section 39.202(c); and
>
> (2) any difference between the price of power obtained through the capacity auctions under Sections 39.153 and 39.156 and the power cost projections that were employed for the same time period in the ECOM model to estimate stranded costs in the proceeding under Section 39.201.

The final fuel balance of subpart (1), which is summed with the capacity auction true-up amount, is not at issue in this appeal. Under subpart (2), the power-generation company (Genco) bills the transmission and distribution company (CenterPoint) if revenues as determined by the capacity auction price are less than the revenues predicted by the ECOM model. The amount billed to the transmission and distribution company can then be recovered from consumers through adjustment of the nonbypassable delivery rates.[95] Under the formula used by the PUC in its Substantive Rule 25.263(i),[96]

(ECOM market revenues – ECOM fuel costs)
less
(market revenues (as determined from capacity auctions) – actual fuel costs)
equals
capacity auction true-up

[95] *See id.* § 39.262(g).

[96] 16 TEX. ADMIN. CODE § 25.263(i).

Under this formula, market revenues "as determined from capacity auctions" is a term of art and is a proxy for actual market revenues of the utility during the relevant period. Under the Rule, market revenues consist of the "capacity auction price x total 2002 and 2003 busbar sales." "Total busbar sales" refers to the total quantity of power generated for sale by Genco. The formula deems all busbar sales as being made at the average capacity auction price, since Rule 25.263(i)(1)(C) defines the capacity auction price as the affiliated power-generation company's "total capacity auction revenues derived from the capacity auctions conducted for the years 2002 and 2003 divided by that [company's] total [megawatt hour] sales of capacity auction products for the years 2002 and 2003."

In its Order the PUC stated that "the purpose of the capacity auction true-up is to ensure that utilities receive the margins predicted in the ECOM model which assumed the continuation of regulation." We agree, having previously noted that the capacity auction true-up "guarantees consumers and power companies that the power company will receive no more and no less than a margin predetermined by the Commission in 2001 when the ECOM model was run in compliance with section 39.201."[97] We further explained the underlying rationale for the capacity auction true-up as follows:

> The Legislature recognized that on the first day of deregulation, January 1, 2002, there was no way to validly quantify stranded costs, if any, because a market for electricity, both wholesale and retail, would need time to develop, and there would be interim distortions and fluctuations, perhaps severe ones. The Legislature was also concerned that distortions and fluctuations in the market price of power during the first two years of deregulation could harm consumers and generation companies alike. The Legislature accordingly designed the capacity auction true-up proceeding

[97] *CenterPoint Energy*, 143 S.W.3d at 96.

because of the likelihood that no stable market would exist until up to two years after the first day of deregulation.[98]

Sections 39.153(e) and (f) required the PUC to adopt rules governing the statutory capacity auctions. The PUC adopted rules governing the auctions in many particulars, covering the time of sale, the type of products sold, and the terms of the sales.[99] The PUC required Genco to sell entitlements to its generation capacity in four product categories: baseload, gas-intermediate, gas-cyclic, and gas-peaking. Due to variations of market demand, these rules contained a "safe-harbor" provision deeming the 15-percent requirement met if the affiliated power-generation company "offered products in a product category (for example, gas-intermediate) and successfully sold, at least, all of the entitlements offered in one particular month, in that product category."[100] If demand was insufficient to meet even this provision, the company was to make "a proposal to the commission" to modify the auction process, prices, or products.[101]

Genco offered the required 15 percent of its capacity in the four product categories in its statutory capacity auctions and sold all the entitlements for at least one month in 2002 and 2003 for each product category except for gas-intermediate in 2003. Genco made proposals to facilitate the auction for gas-intermediate, two of which were approved by the PUC, that included cut-rate pricing for as little as one cent for kilowatt-month, but Genco was ultimately unsuccessful in meeting the

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[98] *Id.*

[99] 16 TEX. ADMIN. CODE § 25.381.

[100] *Id.* § 25.381(h)(1)(B)(iv).

[101] *Id.* § 25.381(h)(7)(C).

safe-harbor requirement that it sell all entitlements to gas-intermediate for at least one month in 2003.

The Commission found that Genco had sold only 65 percent of the capacity it was required to sell under the 15 percent requirement of Section 39.153, and less than half the gas-intermediate capacity required of Commission rules. However, Genco correctly points out that it would have complied with the safe harbor provisions if it had succeeded in selling additional entitlements in one product category for $5,250. Based on this failure, the PUC concluded that Genco had not complied with PURA Section 39.153(a) and therefore its formula under Rule 25.263(i) could not be used. It then proceeded to consider an alternative "proper method" for determining the capacity auction true-up amount, one that in the eyes of the PUC would avoid "the bias created by the failure of [Genco] to auction a full 15 percent of its auction products."[102]

The PUC considered various proposals but adopted the approach of an Intervenor witness, Dennis Goins, who proposed "that the capacity auction price used in the formula should be defined as the average price of all capacity products sold in the PUC and private auctions." Under this formula, the capacity auction true-up amount was reduced by $439,744,218. The district court reversed the PUC on this issue, but the court of appeals agreed with the PUC and reinstated this disallowance.[103]

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[102] In addressing the "bias" created by Genco's inability to auction the required quantity of product, the PUC stated in its Order that "[t]he absence of capacity products produces a downward bias in the market price derived from capacity auction sales, thereby overstating the capacity auction true-up." However, under the formula described above for calculating the capacity auction true-up, if Genco had succeeded in selling an additional 21 gas-intermediate entitlements for 1 cent per kilowatt-month, under a proposal approved by the PUC under its safe-harbor rules, the effect on the capacity auction true-up would have been negligible.

[103] 252 S.W.3d at 48–59.

We conclude that the court of appeals and the PUC erred in reducing the capacity auction true-up amount as described above. The capacity auction true-up amount should not be reduced by over $400 million because Genco was unable to sell $5000 worth of one subcategory of its generation capacity at auction. While Section 39.153 specifies that the utility sell 15 percent of its generating capacity at auction, the record indicates that Genco made a good faith effort to comply with this statute and was simply unable to sell by auction, at any price, the amount of one product category required by PUC rules. It points out that no utility was able to sell all its gas-intermediate entitlements for even one month in 2003. We avoid statutory constructions that impose an impossible condition.[104]

Further, Section 39.262 does not state that the capacity auction price specified therein should be ignored because of a trivial noncompliance with rules promulgated under Section 39.153. Nothing in Chapter 39 requires such a result. In the portion of the Order discussing the issue, the PUC conceded, "Neither PURA nor the Commission's rules specify what happens if a company fails to meet the 15 percent sales requirement or the safe-harbor provisions." The capacity auction true-up in Section 39.262 is not conditioned on compliance with the requirement, under the separate statute governing the capacity auctions themselves, that the utility *succeed* in auctioning 15 percent of its generating capacity. As discussed above, the two sections address different legislative purposes. The capacity auctions themselves were intended to provide a supply of power to new entrants in the retail electric market, while the capacity auction true-up was intended to assure that the original

[104] *See* TEX. GOV'T CODE § 311.021(4) (recognizing that courts, in construing statutory codes, should presume that "a result feasible of execution is intended"); *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 619, 629 (Tex. 1996) (avoiding construction that would subject parties to an impossible condition).

utilities recovered "a margin predetermined by the Commission in 2001."[105]

Section 39.262 does, however, expressly require the use of the "*price* of power obtained through the capacity auctions under Sections 39.153 and 39.156."[106] Goins conceded that CenterPoint used the statutory price as spelled out in Section 39.262 and Rule 25.263(i) in making its capacity auction true-up request. However, he believed that the statutory formula created a "downward bias" if the auction was unsuccessful in selling a relatively higher-priced product such as gas-intermediate. He therefore proposed following Rule 25.263(i) "with one major modification." He recommended calculating the capacity auction price based on the average prices of products sold in the PUC capacity auctions as well as prices obtained in so-called "TGN auctions." The TGN auctions were private auctions that did not have to comply with PUC rules.[107] Notably RERS, Genco's affiliated retail electric provider and its biggest customer, could participate in these auctions, in direct violation of the letter of Section 39.153[108] and its essential purpose in making capacity available to new competitors. Not surprisingly, the prices obtained in the TGN auctions were sometimes higher than those obtained in the Chapter 39 auctions, since an additional, established competitor was allowed to bid. The chief executive of Genco testified that since RERS "had the majority of the load in the Houston area . . . there was a lot more competition, I believe, in the TGN than there was in the PUC auction." Goins agreed that the TGN auctions were "somewhat

[105] *CenterPoint Energy*, 143 S.W.3d at 96.

[106] TEX. UTIL. CODE § 39.262(d)(2) (emphasis added).

[107] *See id.* § 39.153(d).

[108] *See id.* § 39.153(c) ("An affiliate of the electric utility selling entitlements in the auction required by this section may not purchase entitlements from the affiliated electric utility at the auction.").

more successful" in selling products because RERS was eligible to participate in those auctions. Goins's "major modification" was inconsistent with Chapter 39 and the PUC should not have adopted it.

Section 39.262 unambiguously specifies that the statutory capacity auction price, not some other blended price the PUC finds more appropriate, must be used in calculating the capacity auction true-up amount. The PUC's Rule 25.263(i), the validity of which is not challenged by any party,[109] provides the correct method for calculating the capacity auction price, and it should have been used. Parties, experts, and the PUC can look to the formula derived from Section 39.262(d)(2) and question why it chooses the capacity auction price instead of some other price in calculating market revenues, why sales in 2002 and 2003 are used instead of sales in some other time period, or indeed why a capacity auction true-up is necessary at all in light of other provisions providing for the recovery of stranded costs. But the statute is clear enough and we apply it as written.[110]

2. Carrying Costs on Capacity Auction True-Up

Intervenors complain that the PUC erred in allowing CenterPoint to recover $168 million in interest on the capacity auction true-up award. The trial court and court of appeals[111] agreed with the PUC on this issue, as do we.

In *Texas Industrial Energy Consumers v. CenterPoint Houston Electric, LLC*, we recently

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[109] *See id.* § 39.001(f) ("A person who challenges the validity of a competition rule must file a notice of appeal with the court of appeals and serve the notice on the commission not later than the 15th day after the date on which the rule as adopted is published in the Texas Register.").

[110] *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008) ("In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the language of the statute.").

[111] 252 S.W.3d at 59–62.

held that interest on the capacity auction true-up and other non-stranded costs awarded in a Section 39.262 true-up proceeding was recoverable.[112] We upheld the validity of the portion of PUC Rule 25.263(*l*)(3) providing for "carrying costs on the true-up balance," even though in *CenterPoint Energy* we had invalidated another portion of the Rule specifying the date at which interest begins to accrue.[113] We noted that "invalidating the whole rule and barring any recovery of interest whatsoever would *contradict* our view in *CenterPoint Energy* 'that the Legislature intended electric utilities to recover carrying costs on stranded costs to compensate for the financial costs incurred during the stranded cost recovery period,' consistent with the prior ratemaking principle that 'carrying costs on investments in generation plants were included in rates.'"[114]

While, as discussed above, general ratemaking principles need not always be applied to a Chapter 39 true-up proceeding, we again see no valid reason the PUC cannot provide for interest on true-up balances under Rule 25.263(*l*)(3), including interest on the capacity auction true-up balance. The parties in *TIEC* challenged the amount of interest specified under Rule 25.263(*l*)(3), and did not necessarily question the authority vel non of the PUC to award interest, but in today's case we see no error in the PUC's decision to award interest on the capacity auction true-up to reflect the time value of money. Since, as discussed above, this true-up award is designed to assure the recovery of revenues projected in the ECOM model for 2002 and 2003, the PUC reasonably concluded that a full recovery of this amount must include interest to reflect the time value of money. It correctly found

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[112] 324 S.W.3d 95, 101–05 (Tex. 2010) (hereinafter *TIEC*).

[113] The current version of the Rule complies with *CenterPoint Energy*. 16 TEX. ADMIN. CODE § 25.263(*l*)(3).

[114] *Id.* at 103–04 (quoting *CenterPoint Energy*, 143 S.W.3d at 83).

in its Order: "Awarding the time value of the capacity auction true-up award puts the joint applicants in the same economic position they would have been in had they received this amount in 2002 and 2003." Intervenors provide no persuasive reason that interest on the capacity auction true-up cannot be awarded in this case as in other cases where utilities are allowed to recover costs with interest.

III. Conclusion

We affirm the court of appeals' judgment in part and reverse it in part. We remand this case to the Commission for further proceedings consistent with this decision.

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Don. R. Willett
Justice

OPINION DELIVERED: March 18, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0497

RAILROAD COMMISSION OF TEXAS AND PIONEER EXPLORATION, LTD., PETITIONERS,

v.

TEXAS CITIZENS FOR A SAFE FUTURE AND CLEAN WATER AND JAMES G. POPP, RESPONDENTS

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

Argued April 14, 2010

JUSTICE GUZMAN delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE JOHNSON.

CHIEF JUSTICE JEFFERSON delivered an opinion concurring in the judgment, joined by JUSTICE WILLETT and JUSTICE LEHRMANN.

The Texas Water Code requires the Railroad Commission of Texas to weigh the "public interest" in the permitting of proposed oil and gas waste injection wells. In a ruling, the Commission declined to consider traffic-safety factors in its public interest inquiry. We determine whether the Commission's interpretation of "public interest" is entitled to judicial deference. Because we conclude the Commission's construction of the phrase was reasonable and in accord with the plain language of the statute, we hold the court of appeals erred in not deferring to the Commission's

interpretation. We therefore reverse the court of appeals' judgment and render judgment for the petitioners in accordance with the trial court's original judgment.

I. Background

The Barnett Shale is a large, prolific oil and gas field lying beneath several counties, including Wise County, in north Texas. As in other shale formations, wells in the Barnett Shale require fracture stimulation in order to produce. Fracing a well entails pumping large volumes of water and sand into reservoir rock, which then mixes with saline formation water and must be flowed back out of the well before production can begin. A company fracing a well must dispose of the resulting waste. Most companies do so by injecting the waste into subsurface zones which are naturally saline environments, usually in old wells converted to injection wells.[1] A company seeking to convert a well to an injection well for oil and gas waste must apply to the Commission for a permit. TEX. WATER CODE § 27.031.

In granting an injection well permit, the Commission is required to make the following findings:

> (1) that the use or installation of the injection well *is in the public interest*;
>
> (2) that the use or installation of the injection well will not endanger or injure any oil, gas, or other mineral formation;

[1] The Water Code defines "injection well" as "an artificial excavation or opening in the ground made by digging, boring, drilling, jetting, driving, or some other method, and used to inject, transmit, or dispose of industrial and municipal waste or oil and gas waste into a subsurface stratum; or a well initially drilled to produce oil and gas which is used to transmit, inject, or dispose of industrial and municipal waste or oil and gas waste into a subsurface stratum; or a well used for the injection of any other fluid; but the term does not include any surface pit, surface excavation, or natural depression used to dispose of industrial and municipal waste or oil and gas waste." TEX. WATER CODE § 27.002(11).

> (3) that, with proper safeguards, both ground and surface fresh water can be adequately protected from pollution; and
>
> (4) that the applicant has made a satisfactory showing of financial responsibility if required by Section 27.073.

Id. § 27.051(b) (emphasis added). The instant dispute centers on the requisite public interest finding in section 27.051(b)(1).

Pioneer Exploration, Ltd. (Pioneer) applied to the Commission for a permit to convert an existing well into an injection well for the disposal of oil and gas waste. But several Wise County residents living near the well—respondents Texas Citizens for a Safe Future and Clean Water and James Popp (collectively, Texas Citizens)—opposed the proposed injection well, necessitating a contested administrative hearing before Commission hearing examiners. At the hearing, Texas Citizens voiced a variety of concerns about the well's environmental soundness, but also presented arguments and evidence related to traffic-safety issues. Specifically, Texas Citizens argued that large trucks used to haul waste water to the well would damage nearby roads and pose a threat to area residents who use the roads, and thus would not serve the "public interest" under section 27.051(b)(1).[2] Pioneer did not rebut this traffic-safety evidence. Instead, Pioneer essentially argued that the production of natural gas is in the public interest.

The hearing examiners recommended issuing the permit. In the examiners' findings of fact and conclusions of law, adopted by the Commission in its final order, the examiners found

[2] Texas Citizens presented evidence that (1) the small country gravel roads leading to the well are too narrow (about sixteen feet wide) for large truck traffic, (2) the trucks would damage the roads, and (3) the trucks would pose a safety threat to children and other pedestrians who frequently use the roads. The evidence at the hearing demonstrated that up to fifty trucks per day could travel the roads at all hours of the day and night.

> [u]se of the proposed disposal well is in the public interest because it will provide needed additional disposal capacity and an economical means of disposing of produced salt water from completed wells in the rapidly expanding Barnett Shale Field Area, thereby increasing ultimate recovery from these wells and preventing waste. The safe and proper disposal of produced saltwater serves the public interest.
>
> . . .
>
> The use of the proposed disposal well is in the public interest pursuant to Sec[tion] 27.051 of the Texas Water Code.

In the proposal for decision, the examiners additionally concluded the "production of hydrocarbons for use by the people of Texas and industry serves the public interest." In addressing Texas Citizens' traffic-safety evidence, the examiners stated the Commission "does not have jurisdiction to regulate truck traffic on the state's roads and highways." The examiners concluded that, while they empathized with Texas Citizens' concerns about property values and quality of life, Pioneer had met its burden of proof on the public interest finding.[3]

The Commission adopted the examiners' findings of fact and conclusions of law and approved Pioneer's application. Texas Citizens appealed to the trial court, which affirmed the Commission's order. The court of appeals, however, reversed, holding that the Commission abused its discretion in interpreting the "public interest" inquiry too narrowly by solely focusing on the proposed well's effect on the conservation of natural resources.[4] *See* 254 S.W.3d 492, 503. The

[3] In their findings of fact and conclusions of law, the hearing examiners also addressed the other statutory findings required for the Commission's grant of a permit, finding Pioneer had posted required financial assurance, and concluding that the proposed injection well would not endanger oil, gas, or geothermal resources or cause pollution of surface or fresh water. *See id.* § 27.051(b)(2)–(4).

[4] Texas Citizens also raised procedural due process and notice arguments in the court of appeals. The court of appeals affirmed the Commission's order on both of these grounds. Texas Citizens does not appeal these rulings to this Court.

court of appeals remanded the case to the Commission to "reconsider its public interest determination, using a broader definition of 'the public interest,' which includes public-safety concerns where evidence of such concerns has been presented." *Id.* The Commission moved for rehearing en banc, which the court of appeals denied in a per curiam opinion with two justices writing separately, concurring in the denial. *See id.* at 503–07. The Commission and Pioneer petitioned this Court for review of the court of appeals' holding on the "public interest" issue.

II. Standard of Review

The parties disagree on the contours of the precise issue in dispute, which is a matter we initially address. The Commission contends this case fundamentally concerns the need for court deference to an agency's interpretation of what it argues is an ambiguous statute. If an agency's construction of an ambiguous statute it is charged with administering is reasonable, the Commission urges, it is improper for a court to overturn that interpretation.[5] Texas Citizens counters that the core issue is not an agency's interpretation of a statutory term or even the proper definition of "public interest," but rather whether that phrase may include factors beyond the production of oil and gas, requiring the Commission to weigh all evidence offered in support of or against the public interest finding.

We agree with the Commission that this case turns on a matter of statutory construction—specifically, the definition of the term "public interest"—and therefore the proper

[5] Pioneer also argues that the Court must defer to the Commission's reasonable interpretation of the statute. However, Pioneer primarily contends that, under the substantial evidence rule, the Commission did not abuse its discretion because substantial evidence in the record supported the Commission's ruling and the ruling comports with the law. *See* TEX. GOV'T CODE § 2001.174.

level of deference a court must grant the Commission's interpretation of that term. As Texas Citizens asserts, the Commission's order does not expressly define the term "public interest." Rather, the order—by way of adopting the examiners' findings of fact and conclusions of law—states that the well is in the public interest because of its positive effect on increased productivity from wells in the Barnett Shale field. But although the Commission's final order does not explicitly adopt the examiners' statements concerning Texas Citizens' traffic-safety evidence, the Commission has made clear, throughout these proceedings, that it does not view its public interest analysis as an open-ended inquiry including public-safety issues, but rather one limited to matters related to oil and gas production. The crux of the dispute, then, is whether the term "public interest" in section 27.051(b) of the Water Code is a broad, open-ended term, encompassing any conceivable subject potentially affecting the public, or a more narrow term that does not include a subsidiary issue like traffic safety but is limited to matters related to oil and gas production.

The Utilities Code generally requires a court to review a decision of the Commission under a substantial evidence standard. *See* TEX. UTIL. CODE § 105.001(a) ("Any party to a proceeding before the railroad commission is entitled to judicial review under the substantial evidence rule."). This standard requires a court to reverse or remand a case for further proceedings "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" are, among other things, not reasonably supported by substantial evidence, or are "characterized by abuse of discretion." TEX. GOV'T CODE § 2001.174(2).

The gravamen of this dispute, however, is a governmental agency's construction of a statute it is charged with administering. The construction of a statute is a question of law we review de

novo. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008); *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007). We have long held that an agency's interpretation of a statute it is charged with enforcing is entitled to "serious consideration," so long as the construction is reasonable and does not conflict with the statute's language. We have stated this principle in differing ways, but our opinions consistently state that we should grant an administrative agency's interpretation of a statute it is charged with enforcing some deference.[6]

Citing the Supreme Court's seminal case on judicial deference, the Commission argues that state law principles regarding judicial deference to an agency's interpretation of a statute it implements are closely aligned to federal-court precedent. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under the *Chevron* doctrine, a federal court embarks on a two-part test in determining whether to defer to an agency's construction of a statute. First, the court must consider whether Congress has "directly spoken to the precise question at issue." *Id.* at

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[6] *See, e.g.*, *First Am. Title Ins. Co.*, 258 S.W.3d at 632 (explaining that we give "serious consideration" to an agency's construction of its statute and should uphold the agency's interpretation, so long as it is reasonable and does not contradict the statute's plain language); *Mid-Century Ins. Co. v. Ademaj*, 243 S.W.3d 618, 623 (Tex. 2007) (observing that an agency's construction of a statute it is charged with enforcing is entitled to serious consideration, as long as the construction is reasonable and does not contradict the statute's plain language); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747–48 (Tex. 2006) (recognizing that courts give "some deference" to an agency regulation—including an agency's formal opinion adopted after a formal proceeding—concerning a statute, so long as the language at issue is ambiguous and the agency's construction reasonable); *TXU Elec. Co. v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 275, 286 (Tex. 2001) (concluding that the Court gives "some deference" to the Public Utility Commission's interpretation of a statute if it is reasonable and does not conflict with the statute's language); *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998) (noting that the contemporaneous construction of a statute by a governmental agency charged with its enforcement is entitled to "great weight"); *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994) (recognizing that an administrative agency's construction of a statute that it is charged with enforcing is entitled to "serious consideration," so long as the construction is reasonable and does not contradict the statute's plain language); *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993) (same); *Tex. Emp'rs Ins. Ass'n v. Holmes*, 196 S.W.2d 390, 395 (Tex. 1946) (observing that "'the practical interpretation of [an] Act by the agency charged with the duty of administering it is entitled to the highest respect from the courts'") (quoting *Indus. Accident Bd. v. Glenn*, 190 S.W.2d 805, 809 (Tex. 1945) (Simpson, J., dissenting)); *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944) (observing that courts will ordinarily adopt and uphold a construction of a statute by the executive officer or department charged with its administration, if the statute is ambiguous and the construction reasonable).

842. If Congress's intent is clear and unambiguous under the language of the statute, that is the end of the inquiry. *See id.* at 842–43. If the statute is silent or ambiguous, however, the court does not impose its own construction of the statute, but rather defers to the agency's interpretation so long as it is reasonable. *See id.* at 843. The *Chevron* doctrine applies to a formal agency construction of a statute, as in an order following a formal adjudication or a regulation. *See U.S. v. Mead Corp.*, 533 U.S. 218, 229–30 (2001). Informal interpretations, such as advisory opinions, may merit some deference, as articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944), but not the high deferential standard afforded in *Chevron*. *See Mead*, 533 U.S. at 234–35; *see generally* Bradley Lipton, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 YALE L.J. 2096 (2010).

We have never expressly adopted the *Chevron* or *Skidmore* doctrines for our consideration of a state agency's construction of a statute, but we agree with the Commission that the analysis in which we engage is similar. In our "serious consideration" inquiry, we will generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing, "'so long as the construction is reasonable and does not contradict the plain language of the statute.'" *First Am. Title Ins. Co.*, 258 S.W.3d at 632 (quoting *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993)). As we observed in *Fiess*, this deference is tempered by several considerations:

> It is true that courts give some deference to an agency regulation containing a reasonable interpretation of an ambiguous statute. But there are several qualifiers in that statement. First, it applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions [in a court brief]. Second, the language at issue must be ambiguous; an agency's opinion cannot change plain language. Third, the agency's construction must be reasonable; alternative *unreasonable* constructions do not make a policy ambiguous.

Fiess v. State Farm Lloyds, 202 S.W.3d 744, 747–48 (Tex. 2006).

Here, the examiners' opinion, and the Commission's final order, were formally adopted after an adjudication. Accordingly, we will review the Commission's interpretation of "public interest" and uphold it if it is reasonable and in accord with the plain language of the statute. *See First Am. Title Ins. Co.*, 258 S.W.3d at 632.[7]

III. Analysis

A. Injection Well Act

In 1961, the Legislature enacted the Injection Well Act (the Act), which governs the permitting process for all injection wells in the state.[8] The Act—currently codified in Chapter 27 of the Water Code—distinguishes between two types of injection wells, those used to dispose of "industrial and municipal waste," and those used to dispose of "oil and gas waste." TEX. WATER CODE § 27.002(5)–(6). Under the Act, the Commission has jurisdiction over injection wells used to dispose of oil and gas waste, *see id.* §§ 27.031, 27.051(b), while the Texas Commission for Environmental Quality (TCEQ) has jurisdiction over other types of injection wells, including those used for the disposal of industrial and municipal waste, *see id.* §§ 27.011, 27.051(a).

The distinction between the jurisdictions of these two agencies is important because the statute governing the issuance of permits differs as to factors each agency must consider in granting a permit. Both statutes require the agencies to determine "that the use or installation of the injection well is in the public interest," *id.* § 27.051(a)(1), (b)(1), but the TCEQ is additionally required to find

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[7] Because we evaluate the contours of "public interest" as made in formal Commission statements following an adjudication, we need not determine whether some lesser level of deference would be warranted if the statements were made informally, as expressed in *Skidmore*. *See Skidmore*, 323 U.S. at 139–40.

[8] *See* Act of April 5, 1961, 57th Leg., R.S., ch. 82, 1961 Tex. Gen. Laws 159.

that an applicant for a hazardous waste well not located in an industrial area has made reasonable effort to ensure that any burden of the proposed injection well on public roadways will be minimized or mitigated, *id.* § 27.051(a)(6).[9] The statute does not require the Commission to make this public roadway determination. Originally, the Act required both agencies to consider the same factors in determining whether to issue a permit, but a 1987 amendment added the public roadway requirement for the TCEQ's consideration in certain situations but did not enact a similar requirement for the Commission.[10]

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[9] Specifically, the TCEQ is required to make the following findings in granting an injection well permit:

> (1) that the use or installation of the injection well is in the public interest;
>
> (2) that no existing rights, including, but not limited to, mineral rights, will be impaired;
>
> (3) that, with proper safeguards, both ground and surface fresh water can be adequately protected from pollution;
>
> (4) that the applicant has made a satisfactory showing of financial responsibility if required by Section 27.073 of this code;
>
> (5) that the applicant has provided for the proper operation of the proposed hazardous waste injection well;
>
> (6) that the applicant for a hazardous waste injection well not located in an area of industrial land use has made a reasonable effort to ensure that the burden, if any, imposed by the proposed hazardous waste injection well on local law enforcement, emergency medical or fire-fighting personnel, or public roadways, will be reasonably minimized or mitigated; and
>
> (7) that the applicant owns or has made a good faith claim to, or has the consent of the owner to utilize, or has an option to acquire, or has the authority to acquire through eminent domain, the property or portions of the property where the hazardous waste injection well will be constructed.

Id. § 27.051(a).

[10] *See* Act of June 1, 1987, 70th Leg., R.S., ch. 638, § 5, 1987 Tex. Gen. Laws 2433, 2434.

The Act further requires the TCEQ to consider specific criteria—including the compliance history of the applicant, whether an alternative to the well is reasonably available, and, in some circumstances, whether the applicant will maintain sufficient insurance—in its public interest inquiry, though the Act specifically states the TCEQ is not limited to consideration of these factors. *Id.* § 27.051(d).[11] The Act provides no parallel provision enumerating the types of public interest considerations the Commission must evaluate.

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[11] Texas Water Code § 27.051(d) provides:

> The [TCEQ], in determining if the use or installation of an injection well is in the public interest under Subsection (a)(1), shall consider, but shall not be limited to the consideration of:
>
> > (1) compliance history of the applicant and related entities under the method for evaluating compliance history developed by the [TCEQ] under Section 5.754 and in accordance with the provisions of Subsection (e);
> >
> > (2) whether there is a practical, economic, and feasible alternative to an injection well reasonably available; and
> >
> > (3) if the injection well will be used for the disposal of hazardous waste, whether the applicant will maintain sufficient public liability insurance for bodily injury and property damage to third parties that is caused by sudden and non-sudden accidents or will otherwise demonstrate financial responsibility in a manner adopted by the [TCEQ] in lieu of public liability insurance. A liability insurance policy which satisfies the policy limits required by the hazardous waste management regulations of the [TCEQ] for the applicant's proposed pre-injection facilities shall be deemed "sufficient" under this subdivision if the policy:
> >
> > > (A) covers the injection well; and
> > >
> > > (B) is issued by a company that is authorized to do business and to write that kind of insurance in this state and is solvent and not currently under supervision or in conservatorship or receivership in this state or any other state.

Id.

The Act declares a purpose of protecting freshwater supplies in this state, as provided in its statement of policy and purpose:

> It is the policy of this state and the purpose of this chapter to maintain the quality of fresh water in the state to the extent consistent with the public health and welfare and the operation of existing industries, taking into consideration the economic development of the state, to prevent underground injection that may pollute fresh water, and to require the use of all reasonable methods to implement this policy.

Id. § 27.003.

Beyond this statement of purpose, the Act, as a whole, details procedures related to the protection of natural resources, as well as the technical processes involved, in the permitting of an injection well. The chapter prescribes no requirements for the Commission to engage in any sort of process or deliberation involving matters that do not involve oil and gas production and the protection of natural resources.

With this statutory framework in mind, we turn to the Commission's construction of "public interest" to determine if it is reasonable and in harmony with the language of the statute.

B. The Commission's Interpretation of "Public Interest"

Texas Citizens argues, and the court of appeals held, that "public interest" is a broad term, intended by the Legislature to encompass any number of subsidiary issues that might impact the public interest. Texas Citizens asserts two primary arguments in favor of its interpretation: (1) the term is inherently an amorphous, unlimited term, encompassing all possible factors that might affect the public; and (2) since other factors in section 27.051(b) require the Commission to consider matters pertaining to the production of oil and gas and the prevention of fresh water pollution, it must follow that the "public interest" factor is intended to encompass something else.

Both of these arguments are at least somewhat reasonable, though both have flaws. An argument can be asserted—as Pioneer does—that sections 27.051(b)(2) and (3) specifically address the need to produce oil and gas in a manner that does not harm oil, gas, and mineral reserves and protects fresh water supplies, while the public interest factor contemplates whether the proposed well will ultimately positively impact the production of oil and gas. The "amorphousness" of the phrase "public interest" further cuts against Texas Citizens' argument that its interpretation is the only reasonable interpretation of the provision—the statute is, as this dispute demonstrates, subject to more than one interpretation. The greater deficit in Texas Citizens' arguments, though, is that while Texas Citizens' position has some merit, the Commission's interpretation does too.

It is precisely when a statutory term is subject to multiple understandings that we should defer to an agency's reasonable interpretation. *See Fiess*, 202 S.W.3d at 747–48. Because we only require an agency's interpretation of a statute it is charged with administering to be reasonable and in accord with the statute's plain language, we need not consider whether the Commission's construction is the only—or the best—interpretation in order to warrant our deference. In determining whether the Commission's interpretation is reasonable, we begin with the language in the statute itself.

1. Statutory Scheme

The term "public interest" in section 27.051(b)(1) is undefined. We ordinarily construe a statute so as to give effect to the Legislature's intent as expressed in its plain language. *Duenez*, 237 S.W.3d 680 at 683. "'If the statute is clear and unambiguous, we must apply its words according to their common meaning.'" *First Am. Title Ins. Co.*, 258 S.W.3d at 631 (quoting *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006)).

As discussed above, the phrase "public interest" is anything but clear and unambiguous. There are several factors, however, lending support to the Commission's determination that its consideration of the public interest is intended to be a narrow one precluding consideration of traffic-safety concerns.

First, the Legislature's addition of a traffic-related inquiry to the TCEQ's required findings—amended more than twenty-five years after the Act was initially enacted—weighs in favor of the Commission's interpretation. We generally avoid construing individual provisions of a statute in isolation from the statute as a whole. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). We therefore "'read the statute as a whole and interpret it to give effect to every part.'" *Id.* (quoting *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998) (per curiam)). When the Legislature uses a word or phrase in one portion of a statute but excludes it from another, the term should not be implied where it has been excluded. *Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995).[12] Had the Legislature intended for the Commission and the TCEQ to entertain traffic-related evidence in their public interest inquiries, it would not have needed to amend the statute to expressly require the TCEQ to consider a well's impact on traffic in certain situations. *See Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) ("A statute

[12] *See also Fireman's Fund Cnty. Mut. Ins. Co. v. Hidi*, 13 S.W.3d 767, 769 (Tex. 2000) (per curiam) ("When the Legislature has employed a term in one section of a statute and excluded it in another, we presume that the Legislature had a reason for excluding it."); *Shumake*, 199 S.W.3d at 287 (observing statutory construction rule of giving effect to all words and not treating any statutory language as surplusage).

is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it."); *see also Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008).[13]

Second, under the principle of *ejusdem generis*, we have warned against expansively interpreting broad language where it is immediately preceded by narrow and specific terms. *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). "[W]hen words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation." *Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003). Given that the surrounding statutory scheme—including the other three factors the Commission is specifically required to consider in evaluating a permit application—exclusively concern matters related to the production of oil and gas, it is reasonable for the Commission to decline to consider the completely unrelated inquiry of traffic safety in weighing the public interest.

Third, the Act's statement of purpose expressly declares the purpose of the Act is to "maintain the quality of fresh water in the state to the extent consistent with the public health and welfare and the operation of existing industries." TEX. WATER CODE § 27.003. This narrow policy statement declines to promote a purpose of protecting public safety except where natural resources are concerned.

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[13] CHIEF JUSTICE JEFFERSON would hold that the term "public interest" unambiguously precludes the Commission from considering traffic-safety factors because of the TCEQ's separate statutory duty to consider those factors in certain situations. We do not agree that the content or legislative history of these extrinsic provisions renders the term "public interest" unambiguous as to the Commission. As we have previously stated, we apply an *unambiguous* statutory term according to its common meaning. *First Am. Title Ins. Co.*, 258 S.W.3d at 631. Here, we cannot interpret "public interest" according to its common meaning because it *is* ambiguous—instead, we must look to the statutory scheme of Chapter 27 and other extrinsic interpretative aids to determine the meaning of the term.

Finally, in the portions of the Act where the Legislature intends for the TCEQ or the Commission to evaluate a particular factor in considering the public interest, it says so. The Legislature requires the TCEQ to examine specific factors in its public interest inquiry. *See id.* § 27.051(d). Texas Citizens argues that section 27.051(d) does not limit the TCEQ's consideration of these factors in its public interest investigation. *See id.* (providing that the TCEQ "shall not be limited to the consideration of" the enumerated public interest factors). But the Legislature does not require the TCEQ to consider any particular additional factor either. *Id.* In contrast, there is no statutory directive for the Commission to consider matters related to traffic safety or any other specific factor in its public interest evaluation.

When, as here, a statutory scheme is subject to multiple interpretations, we must uphold the enforcing agency's construction if it is reasonable and in harmony with the statute. *See First Am. Title Ins. Co.*, 258 S.W.3d at 632. As the Supreme Court has explained, governmental agencies have a "unique understanding" of the statutes they administer. *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In a complex regulatory scheme like the Act and with a phrase as amorphous as "public interest," this deference is particularly important. *See Pub. Util. Comm'n of Tex. v. Tex. Tel. Ass'n.*, 163 S.W.3d 204, 213 (Tex. App.—Austin 2005, no pet.) ("Public interest determinations are dependent upon the special knowledge and expertise of the [Public Utility] Commission."). Under the plain terms of the Act, we conclude the Commission's construction of "public interest" as a narrow term that does not include traffic-safety considerations is reasonable and in alignment with the statute's meaning.

2. The Commission's Area of Expertise

Texas Citizens argues that we should afford no deference to an agency's interpretation of a statute that does not lie within its administrative expertise or pertain to a nontechnical issue of law. *See Rylander v. Fisher Controls Int'l, Inc.*, 45 S.W.3d 291, 302 (Tex. App.—Austin 2001, no pet.). Texas Citizens further contends that requiring the Commission to consider traffic-safety evidence in its public interest evaluation does not impose on it a duty to "regulate truck traffic" or otherwise evaluate matters beyond its expertise, but rather to simply consider whether traffic-safety concerns might cut against the propriety of the proposed well. The Commission could, Texas Citizens argues, limit the amount of waste the injection well can accept or regulate hours of operation, thus curtailing potential truck traffic, without having to regulate or make policy decisions impacting the state's roads. The Commission counters that its statutory directive is to regulate matters related to oil and gas production, not traffic concerns, and that it does not have the expertise or jurisdiction to consider these sorts of public-safety issues.

As an initial matter, the breadth of the term "public interest" is a question of law that implicates the Commission's very technical decision of whether to grant an injection well permit. But, more importantly, we disagree with Texas Citizens that the Commission's public interest inquiry is unrelated to its administrative expertise: to the contrary, the Commission interpreted the public interest finding in such a way as to ensure that it will *only* consider matters within its expertise. As we concluded above, the Commission's determination that "public interest" does not include traffic-safety matters is reasonable under the Act's statutory scheme. We further conclude

it is reasonable given the Commission's unique competence as the state's agency overseeing oil and gas production.

The Commission has long been the agency charged with regulating matters related to oil and gas production, and is given broad discretion in its administration of oil and gas laws. *See* TEX. NAT. RES. CODE § 85.202(b) (requiring the Commission to "do all things necessary for the conservation of oil and gas and prevention of waste of oil and gas"); *R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 686 (Tex. 1992) (acknowledging the Legislature's grant of "broad discretion to the Commission in administering the laws regulating oil and natural gas"); *Stewart v. Humble Oil & Ref. Co.*, 377 S.W.2d 830, 834 (Tex. 1964) ("[T]he courts have consistently recognized that the Commission must be given discretion in administering the oil and gas statutes."). Among other matters related to oil and gas production, the Legislature charges the Commission with making and enforcing "rules and orders for the conservation of oil and gas and prevention of waste of oil and gas." TEX. NAT. RES. CODE § 85.201.[14]

As the Commission argues, nothing in any of the Commission's enabling acts grants the Commission authority over matters related to traffic safety. Rather, each of these statutory provisions make clear that the Commission is the agency charged with administering laws related to oil and gas production. *See R.R. Comm'n v. Sterling Oil & Ref. Co.*, 218 S.W.2d 415, 418 (Tex. 1949) ("The Legislature realized the great value of oil and gas and the importance of the task and

[14] *See also id.* § 85.202(b) ("The commission shall do all things necessary for the conservation of oil and gas and prevention of waste of oil and gas and may adopt other rules and orders as may be necessary for those purposes."); § 86.041 ("The commission has broad discretion in administering the provisions of this chapter and may adopt any rule or order in the manner provided by law that it finds necessary to effectuate the provisions and purposes of this chapter.").

duty placed on the Railroad Commission to conserve same for the use of the public, and by many provisions of the statutes full power is given the Railroad Commission to prevent the waste of oil and gas."). Further, it is "utterly impossible for the Legislature to meet the demands of every detail in the enactment of laws relating to the production of oil and gas . . . . The Legislature . . . has authorized the Railroad Commission to handle the details relating to the preservation and conservation of the natural resources of the State." *Corzelius v. Harrell*, 186 S.W.2d 961, 964 (Tex. 1945). The Commission must have discretion in determining the minutiae of its statutory mandates.

Here, Texas Citizens raised arguments concerning the impact of large trucks on dirt roads, inadequate road width to handle truck traffic, and safety concerns related to the truck traffic. Given the Commission's institutional focus on matters concerning oil and gas production, it is reasonable for the Commission to decline to consider matters beyond its administrative expertise. This is especially the case given the limitless number of factors the Commission may need to consider in evaluating an injection well permit if the Commission is required to study any potential subsidiary matter bearing on the public interest, such as truck traffic in this case. As Texas Citizens conceded at oral argument, it does not merely want for the Commission to examine matters related to truck traffic, but rather any factor that might conceivably touch on a broad definition of "public interest." In opposition to an injection well, a creative opponent could assert any number of concerns impacting the public interest entirely unrelated to the Commission's express legislative directives.

Under Texas Citizens and the court of appeals' approach, the Commission would have to consider and weigh a limitless number of factors beyond the Commission's institutional competence.[15]

The Commission's purpose is to "do all things necessary for the conservation of oil and gas and prevention of waste of oil and gas." TEX. NAT. RES. CODE § 85.202(b). As the agency charged with administering the state's oil and gas laws, it is reasonable for the Commission to refuse to consider traffic-safety evidence in its public interest analysis.[16]

3. Commission Practice in Weighing the "Public Interest"

The Commission finally argues that in the half-century since the Legislature first promulgated the requirement that it weigh the public interest in evaluating an injection well permit, it has never considered traffic-safety concerns. The Commission urges that its long-standing construction of the term "public interest" is especially entitled to judicial deference. Citing an Amarillo Court of Appeals' opinion, Texas Citizens counters that, at least on one occasion, the Commission did, in fact, consider traffic-safety evidence. The Amarillo Court of Appeals' decision, however, does not support Texas Citizens' assertion. In that case, as in the instant dispute, property owners protested

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[15] As Justice Pemberton noted in his concurrence to the denial of en banc review in the court of appeals, there is a "virtually infinite range of considerations" that could bear upon the public interest inquiry. 254 S.W.3d at 503 (Pemberton, J., concurring in denial of reconsideration en banc). In his concurrence to the denial of en banc review, Justice Waldrop also opined that the term public interest "could well have been intended to be broad enough to allow the Commission to address the myriad possible circumstances that might be presented in an injection well permit application." *Id.* at 507 (Waldrop, J., concurring in denial of reconsideration en banc). Nonetheless, both justices ultimately concluded the statutory scheme did not demonstrate a legislative intent to limit the Commission's statutory authority or jurisdiction so as to preclude its consideration of traffic-safety issues.

[16] We note that the Legislature has granted other entities express statutory authority over the regulation of traffic-related concerns. *See, e.g.*, TEX. TRANSP. CODE § 251.151 (granting county commissioners court the authority to "regulate traffic on a county road or on real property owned by the county that is under the jurisdiction of the commissioners court"); § 311.001 (granting home-rule municipality control over public highways, streets, and alleys of the municipality). We need not consider the potential intersection of another entity's regulation of traffic-safety issues with the Commission's grant of an injection well permit as that issue is not before us.

a proposed injection well in a contested hearing before the Commission, arguing that the well would not comport with the public interest because of public-safety concerns. *Berkley v. R.R. Comm'n of Tex.*, 282 S.W.3d 240, 244 (Tex. App.—Amarillo 2009, no pet.). Following the Austin Court of Appeals' holding in the instant case, the Amarillo Court of Appeals explained that safety concerns "are indicia that should be considered by the Commission when assessing public interests." *Id.* In *Berkley*, however, there is no indication the Commission considered traffic-safety evidence in its decision; instead, the Commission found the proposed injection well would serve the public interest for similar reasons as those articulated in the order here. *Id.*[17]

We agree with the Commission that an agency's long-standing construction of a statute, especially in light of subsequent legislative amendments, is particularly worthy of our deference. *See Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944) (explaining that an agency's construction of a statute it is charged with enforcing is "worthy of serious consideration as an aid to interpretation, particularly where such construction has been sanctioned by long acquiescence") (citations omitted); *see also Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 324 (Tex. 2001).[18] The Commission has declined to consider public-safety evidence in its public interest analysis for almost fifty years, and Texas Citizens provides no authority to the contrary. Had the Legislature disagreed with the Commission's construction of "public interest," it could have

[17] The *Berkley* decision was also rendered more than a year after the court of appeals' decision in this case, so it is possible that, even if the Commission did weigh public-safety factors, it was doing so as required by the Austin Court of Appeals' holding.

[18] Because the Commission has long interpreted the public interest finding to not include traffic-safety issues, we need not consider the manner in which the Commission can potentially later revise its interpretation.

amended the Act to require the Commission to take a broader view of the term. *See Stanford*, 181 S.W.2d at 273–74. We will not judicially amend the Act in the manner Texas Citizens proposes.

IV. Conclusion

The court of appeals failed to grant deference to the Commission's interpretation of "public interest" in section 27.051(b)(1) of the Water Code and instead held the Commission abused its discretion in its construction of the statute. Because we conclude the Commission's interpretation of the phrase "public interest" is reasonable and in accord with the plain meaning of the statute, we hold the court of appeals erred in refusing to defer to the Commission's construction of the term.

Accordingly, we reverse the court of appeals' judgment and render judgment for the Commission and Pioneer in accordance with the trial court's original judgment.

_____
Eva M. Guzman
Justice

OPINION DELIVERED: March 11, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0497

RAILROAD COMMISSION OF TEXAS AND PIONEER EXPLORATION, LTD., PETITIONERS,

v.

TEXAS CITIZENS FOR A SAFE FUTURE AND CLEAN WATER AND JAMES G. POPP, RESPONDENTS

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

Argued April 14, 2010

CHIEF JUSTICE JEFFERSON, joined by JUSTICE WILLETT and JUSTICE LEHRMANN, concurring.

I concur in the Court's judgment, but I write separately because the statute at issue in this case unambiguously precludes the Railroad Commission ("Commission") from considering traffic safety factors as part of its public interest inquiry in the permitting of oil and gas waste injection wells.

As the Court and the parties attest, ___ S.W.3d at ___, "public interest" is a broad term, the scope of which is difficult to determine with precision. But the fact that a term may admit of different meanings, and may be ambiguous as to some conceivable set of facts, does not mean that it is ambiguous as to every proposed reading. The potential breadth of a statutory term does not

prevent us from holding that a party's proposed construction is unambiguously precluded. *See* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 45:1 (7th ed. 2007) (noting that the object of statutory interpretation is to determine a statute's "correct application *in a particular situation*" (emphasis added)).

The Commission relies principally on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in urging us to defer to its interpretation of the statute. While we frequently defer to administrative agencies' statutory interpretations, we do so principally when the relevant statute is ambiguous. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006) (noting that "the language at issue must be ambiguous" before we grant the agency's interpretation deference). Here, I believe the statute unambiguously makes clear that, in this context, "public interest" cannot include traffic safety factors.

Chapter 27 of the Water Code regulates the permitting of injection wells. The Commission is charged with permitting injection wells for the disposal of oil and gas waste, while the Texas Commission on Environmental Quality ("TCEQ") is charged with permitting injection wells for the disposal of industrial or municipal waste. TEX. WATER CODE § 27.011 (granting TCEQ the power to regulate injection wells for the disposal of industrial and municipal waste); *id.* § 27.031 (granting the Commission the power to regulate injection wells for the disposal of oil and gas waste). The Code mandates consideration by the agencies of a number of factors in deciding whether to grant a permit application. Most relevantly, both must consider whether the proposed well "is in the public interest." *Id.* § 27.051(a)(1); *id.* § 27.051(b)(1). The Commission is directed to consider a number of other factors, all of which have to do with the protection of natural resources and the regulation

of the oil and gas industry. *See id.* § 27.051(b). TCEQ is directed to consider a similar list of factors, to which is added one crucial provision: a mandate that TCEQ consider traffic safety in granting injection well permits. *Id.* § 27.051(a)(6). The significance of this provision is twofold. First, had the Legislature intended for the Commission to consider traffic safety factors in permitting wells, it would have included the same express language among the Commission's charges as it did among TCEQ's. Second, the portion of the statute dealing with TCEQ, unlike that dealing with the Commission, contains a partial definition of the term "public interest." TCEQ, in considering the public interest, "shall consider, but shall not be limited to the consideration of" several factors bearing on the protection of natural resources and the environment. *Id.* § 27.051(d). The directive to consider traffic safety is not made part of that public interest inquiry. This suggests that the Legislature, even as it required TCEQ to consider traffic safety factors, did not want that inquiry to be part of a consideration of the public interest. Rather, public interest, in the context of the statute governing both TCEQ and the Commission, is limited to a consideration of factors consistent with the chapter's purpose: "to maintain the quality of fresh water in the state to the extent consistent with the public health and welfare and the operation of existing industries, taking into consideration the economic development of the state." *Id.* § 27.003.

We do not defer to agency interpretations of unambiguous statutes. Although I agree with the Commission that it need not consider traffic safety when permitting injection wells, I do so because chapter 27 of the Water Code so requires. The principle behind the Court's holding would require deference to a future Commission's decision that denied a permit based on the consideration of such traffic safety factors as the presence of trucks hauling saltwater on narrow neighborhood

roads. I believe, to the contrary, that the statute's language and context preclude such an interpretation as a matter of law. Because there is no legitimate role for deference here, and because the statute prohibits consideration of traffic safety in the Commission's decision to issue injection permits, I concur in the Court's judgment.

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 11, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0523

TEXAS LOTTERY COMMISSION, PETITIONER,

v.

FIRST STATE BANK OF DEQUEEN, STONE STREET CAPITAL, INC., AND CLETIUS L. IRVAN, RESPONDENTS

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

Argued December 16, 2009

JUSTICE JOHNSON delivered the opinion of the Court.

This case arises because provisions of the Texas Uniform Commercial Code (UCC) and the Texas Lottery Act conflict as to whether installment payments of a lottery prize are assignable. The primary issues are whether the Commission has sovereign immunity from suit and whether the Lottery Act's prohibition against transferring the last two installments of a prize are negated by the UCC.

Cletius Irvan, a Texas Lottery prizewinner, assigned his final two annual installment prize payments as part of a financial arrangement by which he was to pay a bank debt. The Lottery Commission refused to recognize the assignment because the Lottery Act prohibits assignments of installment payments due within the final two years of the prize payment schedule. Irvan and other

parties to the assignment sought a declaratory judgment that the UCC permits such assignments and specifically renders conflicting provisions of the Lottery Act ineffective. The trial court and court of appeals held that the UCC prevailed and the assignments were permitted. We agree and affirm the court of appeals' judgment.

I. Background

A. The Statutory Conflict

When the Lottery Act was first enacted, lottery prizes generally could not be assigned, and to the extent they could be assigned, the assignment had to be pursuant to an "appropriate judicial order" that resolved a controversy involving the prize winner. *See* Act of Aug. 12, 1991, 72nd Leg., 1st C.S., ch. 6, § 2, 1991 Tex. Gen. Laws 197, 218 (current version at TEX. GOV'T CODE § 466.406). In 1999, the Act was amended and restrictions on assignment of prizes were relaxed. Act of May 30, 1999, 76th Leg., R.S., ch. 1394, §§ 2, 4, 1999 Tex. Gen. Laws 4717, 4717-18. The amended provisions authorized prize winners to assign all but the last two installment prize payments if certain requirements were met.[1] TEX. GOV'T CODE § 466.410(a). Under the amended Act, however, "prize payments due within the final two years of the prize payment schedule may not be assigned." *Id.*

[1] The requirements are not relevant to disposition of this appeal, but they include: (1) approval of the assignments by a district court in Travis County, (2) service of the petition seeking approval on the executive director of the Lottery Commission, (3) the assignment being in writing, and (4) the assignor providing an affidavit stating that he is of sound mind, is over 18 years of age, has been advised regarding the assignment by independent legal counsel, has had the opportunity to receive independent financial advice, and has been provided a disclosure stating the payments being assigned, the purchase price being paid, the rate of discount to the present value of the prize, and the amount of closing fees. TEX. GOV'T CODE § 466.410(b).

The apparent statutory conflict in this case arises because thirteen days before amending the Lottery Act in 1999 the Legislature amended the UCC and included "winnings in a lottery or other game of chance operated or sponsored by a state" as part of the definition of "account." Act of May 17, 1999, 76th Leg., R.S., ch. 414, § 1.01, 1999 Tex. Gen. Laws 2639, 2640 (codified at TEX. BUS. & COM. CODE § 9.102(a)(2)(viii)). Under the UCC, accounts are assignable. *See* TEX. BUS. & COM. CODE § 9.406(a). The UCC amendments, however, did not parallel the Lottery Act amendments that prohibited assignment of the last two installment payments of a lottery prize. To the contrary, the UCC reinforced the assignable character of accounts by specifying that rules of law, statutes and regulations purporting to prohibit or restrict assignment of accounts are ineffective:

> [A] rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:
>
> > (1) prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account or chattel paper . . . .

Id. § 9.406(f). The amendments to the UCC were effective in 2001. In 2001, section 9.406(f) was amended in part and reenacted; the provisions making conflicting statutes ineffective were not changed by the amendment. *See* Act of May 17, 2001, 77th Leg., R.S. ch. 705, § 11, 2001 Tex. Gen. Laws 1403, 1405 (codified at TEX. BUS. & COM. CODE § 9.406(f)).

B. Facts

Cletius Irvan won a Texas Lottery prize in 1995. The prize was payable in twenty annual installments of just over $440,000 each, with the final two payments to be made in 2013 and 2014. After the Legislature amended the Act so prize payments could be assigned, Irvan assigned his rights to all but the last two of his prize payments in exchange for a lump sum.[2] He later became indebted to First State Bank of DeQueen (FSB DeQueen). Arrangements were made in 2006 for Irvan to pay the debt through a common-law Composition of Creditors proceeding in Arkansas. The creditors' arrangement provided for Irvan to assign the rights to his final two annual lottery payments to Stone Street Capital, which would in turn assign the rights to Great-West Life and Annuity. In consideration for assigning his rights, Irvan was to receive a lump sum of $308,032, out of which he would pay FSB DeQueen. The arrangement was approved by an Arkansas court. FSB DeQueen notified the Lottery Commission of the assignment and filed an application in Travis County to register the Arkansas judgment approving the arrangement. *See* TEX. CIV. PRAC. & REM. CODE § 35.003. The Commission advised FSB DeQueen and Irvan that it did not recognize the validity of the Arkansas judgment and it intended to make the final prize payments to Irvan.

FSB DeQueen, Irvan, and Stone Street Capital (collectively, FSB) filed suit pursuant to the Declaratory Judgments Act (DJA) seeking declaratory and injunctive relief. *See id.* §§ 37.001-.011. Specifically, FSB sought declaratory judgment that (1) the final Arkansas order is effective as a Travis County judgment, (2) Section 9.406(c) of the UCC renders Lottery Act sections 466.406 and 466.410 ineffective, (3) the assignments of the final prize payments from Irvan to Stone Street and

[2] Irvan made two assignments to the same company. The record is not clear whether he received one or two lump sum payments.

from Stone Street to Great-West are enforceable, and alternatively, (4) the Arkansas Final Order is an "appropriate judicial order pursuant to which the Commission shall make the final prize payments to Great-West." *See* TEX. GOV'T CODE § 466.406(f) ("A prize to which a winner is otherwise entitled may be paid to any person under an appropriate judicial order."). FSB also requested the court to enjoin the Commission and to require it to make the final lottery payments to Great-West.

FSB moved for partial summary judgment on its claim that the UCC renders the anti-assignment provisions of the Lottery Act ineffective. The trial court granted the motion and declared that UCC sections 9.406 and 9.102 render Lottery Act sections 466.406 and 466.410 ineffective to the extent those sections purport to restrict or prohibit assignment of prize payments. At the parties' request, the trial court severed the UCC claim and the Commission appealed the summary judgment. The court of appeals affirmed. 254 S.W.3d 677.

In this Court, the Commission seeks reversal of the court of appeals judgment on the bases that: (1) the Commission has sovereign immunity from suit, thus the appeal and suit should be dismissed for lack of jurisdiction; (2) under the UCC, conflicts should be resolved in favor of the Lottery Act because the act is a consumer protection law; and (3) under established canons of statutory interpretation regarding conflicting statutes, the Lottery Act controls.[3] We disagree with the Commission and affirm the judgment of the court of appeals.

II. Jurisdiction

[3] The Commission also, in a footnote, urges that the UCC does not apply because it is inapplicable to assignments undertaken to satisfy a preexisting debt such as Irvan's debt to FSB DeQueen. The Commission does not cite authority for nor present argument to support its position. We decline to make its case for it. *See* TEX. R. APP. P. 55.2(i).

The Commission first argues that it has sovereign immunity from suit so the appeal and suit should be dismissed for lack of jurisdiction. It urges that this is an *ultra vires* suit which must be brought against a state official and it cannot be brought against the Commission because the Commission is a governmental entity. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372-73 (Tex. 2009). FSB counters that this appeal involves a challenge to the validity of a statute and the DJA waives the Commission's immunity as to such claims. We agree with FSB. As we explain below, the claim in this appeal is not one involving a government officer's action or inaction, but is a challenge to a statute. Thus this is not an *ultra vires* claim to which a government officer must be a party.

An *ultra vires* suit is one to require a state official to comply with statutory or constitutional provisions. *Id.* at 372. In *Heinrich* we distinguished between claims seeking declaratory relief in an *ultra vires* suit, which must be brought against governmental officials, and suits challenging the validity of an ordinance or statute. *Id.* at 373 n.6 ("For claims challenging the validity of ordinances or statutes . . . the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity." (citing TEX. CIV. PRAC. & REM. CODE § 37.006(b))). While FSB filed an initial claim challenging Commission actions and requesting the Commission be required to comply with statutory provisions, that is not the claim at issue here. FSB asserted in its pleadings that the Commission did not recognize the validity of the final order filed in Travis County and refused to acknowledge and comply with it, but that the Act authorized the Commission to accept and comply with the assignments. FSB requested a declaratory judgment that the final order was an appropriate judicial order pursuant to which the Commission should make payments to

Great-West. It also sought a judgment enjoining the Commission to make payments to Great-West. Those claims were severed from the question ruled on by the trial court and at issue here: whether UCC sections 9.406 and 9.102 render Texas Government Code sections 466.406 and 466.410 ineffective to the extent those sections restrict or prohibit the assignment of Texas Lottery prize payments. FSB asserts that immunity does not apply because, unlike the plaintiff in *Heinrich*, it is not challenging an individual's actions under a statute, but is challenging the validity of the statute itself. We agree.

> The Declaratory Judgments Act
>
> > expressly provides that persons may challenge ordinances or statutes, and that governmental entities must be joined or notified. Governmental entities joined as parties may be bound by a court's declaration on their ordinances or statutes. The Act thus contemplates that governmental entities may be—indeed must be—joined in suits to construe their legislative pronouncements.

Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 446 (Tex. 1994).[4]

The Commission also argues that the DJA does not waive immunity in this case because it only waives immunity of a municipality, not a state entity. The Commission points to Civil Practice and Remedies Code section 37.006(b), which states that "[i]n any proceeding that involves the validity of a municipal ordinance . . . the municipality must be made a party." But the Court in *Leeper* did not rely on section 37.006 when it concluded that "governmental entities" are to be joined in suits to construe legislative pronouncements. Rather, the Court concluded that because the DJA permits statutory challenges and governmental entities may be bound by those challenges, the DJA

[4] *See also Heinrich*, 284 S.W.3d at 373 n.6 (citing Texas Civil Practice and Remedies Code section 37.006(b) and noting that when the *validity* of ordinances or statutes is challenged, the DJA waives immunity to the extent it requires relevant governmental entities be made parties).

contemplates entities must be joined in those suits. *Leeper*, 893 S.W.2d at 446. We have subsequently applied the holding of *Leeper* to different governmental entities. *Heinrich*, 284 S.W.3d at 373 n.6; *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-98 (Tex. 2003); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 859-60 (Tex. 2002). Accordingly, we disagree that the DJA only waives the immunity of municipalities.

Next, the Commission asserts that the DJA does not waive immunity because it applies only to suits involving constitutional invalidation and not to those involving statutory interpretation. But the language in the DJA does not make that distinction. In *Leeper*, the issue was whether a mandatory school attendance private school exemption statute applied to children taught at home. *Leeper*, 893 S.W.2d at 433. While the plaintiffs also claimed that enforcement of the statute violated their constitutional rights, the Court did not reach the constitutional issue. *Id.* at 446. Rather, the DJA discussion was in the context of a statutory clarification. *Id.*

Because the claim at issue here is not one involving a government officer's action or inaction, but is a challenge to a statute, this is not an *ultra vires* claim to which a government officer should have been made a party. The decision on this claim may ultimately impact actions taken by officers of the Commission, but that does not deprive the trial court of jurisdiction. *Id.* at 445 (noting that the DJA allows courts to declare relief "whether or not further relief is or could be claimed"). The trial court properly exercised jurisdiction over this claim.

We next turn to the question of whether the UCC impacts the Lottery Act's anti-assignment provisions, and if so, how.

III. Construing the Statutes

We review issues of statutory construction de novo. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). In construing statutes our primary objective is to give effect to the Legislature's intent. *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008). We presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind. *See In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *Chastain v. Koonce*, 700 S.W.2d 579, 582 (Tex. 1985).

A. Does the Lottery Act Provide a Different Rule for Consumers?

The UCC authorizes state lottery winners to freely assign their winnings. TEX. BUS. & COM. CODE § 9.406(a) (permitting account assignments); *see id.* § 9.102(a)(2)(viii) (including "winnings in a lottery or other game of chance operated or sponsored by a state" in the definition of "Account"). Citing section 9.201 of the UCC, the Commission asserts that Chapter 9 of the UCC conflicts with the Lottery Act and the Lottery Act controls.

Section 9.201 of the UCC provides, in relevant part:

> (b) A transaction subject to this chapter is subject to any applicable rule of law that establishes a different rule for consumers . . . .
>
> (c) In case of a conflict between this chapter and a rule of law, statute, or regulation described in Subsection (b), the rule of law, statute, or regulation controls.

Id. § 9.201. The Commission asserts sections 9.201(b) and (c) make it clear that any conflict between Article 9 and consumer protection laws must be resolved against Article 9 and that the

Lottery Act and its anti-assignment provisions are unquestionably consumer protection provisions. FSB counters that (1) the Lottery Act provision does not "establish a different rule of law for consumers" because neither the Lottery Act nor the UCC refers to lottery prize winners or assignors as "consumers," (2) the Lottery Act's anti-assignment provisions protect lottery *winners* who are not consumers, but rather who are account creditors who sell their rights, and (3) a lottery winner such as Irvan who sells his right to receive payments is not purchasing or acquiring anything, thus he cannot be a consumer as to the transaction. We agree with FSB that the Lottery Act does not provide a different rule for consumers within the meaning of section 9.201 of the UCC.

Chapter 9 of the UCC does not provide a definition for "consumer," but the term is defined in Chapter 1 as "an individual who enters into a transaction primarily for personal, family, or household purposes." *Id.* § 1.201(b)(11). The Chapter 1 definitions apply to all chapters of the UCC except when the context in which they are used requires otherwise or a different definition is provided by a particular chapter. *Id.* § 1.201(a). Neither of the exceptions applies here, thus the definition in section 1.201(b)(11) applies.

While the Lottery Act establishes a rule regarding lottery prize assignments different from the provisions in the UCC, the Lottery Act's rule is not specifically directed at or limited to individuals who enter into a transaction primarily for personal, family, or household purposes. Any purchaser of a lottery ticket, whether an individual or some type of entity such as a partnership, trust, or corporation, purchases the ticket subject to the provisions of the Lottery Act. TEX. GOV'T CODE § 466.252 ("By purchasing a ticket in a particular lottery game, a player agrees to abide by and be bound by the commission's rules, including the rules applicable to the particular lottery game

involved."). The Lottery Act provides that "[a] person may assign, in whole or in part, the right to receive prize payments that are paid by the commission" and then sets out what is required of the assignor. *Id.* § 466.410. The Legislature has defined the term "person" to include "[a] corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." *Id.* § 311.005(2). Nothing in section 466.410 indicates the assignment provisions are applicable only when an individual purchases a ticket, much less only when an individual purchases a ticket for purposes of personal, family, or household use. *See* TEX. BUS. & COM. CODE § 1.201(b)(11). Nor does the Lottery Act limit the applicability of the assignment provisions and restrictions to individuals such as Irvan, even if they are entering the assignment transaction to receive and use money for personal, family, or household purposes. To the contrary, the Lottery Act contemplates that a prizewinner, and therefore a person entitled to receive and assign—or restricted from assigning—prize payments, may be "persons" who are not individuals or consumers. *See* TEX. GOV'T CODE § 466.406(b). Furthermore, the Lottery Act refers to "individuals" in several sections. *See, e.g.*, *id.* § 466.3051 (providing that an individual younger than eighteen years of age may not purchase a lottery ticket); *id.* § 466.409 (providing that certain individuals are not eligible to receive lottery prizes). The fact that the Legislature made certain provisions of the Act applicable only to individuals indicates that its use of the word "person" rather than "individual" in section 466.410 was intentional. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 193 n.20 (Tex. 2007); *see also Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009) (noting that we examine the Legislature's words in context of the statute as a whole and do not consider words or parts of the statute in

isolation). So, while section 466.410 applies to individuals who assign or desire to assign their prize payments for personal, family, or household purposes, the use of "person" in context of section 466.410 does not require a different definition than that prescribed by the Code Construction Act. And, we do not see how use of the Legislature's definition yields an absurd result. Under the circumstances, we are bound to construe the term "person" to mean what the Legislature defined it to mean, and it is not limited to consumers as defined by the Lottery Act, the UCC, or any other applicable definition of consumer. Moreover, if section 9.201(b)'s reference to a statute or rule that establishes a different rule for consumers encompasses statutes and rules applying equally to both consumers and non-consumers, as opposed to only consumers, then all conflicting laws or rules that apply to consumers would be subject to the exception, and the exception would swallow the UCC's overarching rule that accounts are assignable.

The Commission stresses that a transaction by a consumer occurred in this case: Irvan assigned his future lottery winnings in return for an up-front lump sum payment—a transaction primarily for personal, family, or household purposes. But even assuming Irvan's assignment was a consumer *transaction*, the UCC does not address individual transactions undertaken by consumers. It addresses rules of law, statutes, and regulations that apply broadly. Section 466.410 establishes a rule for all persons, not just individuals involved in Lottery Act transactions primarily for personal, family, or household purposes. Read in context, we do not believe section 466.410 is a statute or rule of law "that establishes a different rule for consumers" within the meaning of section 9.201(b).

B. Do Canons of Construction Apply?

The Commission asserts that the UCC does not render the Lottery Act assignment restrictions in sections 466.406 and 466.410 ineffective based on established canons of statutory interpretation. It points to the Code Construction Act, which provides guidance for courts when they seek to determine the Legislature's intent. Specifically, the Commission points to the following as legislative guidance that should be used here: (1) an entire enacted statute is presumed to be effective, TEX. GOV'T CODE § 311.021(2); (2) if statutes are irreconcilable, the statute latest in date of enactment prevails, *id.* § 311.025(a); and (3) a specific statutory provision prevails as an exception over a conflicting general provision. *Id.* § 311.026.

FSB argues that even though the Legislature's guidance for construing statutes would confirm the conclusions of the trial court and court of appeals if they were applied, applying the canons is inappropriate because in the UCC the Legislature specifically provided the means for resolving conflicts between the UCC and other statutes such as the Lottery Act. We agree with FSB that because the Legislature expressly and unambiguously set out the method for resolving conflicts between the UCC and other statutes, it would be improper to go outside the language of the statute and use canons of construction to resolve the question. *City of Rockwall*, 246 S.W.3d at 626 ("When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language."). Courts "do not lightly presume that the Legislature may have done a useless act." *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998). But we must take statutes as we find them and first and primarily seek the Legislature's intent in its language. *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997). Courts are not responsible for omissions in legislation, but we are responsible for a true and fair

interpretation of the law as it is written. *Id.* Additionally, "[i]t is at least theoretically possible that legislators—like judges or anyone else—may make a mistake." *Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004). Even when it appears the Legislature may have made a mistake, courts are not empowered to "fix" the mistake by disregarding direct and clear statutory language that does not create an absurdity. *See id.* (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979)). And although some might believe precluding lottery prize winners from assigning all or some of their installment payments is the better policy choice, we do not see how it is an absurdity to construe this clear statutory language to mean what it says. Here the result is that lottery winners are allowed to assign what no one contests is their property, even at the risk of their making poor assignment choices.

The UCC specifies that state lottery winnings are accounts and are assignable, TEX. BUS. & COM. CODE § 9.406(a), but the Lottery Act prohibits assignments of the last two prize installments. TEX. GOV'T CODE §§ 466.406, 466.410. While these statutory provisions conflict, the Legislature also explicitly provided that "a rule of law, statute, or regulation that prohibits [or] restricts" an assignment of a prize won in a state lottery "is ineffective." TEX. BUS. & COM. CODE § 9.406(f). Giving effect to the clear legislative language about how to resolve conflicts regarding assignments results in there being no conflict to resolve because the Lottery Act's anti-assignment provisions are ineffective insofar as they conflict with the UCC.

Moreover, the Commission's argument that we should not construe the UCC to render the Lottery Act anti-assignment provisions useless turns on itself. If we construe the Lottery Act's anti-assignment restrictions as valid because otherwise their enactment would be a useless legislative

action, we render UCC section 9.406(f) useless as it applies here. Under that construction section 9.406(f) would be useless legislative action, at least in part, because that section clearly was enacted to address situations in which the Legislature enacted a conflicting statute.

The Commission points to cases from other jurisdictions holding that statutory restrictions on lottery assignments are effective. In three of the cases the facts and statutes are distinguishable from those at issue here. *See In re Guluzian*, No. BK 04-10390-JMD, 2004 WL 2813523, at *3 (Bankr. D.N.H. Dec. 3, 2004) (noting that legislation amending the UCC assignment provisions to include lottery payments also amended the lottery statute to provide that the lottery prize assignment prohibition prevailed over UCC provisions); *In re Duboff*, 290 B.R. 652, 656 (Bankr. C.D. Ill. 2003) (holding that UCC provision was inapplicable because it was not enacted until nineteen months after the assignment was executed); *Midland States Life Ins. Co. v. Cardillo*, 797 N.E.2d 11, 17-18 (Mass. App. Ct. 2003) (noting that at the same time the UCC was amended, the lottery statute was amended to provide that it prevailed over UCC provisions).

In two cases factually similar to the one before us, courts held that statutory restrictions on lottery prize assignments prevailed over UCC provisions declaring such restrictions ineffective. *See Stone St. Capital, LLC v. Cal. State Lottery Comm'n*, 80 Cal. Rptr. 3d 326, 340 (Cal. Ct. App. 2008); *Va. State Lottery Dept. v. Settlement Funding, LLC*, No. CH-2003-183848, 2005 WL 3476682, at *3 (Va. Cir. Ct. Nov. 7, 2005). But in both those cases, the courts relied on statutory construction aids to reach their conclusions. *Stone St. Capital*, 80 Cal. Rptr. 3d at 333 (noting that under California rules of statutory construction, a more specific statute controls over a general statute, regardless of which statute was passed earlier); *Va. State Lottery Dep't*, 2005 WL 3476682, at *2-3

(applying the rule of statutory construction that a specific statute applies over a general one). While we have no argument with how those courts resolved their statutory conflicts, neither court discussed resolving the conflict by initially and primarily looking at the language in the statutes themselves. In contrast, we construe statutes by first looking to the statutory language for the Legislature's intent, and only if we cannot discern legislative intent in the language of the statute itself do we resort to canons of construction or other aids such as which statute is more specific. *City of Rockwall*, 246 S.W.3d at 626. Under Texas rules of statutory construction, the language of UCC section 9.406 prevails because on its face it manifests clear legislative intent that conflicting statutes are ineffective.

The Commission argues that failing to give effect to the Lottery Act would essentially amount to an impermissible requirement that the Legislature use explicit language to carve out the Lottery Act from the reach of section 9.406; in other words, a requirement of a "magical password." *See Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) ("When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'"). But Justice Scalia was referring to provisions that require Congress to use specific language in order to repeal, limit, or modify a statutory provision. *See id.* Here, UCC section 9.406(f) does not require some specific language to be included in subsequent legislation in order for it to be modified or repealed. Nor does the Commission contend that the Legislature was attempting to repeal or otherwise modify section 9.406(f) when it enacted the prohibition on lottery prize assignments.

Finally, the Commission asserts that we should give serious consideration to the Commission's construction of the Lottery Act, by which it gives full effect to the assignment restrictions. *See Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993) ("Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute."). But here we are not construing the Lottery Act. We are construing the UCC and determining whether it renders sections 466.406 and 466.410 of the Lottery Act ineffective. The Commission does not argue that it is charged with enforcement of the UCC, and even if it were so charged, its interpretation of the UCC contradicts the plain language of that statute. *See id.*

In sum, the language of UCC section 9.406(f) is clear; we need not use a canon of construction to construe it other than the prime canon: we construe statutes by first looking to the statutory language for the Legislature's intent, and only if we cannot discern legislative intent in the language of the statute itself do we resort to canons of construction or other aids such as which statute is more specific. *City of Rockwall*, 246 S.W.3d at 626. Here the statute's unambiguous words disclose the legislative intent: if the Legislature should happen to have enacted, or enacts, a conflicting statute, the conflicting statute is "ineffective to the extent that the . . . statute . . . prohibits [or] restricts" the assignment of an account. TEX. BUS. & COM. CODE § 9.406(f). Section 9.406(f) makes sections 466.406 and 466.410 of the Lottery Act ineffective to the extent they prohibit or restrict Irvan's assignment.

IV. Child Support

Finally, the Commission asserts that holding the UCC prevails over sections 466.406 and 466.410 will inhibit the State's efforts to collect child support because the Lottery Act provisions requiring the Commission to deduct the amount of a child support lien before paying a prize to a child support obligor will also be rendered ineffective. *See* TEX. GOV'T CODE § 466.4075. The argument is substantively similar to the argument that we should use construction aids to resolve the conflict between the statutory provisions; it effectively urges us to disregard the rule that when a statute's language is clear and unambiguous courts do not resort to rules of construction or extrinsic aids to construe the language. *See City of Rockwall*, 246 S.W.3d at 626. We agree that persons who owe child support should pay it. But when the language of a statute is clear, it is not the judicial prerogative to go behind or around that language through the guise of construing it to reach what the parties or we might believe is a better result. *See Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 847 (Tex. 2009).

V. Conclusion

Sections 466.406 and 466.410 of the Lottery Act are ineffective to the extent they restrict or prohibit Irvan's assignment. We affirm the judgment of the court of appeals.

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Phil Johnson
Justice

OPINION DELIVERED: October 1, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0613

NAFTA TRADERS, INC., PETITIONER,

v.

MARGARET A. QUINN, RESPONDENT

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

Argued October 8, 2009

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

CHIEF JUSTICE JEFFERSON filed a concurring opinion, in which JUSTICE WAINWRIGHT and JUSTICE LEHRMANN joined.

"The answer to most questions regarding arbitration 'flow inexorably from the fact that arbitration is simply a matter of contract between the parties.'"[1] Nevertheless, the United States Supreme Court has held in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, that the grounds for vacating or modifying an arbitration award under the Federal Arbitration Act (FAA)[2] "are exclusive"

[1] *Perry Homes v. Cull*, 258 S.W.3d 580, 593 (Tex. 2008) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

[2] 9 U.S.C. §§ 1-16. All references to the FAA are to these provisions.

and cannot be "supplemented by contract".[3] The principal questions in this case are whether the Texas General Arbitration Act (TAA)[4] likewise precludes an agreement for judicial review of an arbitration award for reversible error, and if not, whether the FAA preempts enforcement of such an agreement. We answer both questions in the negative and consequently reverse the judgment of the court of appeals[5] and remand the case to that court for further proceedings.

I

Petitioner, Nafta Traders, Inc., an international re-distributor of athletic apparel and footwear, terminated its employment of respondent, Margaret A. Quinn, its Vice President of Operations, citing as the basis for its decision a reduction in force due to worsening business conditions. Quinn sued Nafta for sex discrimination in violation of the Texas Commission on Human Rights Act.[6] Nafta's employee handbook included a section captioned "Arbitration", which called for "a dispute arising out of [the] employment relationship . . . or its termination" to be submitted to binding arbitration. The arbitration section did not indicate whether state or federal law would apply, providing only that "[a]ll proceedings shall be conducted in the City of Dallas, State of Texas."[7]

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[3] 552 U.S. 576, 578 (2008).

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

[5] 257 S.W.3d 795 (Tex. App.–Dallas 2008).

[6] TEX. LAB. CODE §§ 21.001-.556.

[7] The section in full read as follows:

"In the event there is a dispute arising out of your employment relationship with the Company or its termination which the parties are unable to resolve through direct discussion or the Complaint Resolution Procedure that would involve a litigable claim, regardless of the kind or type of dispute (excluding insured workers' compensation claims [other than wrongful discharge claims], claims for unemployment insurance, administrative claims before the National Labor Relations Board, the Equal Employment Opportunity Commission or any parallel state or local agency), the parties agree

Nafta moved to compel arbitration under the FAA, which applies to "contract[s] evidencing a transaction involving commerce".[8] Quinn did not object, and the district court signed an agreed order.

The parties then selected an AAA arbitrator, who heard evidence and awarded Quinn $30,000 in back pay, $30,000 in mental anguish damages, $29,031 in "special damages",[9] $104,828 in attorney fees, and costs. A verbatim record was made of the proceedings. Quinn moved the court to confirm the award under the TAA. Nafta moved for vacatur under the FAA, the TAA, the common law, and a provision in the arbitration section of the employee handbook that stated: "The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law." Nafta argued in part that by agreeing to these limits on the arbitrator's authority

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to submit such dispute to binding arbitration in lieu of pursuing a trial in a court of law.

"The arbitration will be conducted by the American Arbitration Association or other mutually agreeable arbitration service. The arbitrator will be selected by mutual agreement from a list of five, or through alternative strikes from a second list of five. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association Employment Arbitration rules with each party's expenses therefrom to be borne by that party unless otherwise determined by the arbitrator. The arbitrator shall be required to state in a written opinion the facts and conclusions of law relied upon to support the decision rendered. The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law. All proceedings shall be conducted in the City of Dallas, State of Texas. The duty to arbitrate described above shall survive the termination of the employee's employment with the Company. The provisions of the Employee Handbook constitute a knowing and voluntary waiver of the parties' rights to a jury trial."

[8] 9 U.S.C. § 2.

[9] While unemployed, Quinn used $6,000 in personal savings, took out a $5,000 loan on her life insurance policy, withdrew $15,000 from her 401(k) plan, incurring a $1,572 penalty, and paid $1,459 COBRA expenses to maintain her health insurance. These amounts comprised the "special damages".

the parties had in effect agreed to expand the narrow scope of judicial review otherwise provided by the TAA and the FAA.

As grounds for vacating the award, Nafta asserted that the arbitrator had applied federal law to Quinn's sex discrimination claim even though she had alleged only a violation of Texas law, and that the evidence did not support a finding of sex discrimination. Regarding damages, Nafta asserted that the attorney fee award was improper, that the "special damages" award was really a double recovery of lost wages, and that the evidence did not support an award of mental anguish damages. Quinn responded that none of the grounds asserted by Nafta is recognized by the TAA or the FAA as a basis for vacating an arbitration award, and that neither the TAA nor the FAA permits the grounds for vacating an arbitration award to be enlarged by agreement. Even if such an agreement were permissible, Quinn argued, the statement in the handbook was too vague and one-sided to be enforced. And finally, she contended, even if the grounds asserted by Nafta could be considered, they should all be rejected as meritless.

The district court issued a brief order simply confirming the arbitrator's award without giving any indication whether it had considered the substance of Nafta's complaints and rejected them or instead had concluded that the TAA or FAA did not permit consideration of such grounds for vacatur. Nafta appealed.[10] After oral argument in the court of appeals but before an opinion had issued, the United States Supreme Court decided *Hall Street Associates, L.L.C. v. Mattel, Inc.*, holding that the FAA's grounds for vacatur and modification "are exclusive" and cannot be

[10] Quinn also appealed from the district court's denial of her claim for attorney fees incurred in the confirmation proceeding. The court of appeals affirmed, and Quinn has not petitioned for review.

"supplemented by contract".[11] Although the court of appeals applied the TAA in this case rather than the FAA, noting that neither Nafta nor Quinn had disputed on appeal that the TAA governed their arbitration,[12] it concluded that similarities between the two statutes weighed heavily in favor of construing the TAA as *Hall Street* had construed the FAA.[13] Accordingly, the court held that "parties seeking judicial review of an arbitration award covered under the TAA cannot contractually agree to expand the scope of that review and are instead limited to judicial review based on the statutory grounds enumerated in the statute."[14]

One such statutory ground is section 171.088(a)(3)(A), that an arbitrator has exceeded his power,[15] and Nafta argued that the arbitrator had exceeded his power by issuing an erroneous award when the arbitration agreement denied him the authority to commit reversible error or apply an action or remedy contrary to law.[16] The court of appeals rejected Nafta's argument because, it explained, while an arbitrator exceeds his power by deciding an issue the parties did not agree to submit to him, he does not exceed his power by deciding matters incorrectly.[17] Moreover, the court said, Nafta could not use section 171.088(a)(3)(A) "to accomplish indirectly what we have already

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[11] 552 U.S. 576, 578 (2008).

[12] 257 S.W.3d 795, 797 (Tex. App.–Dallas 2008).

[13] *Id.* at 798. The parties acknowledged at oral argument in this Court that they have both taken different positions concerning the applicability of the FAA and TAA during this proceeding.

[14] *Id.* at 799.

[15] TEX. CIV. PRAC. & REM. CODE § 171.088(a)(3)(A).

[16] 257 S.W.3d at 799.

[17] *Id.*

concluded it cannot do directly, that is, contractually expand judicial review of the arbitration decision."[18] Having decided that none of Nafta's complaints fell within any of the statutory grounds for vacatur, the court affirmed the district court's judgment.[19]

We granted Nafta's petition for review.[20]

II

The TAA, which is based on the Uniform Arbitration Act,[21] lists specific grounds for vacating,[22] modifying, or correcting[23] an arbitration award and provides that unless such grounds are

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[18] *Id*.

[19] *Id*. at 799-800.

[20] 52 Tex. Sup. Ct. J. 447 (Mar. 27, 2009).

[21] *See In re Gulf Exploration, LLC*, 289 S.W.3d 836, 839 (Tex. 2009) (noting that "most states (including Texas) have adopted the Uniform Arbitration Act").

[22] TEX. CIV. PRAC. & REM. CODE § 171.088(a) ("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."); *cf.* UNIF. ARBITRATION ACT § 23(a), 7 U.L.A. 77-78 (2000) ("Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: (1) the award was procured by corruption, fraud, or other undue means; (2) there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator's powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.").

[23] TEX. CIV. PRAC. & REM. CODE § 171.091(a) ("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

offered, "the court, on application of a party, shall confirm the award."[24] One such ground for vacating an arbitration award is that "the arbitrators . . . exceeded their powers".[25] In arbitration conducted by agreement of the parties, the rule is well established that "[a]n arbitrator derives his power from the parties' agreement to submit to arbitration".[26] As the United States Supreme Court has stated:

> Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control. This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution.[27]

Nafta and Quinn agreed that an arbitrator appointed to resolve disputes between them "does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to

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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."); *cf.* UNIF. ARBITRATION ACT § 24(a), 7 U.L.A. 87-88 (2000) ("Upon [motion] made within 90 days after the [movant] receives notice of the award pursuant to Section 19 or within 90 days after the [movant] receives notice of a modified or corrected award pursuant to Section 20, the court shall modify or correct the award if: (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award; (2) the arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or (3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.").

[24] TEX. CIV. PRAC. & REM. CODE § 171.087; *cf.* UNIF. ARBITRATION ACT § 22, 7 U.L.A. 76 (2000) ("After a party to an arbitration proceeding receives notice of an award, the party may make a [motion] to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.").

[25] TEX. CIV. PRAC. & REM. CODE § 171.088(a)(3)(A).

[26] *City of Pasadena v. Smith*, 292 S.W.3d 14, 20 (Tex. 2009) (citing *Gulf Oil Corp. v. Guidry*, 327 S.W.2d 406, 408 (Tex. 1959) ("the authority of arbitrators is derived from the arbitration agreement")).

[27] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1773-1774 (2010) (citations and internal quotation marks omitted).

apply a cause of action or remedy not expressly provided for under existing state or federal law." Unless there is some reason to exclude such limitations from the general rule that the parties' agreement determines arbitral authority, Nafta's contention that the arbitrator exceeded his authority raises a ground to vacate the award, and the court of appeals erred in holding to the contrary.

Quinn argues that her agreement to limit the arbitrator's authority is in effect an agreement for broader judicial review of the arbitration award than permitted by the TAA for the same reasons it is not permitted under similar provisions of the FAA, as the United States Supreme Court held in *Hall Street*. Sections 10 and 11 of the FAA specify grounds for vacating,[28] modifying, or correcting[29] an arbitration award that are similar to the TAA's, and like the TAA, section 9 of the FAA mandates confirmation absent such grounds.[30] In *Hall Street*, the parties had tried part of their dispute to the

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[28] 9 U.S.C. § 10(a) ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration — (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.").

[29] *Id.* § 11 ("In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration — (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. (c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.").

[30] *Id.* § 9 ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.").

federal district court and then agreed to submit another part to arbitration.[31] They agreed that the court could "enter judgment upon any award" unless "the arbitrator's findings of facts are not supported by substantial evidence, or . . . the arbitrator's conclusions of law are erroneous."[32] The Supreme Court held that this agreement impermissibly enlarged the grounds for vacating or modifying an arbitration award under the FAA.[33]

We must, of course, follow *Hall Street* in applying the FAA, but in construing the TAA, we are obliged to examine *Hall Street*'s reasoning and reach our own judgment. The Supreme Court based its decision on the framework of the FAA and on policy. It found that "textual features" of sections 9, 10, and 11 were "at odds with enforcing a contract to expand judicial review following the arbitration."[34] Because the grounds listed in sections 10 and 11 all "address egregious departures from the parties' agreed-upon arbitration" and "extreme arbitral conduct", the FAA did not, the Court reasoned, "authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error."[35] Further, the Court observed, section 9 "carries no hint of flexibility"; it "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies", and does not merely "tell a court what to do just

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[31] *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 579 (2008).

[32] *Id.*

[33] *Id.* at 592.

[34] *Id.* at 586.

[35] *Id.*

in case the parties say nothing else."[36] This construction, the Court added, was consistent with policy favoring limited judicial review:

> Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post-arbitration process.[37]

We agree with Quinn that while the Supreme Court and the parties in *Hall Street* framed the issue as "expandable judicial review authority",[38] the flip-side is limited arbitral decision-making authority, the aim of Quinn and Nafta's agreement. Though the parties in *Hall Street* did not couch their agreement in terms of limiting the arbitrator's authority to issue a decision unsupported by the law and the evidence, that was certainly the practical effect of what they expressly agreed to — that the court could not "enter judgment" on such a decision. The parties in *Hall Street* attempted to accomplish indirectly the same end that Quinn and Nafta sought directly — a limit on the arbitrator's authority.

Yet the Supreme Court, in holding that under the FAA the grounds for vacating, modifying, or correcting an arbitration award cannot be expanded beyond those listed in sections 10 and 11, did not discuss section 10(a)(4), which like section 171.088(a)(3)(A) of the TAA, provides for vacatur

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[36] *Id*. at 587.

[37] *Hall St.*, 552 U.S. at 588 (citations, internal quotation marks, and brackets omitted).

[38] *Id*. at 584.

"where the arbitrators exceeded their powers".[39] The omission appears to us to undercut the Supreme Court's textual analysis. When parties have agreed that an arbitrator should not have authority to reach a decision based on reversible error — in other words, that an arbitrator should have no more power than a judge — a motion to vacate for such error as exceeding the arbitrator's authority is firmly grounded in the text of section 10. The Supreme Court's reasoning that an arbitrator's merely legal errors are not the kind of "egregious departures from the parties' agreed-upon arbitration" section 10 addresses loses force when such errors directly contradict the parties' express agreement and deprive them of the benefit of their reasonable expectations.

When parties have agreed to limit an arbitrator's power to that of a judge, whose decisions are reviewable on appeal, and the complaint is that the arbitrator's decision exceeds his powers, a statutory ground for vacatur, the only way to maintain a textual argument for limited judicial review is to hold that such an agreement is not encompassed by the statutory provision and unenforceable. In other words, the textual argument entails that arbitrators can never, by committing reversible error, "exceed their powers" within the meaning of section 10(a)(4), regardless of the parties' agreement. But the FAA itself imposes no such limitation on parties' right of contract.[40] On the contrary, as the

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[39] 9 U.S.C. § 10(a)(4). The only mention of section 10(a)(4) in *Hall Street* is the observation that "some courts have thought[] 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'" *Hall St.*, 552 U.S. at 585.

[40] The Supreme Court has never addressed section 10(a)(4), except to say, since *Hall Street*, that "[i]t is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable", and that "[i]n that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1767 (2010) (citations and internal quotation marks omitted). *Stolt-Nielsen* did not involve an arbitration agreement for expanded judicial review.

Supreme Court noted, "the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law."[41] Furthermore, the Court recognized a "general policy of treating arbitration agreements as enforceable".[42] The Court regarded this general policy as "beg[ging] the question . . . whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration",[43] but one such "textual feature[]" is section 10(a)(4), which requires vacatur when arbitrators exceed their authority. Whether that feature is at odds with expanded judicial review depends on whether the right to contract to circumscribe arbitral authority includes limiting the authority to err in decision-making.

The Supreme Court's textual analysis, when taking account of the complete statutory text, circles back to the question whether parties can agree to limit an arbitrator's power to err. If not, then section 10(a)(4) is consistent with the Court's analysis, but if so, the analysis would appear to be flawed. It is the statutory text that begs the policy question, not policy that begs the statutory construction issue.

The Supreme Court stated that it "makes . . . sense" for there to be "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving

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[41] *Hall St.*, 552 U.S. at 586.

[42] *Id*.

[43] *Id*.

disputes straightaway."[44] One difficulty with this statement of national policy is that the Court had previously identified the enforcement of private agreements as the FAA's "overriding goal", writing:

> The legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement — upon the motion of one of the parties — of privately negotiated arbitration agreements.[45]

Hall Street dismissed these words as taken out of context, explaining that all the Court had said was that arbitration should be expedited, in accordance with the parties' agreement, despite pending litigation, even if proceeding in different forums is not the most efficient course for resolving the disputes.[46] But the Court has since reaffirmed that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms'",[47] so *Hall Street* cannot fairly be read to replace the FAA's "principal purpose" of enforcing arbitration agreements with arbitration's "essential virtue" of expedition in determining what policy should guide its textual

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[44] *Id*. at 588.

[45] *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

[46] 552 U.S. at 588 ("Despite the [*Dean Witter*] opinion's language 'reject[ing] the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims,' the holding mandated immediate enforcement of an arbitration agreement; the Court was merely trying to explain that the inefficiency and difficulty of conducting simultaneous arbitration and federal-court litigation was not a good enough reason to defer the arbitration." (citations and internal quotation marks omitted)).

[47] *AT&T Mobility LLC v. Concepcion*, No. 09-893, 563 U.S. ___, 2011 WL 1561956, at *8 (Apr. 27, 2011) (slip op. at 9-10, *available at* http://www.supremecourt.gov/opinions/10pdf/09-893.pdf) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989), and citing *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1763 (2010)).

interpretation.[48] Parties agree to arbitration for reasons other than speed and cost, such as flexibility, privacy, and in some instances, expertise.[49] In some cases, at least, whether arbitration reduces cost and delay at all is fiercely debated. In any event, it would hardly make sense to force more expedition on parties than they want. If we were to identify an essential virtue of arbitration, it would be that it is a creature of agreement.

But assuming that the ultimate goal of arbitration is haste, the abiding difficulty with a policy against expanded judicial review, and correspondingly, limited arbitral authority, is that the Court could not itself say whether the policy was a good one:

> Hall Street and its *amici* say parties will flee from arbitration if expanded review is not open to them. One of Mattel's *amici* foresees flight from the courts if it is. We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds.[50]

A national policy favoring limited judicial review that turns out to be inimical to arbitration could hardly reside comfortably alongside the "national policy favoring arbitration" that the Supreme Court has held Congress declared in the FAA.[51] But without denying that possibility, the Court concluded that the statutory text leaves no alternative.

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[48] *Id.* at *9 (slip op. at 11) ("'We . . . are not persuaded by the argument that the conflict between two goals of the Arbitration Act — enforcement of private agreements and encouragement of efficient and speedy dispute resolution — must be resolved in favor of the latter in order to realize the intent of the drafters.'" (quoting *Dean Witter*, 470 U.S. 221)).

[49] *See*, *e.g.*, Peter F. Gazda, Comment, *Arbitration: Making Court-Annexed Arbitration an Attractive Alternative in Texas*, 16 ST. MARY'S L.J. 409, 426 (1985).

[50] *Hall St.*, 552 U.S. at 588-589 (citations omitted).

[51] *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

Thus, the search for a policy to justify limited judicial review winds back around to the statutory text, which, as we have already seen, is what commissioned the expedition in the first place. The problem comes down to this. Under the TAA (and the FAA), an arbitration award must be vacated if the arbitrator exceeds his powers. Generally, an arbitrator's powers are determined by agreement of the parties. Can the parties agree that an arbitrator has no more power than a judge, so that his decision is subject to review, the same as a judicial decision? *Hall Street* answers no, based on an analysis of the FAA's text that ignores the provision that raises the problem, and a policy that may be at odds with the national policy favoring arbitration. With great respect, we are unable to conclude that *Hall Street*'s analysis of the FAA provides a persuasive basis for construing the TAA the same way.

The Supreme Court expressed concern that "a more cumbersome and time-consuming judicial review process [would] bring arbitration theory to grief in post-arbitration process",[52] and we agree that delay and resulting expense are concerns that arbitration is intended, at least, to alleviate.[53] But equally grievous is a post-arbitration process that refuses to correct errors as the parties intended, and of equal concern is a civil justice system that allows parties an alternative to litigation only if they are willing to risk an unreviewable decision. The California Supreme Court, declining to follow *Hall Street* in construing its own state's statute, offered this assessment:

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[52] *Hall St.*, 552 U.S. at 588 (citations and internal quotation marks omitted).

[53] *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002) ("Subjecting arbitration awards to judicial review adds expense and delay, thereby diminishing the benefits of arbitration as an efficient, economical system for resolving disputes. Accordingly, we 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 judicial system reaps little benefit from forcing parties to choose between the risk of an erroneous arbitration award and the burden of litigating their dispute entirely in court. . . . There are also significant benefits to the development of the common law when arbitration awards are made subject to merits review by the parties' agreement. . . . These advantages, obtained with the consent of the parties, are substantial.[54]

As a fundamental matter, Texas law recognizes and protects a broad freedom of contract. We have repeatedly said that

> if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.[55]

We find nothing in the TAA at odds with this policy.[56] On the contrary, the purpose of the TAA is to facilitate arbitration agreements, which have been enforceable in Texas by Constitution or statute since at least 1845.[57] Specifically, the TAA contains no policy against parties' agreeing to limit the

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[54] *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 606 (Cal. 2008).

[55] *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008) (construing insurance policy coverage of punitive damages) (quoting *Wood Motor Co. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951) (construing contract termination clause) (quoting *Printing & Numerical Registering Co. v. Sampson*, 19 L.R. Eq. 462, 465, 1874 WL 16322 (1875))); *see also Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007) (construing commercial lease expressly waiving warranties) (quoting *Wood*); *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 767 (Tex. 2005) (construing liquidated damages clause) (quoting *Wood* and *Sampson*); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 n.11 (Tex. 2004) (construing contractual jury waiver) (quoting *Wood* and *Sampson*); *Mo., Kan. & Tex. Ry. Co. of Tex. v. Carter*, 68 S.W. 159, 164 (Tex. 1902) (construing contract waiving responsibility for fires caused by railroad engines) (quoting *Sampson*).

[56] *See Fairfield*, 246 S.W.3d at 655; *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 628 (Tex. 2004) ("Generally, 'the State's public policy is reflected in its statutes.'" (quoting *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex. 2002))); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000).

[57] *In re AIU Ins. Co.*, 148 S.W.3d 109, 122 (Tex. 2004) (Phillips, C.J., dissenting) ("The right to arbitration has been guaranteed in every Texas constitution." (citing TEX. CONST. art. XVI, § 13 (repealed 1969); TEX. CONST. of 1869, art. XII, § 11; TEX. CONST. of 1866, art. VII, § 15; TEX. CONST. of 1861, art. VII, § 15; TEX. CONST. of 1845, art. VII, § 15)); *id*. at 122 n.1 ("Each constitution provided that it is 'the duty of the Legislature to pass such laws as may be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial.' TEX. CONST.

authority of an arbitrator to that of a judge, but rather, an express provision requiring vacatur when "arbitrators [have] exceeded their powers".[58]

Quinn argues that an agreement like the one in this case is one-sided, but we fail to see how. Had the arbitration award gone against her and against the law and evidence, the agreement would have been to her benefit. We have said that an arbitration agreement may be so one-sided as to be unconscionable,[59] but the benefits or burdens of judicial review for reversible error fall to each side alike.

The Supreme Court in *Hall Street* squarely rejected the argument that an agreement to expand the statutory grounds for judicial review of an arbitration award is an invalid attempt to confer jurisdiction on a court by contract:

> Because the FAA is not jurisdictional, there is no merit in the argument that enforcing the arbitration agreement's judicial review provision would create federal jurisdiction by private contract.[60]

The TAA, also, is not jurisdictional, and the argument has no more merit with respect to Texas courts' jurisdiction. Nothing more need be said on the subject.

1876, art. XVI, § 13 (repealed 1969). This section was repealed by the voters in 1969 as one of the 'obsolete, superfluous and unnecessary sections of the Constitution.' Tex. H.J.R. No.3, 6lst Leg., R.S., 1969 Tex. Gen. Laws 3230. The House Joint Resolution stated that the repealer was not intended to 'make any substantive changes in our present constitution.' *Id.*").

[58] TEX. CIV. PRAC. & REM. CODE § 171.088(a)(3)(A).

[59] *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) ("Unconscionability is to be determined in light of a variety of factors, which aim to prevent oppression and unfair surprise; in general, a contract will be found unconscionable if it is grossly one-sided.").

[60] 552 U.S. 576, 582 n.2 (2008).

We are mindful of the TAA's mandate that it "be construed to . . . make uniform the construction of other states' law applicable to an arbitration."[61] But the states are already divided over whether their own statutes permit agreements for expanded judicial review of arbitration awards: three say yes,[62] five say no.[63] In construing the TAA, we are obliged to be faithful to its text.

Accordingly, we hold that the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error.

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[61] TEX. CIV. PRAC. & REM. CODE § 171.003.

[62] *See Raymond James Fin. Servs., Inc. v. Honea*, 55 So. 3d 1161, 1170 (Ala. 2010); *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 606 (Cal. 2008); *Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 640 A.2d 788, 793 (N.J. 1994); *see also HH East Parcel, LLC v. Handy & Harman, Inc.*, 947 A.2d 916, 926 n.16 (Conn. 2008).

[63] *See Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 696 S.E.2d 663, 667 (Ga. 2010); *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725, 736 (Me. 2011); *John T. Jones Constr. Co. v. City of Grand Forks*, 665 N.W.2d 698, 704 (N.D. 2003); *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 261 (Tenn. 2010); *Barnett v. Hicks*, 829 P.2d 1087, 1095 (Wash. 1992); *see also Dick v. Dick*, 534 N.W.2d 185, 190-191 (Mich. Ct. App. 1995); *Trombetta v. Raymond James Fin. Servs., Inc.*, 907 A.2d 550, 576 (Pa. Super. Ct. 2006).

III

When, as in this case, an arbitration agreement is covered by both state and federal law,[64] state law is preempted "to the extent that it actually conflicts with federal law — that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives

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[64] The FAA applies to maritime transactions and transactions involving commerce, 9 U.S.C. § 2, defined as follows: "'Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

Quinn argued in the court of appeals that her agreement with Nafta did not involve interstate commerce, but she has abandoned that argument in this Court, and in any event, there is no serious argument that her agreement as Vice President of Operations of a business with national and international sales did not involve interstate commerce.

The TAA applies to written arbitration agreements, TEX. CIV. PRAC. & REM. CODE § 171.001, except as follows:

"(a) This chapter does not apply to:
(1) a collective bargaining agreement between an employer and a labor union;
(2) an agreement for the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than $50,000, except as provided by Subsection (b);
(3) a claim for personal injury, except as provided by Subsection (c);
(4) a claim for workers' compensation benefits; or
(5) an agreement made before January 1, 1966.

"(b) An agreement described by Subsection (a)(2) is subject to this chapter if:
(1) the parties to the agreement agree in writing to arbitrate; and
(2) the agreement is signed by each party and each party's attorney.

"(c) A claim described by Subsection (a)(3) is subject to this chapter if:
(1) each party to the claim, on the advice of counsel, agrees in writing to arbitrate; and
(2) the agreement is signed by each party and each party's attorney."

Id. § 171.002.

As the court of appeals noted, the parties have not disputed the applicability of the TAA to their agreement.

The TAA and the FAA may both be applicable to an agreement, absent the parties' choice of one or the other. *In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 127-128 (Tex. 1999) (per curiam).

of Congress.'"[65] Having concluded that the TAA permits parties to agree to expanded judicial review of arbitration awards, we must determine whether the FAA, which under *Hall Street* precludes such agreements, preempts Texas law. That is, do such agreements thwart Congress's purposes and objectives in the FAA?

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, the Supreme Court explained the FAA's preemptive effect as follows:

> The FAA was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered. Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.[66]

FAA-preemption is thus aimed at state-law hindrances to enforcement of arbitration agreements not applicable to contracts generally. We have explained it this way:

> The FAA only preempts the TAA if: (1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses under state law, and (4) state law affects the enforceability of the agreement. . . . The mere fact that a contract affects interstate commerce, thus triggering the FAA, does not preclude enforcement under the TAA as well. For the FAA to preempt the TAA, state law must refuse to enforce an arbitration agreement that the FAA would enforce, either because (1) the TAA has expressly exempted the agreement from

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[65] *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

[66] *Id.* at 478 (citations, punctuation, and internal quotation marks omitted).

> coverage, or (2) the TAA has imposed an enforceability requirement not found in the FAA.[67]

In *Volt*, the parties chose California law to govern their arbitration agreement.[68] When a dispute arose between them, one demanded arbitration while the other filed suit, joining two strangers to the agreement as defendants. The state trial court stayed the arbitration pursuant to a provision of the California Arbitration Act that authorized a court "to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where 'there is a possibility of conflicting rulings on a common issue of law or fact.'"[69] Though the FAA contains no similar provision, the Supreme Court held that the FAA did not preempt state law:

> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, 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 Act would otherwise permit it to go forward. By

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[67] *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006) (citations, brackets, emphasis, and internal quotation marks omitted).

[68] *Volt*, 489 U.S. at 470.

[69] *Id.* at 471 (quoting CAL. CIV. PROC. CODE § 1281.2(c)(3) (West 1982)).

> permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.[70]

State law was not preempted, even though it operated to stay arbitration that would have gone forward under federal law. The parties' agreement was enforced, not thwarted, by application of the California law they had chosen. The Supreme Court concluded that the FAA's purposes and objectives are not defeated by conducting arbitration under state-law procedures different from those provided by the federal statute. Indeed, as *Volt* acknowledged, it is not clear to what extent the FAA's procedures, prescribed expressly for federal courts, ever apply in state courts.[71] Section 10 of the FAA, the basis of the decision in *Hall Street*, is itself addressed only to "the United States court in and for the district wherein the award was made".[72] The lesson of *Volt* is that the FAA does not preempt all state-law impediments to arbitration; it preempts state-law impediments to arbitration agreements.

The opinion in *Hall Street*, as we have discussed, seems at one point to promote expedition as the primary goal of the FAA. But if expedition is the touchstone for FAA-preemption, then *Volt*

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[70] *Id*. at 478-479 (citations and internal quotation marks omitted).

[71] *Id*. at 477 n.6 ("While we have held that the FAA's 'substantive' provisions — §§ 1 and 2 — are applicable in state as well as federal court, see *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984), we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, see 9 U.S.C. § 3 (referring to proceedings 'brought in any of the courts of the United States'); § 4 (referring to 'any United States district court'), are nonetheless applicable in state court. See *Southland Corp. v. Keating, supra,* at 16, n. 10 (expressly reserving the question whether '§§ 3 and 4 of the Arbitration Act apply to proceedings in state courts'); see also *id.,* at 29 (O'CONNOR, J., dissenting) (§§ 3 and 4 of the FAA apply only in federal court)."); *see also Vaden v. Discover Bank*, 129 S.Ct. 1262, 1279 n.20 (2009) (stating that "[t]his Court has not decided whether §§ 3 and 4 apply to proceedings in state courts," citing *Volt*); *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 597 n.12 (Cal. 2008) (stating that the FAA's procedural provisions do not apply in state court proceedings). We need not resolve the issue here.

[72] 9 U.S.C. § 10.

was incorrectly decided, since it upheld the use of state law to delay arbitration. Though *Hall Street*'s majority did not cite *Volt*, the Court has since relied on it.[73] With *Volt* intact, we cannot read *Hall Street*'s discussion of the importance of expedition to displace as the principal basis for preemption the protection of parties' agreements.[74] More importantly, *Hall Street* expressly contemplates that the FAA will not preempt state law that allows agreements to enlarge judicial review of arbitration awards:

> In holding that [FAA] §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.[75]

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[73] *AT&T Mobility LLC v. Concepcion*, No. 09-893, 563 U.S. ___, 2011 WL 1561956, at *8 (Apr. 27, 2011) (slip op. at 9-10, *available at* http://www.supremecourt.gov/opinions/10pdf/09-893.pdf) (quoting *Volt*); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1773-1774 (2010) ("While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion . . . . [W]e have said on numerous occasions that the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms . . . . Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties . . . . [W]e have held that parties are generally free to structure their arbitration agreements as they see fit . . . and may agree on rules under which any arbitration will proceed." (citing *Volt,* 489 U.S. at 479) (citations and internal quotation marks omitted)).

[74] A state law that both denies enforcement of the parties' agreement and defeats arbitration's goal of expedition is, not surprisingly, preempted. *Concepcion*, 2011 WL 1561956 (holding that the California rule, regarding the unconscionability of class arbitration waivers in consumer contracts, from *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), is preempted by the FAA).

[75] *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008).

Dissenting from the Court's construction of the FAA, Justice Breyer emphasized that the Court was in agreement that its decision would not have preclusive effect. Citing the passage of the Court's opinion we have just quoted, and a part of Justice Stevens' dissenting opinion, he stressed:

> The question presented in this case is whether "the Federal Arbitration Act . . . *precludes* a federal court from enforcing" an arbitration agreement that gives the court the power to set aside an arbitration award that embodies an arbitrator's mistake about the law. Like the majority and Justice STEVENS, and primarily for the reasons they set forth, I believe that the Act does not *preclude* enforcement of such an agreement.[76]

These passages, we think, refute any argument that *Volt*'s reasoning applies only to the procedure by which arbitration is conducted, not the procedure by which awards are reviewed. The only reasonable reading of the opinions in *Hall Street*, in our view, is that the FAA does not preempt state law that allows parties to agree to a greater review of arbitration awards.[77]

It was not necessary for Quinn and Nafta to choose the TAA to govern their agreement, nor would that choice alone have provided them expanded judicial review of an arbitration award. The TAA, as we have construed it, permits parties to agree to expanded review, or to a corresponding limit on the arbitrator's authority, as in this case, but it does not impose such review on every arbitration agreement. Nor was it necessary for Quinn and Nafta to choose not to be governed by the FAA, since even if it applies, as it does in this case, it does not preempt the parties' agreement for expanded judicial review. The matter is left to the agreement of the parties. But absent clear

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[76] *Id*. at 596 (Breyer, J., dissenting) (emphasis added) (citation omitted).

[77] *See Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 595-599 (Cal. 2008).

agreement, the default under the TAA, and the only course permitted by the FAA, is restricted judicial review.[78]

For these reasons, we hold that the FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the TAA.

IV

An arbitration award is not susceptible to full judicial review merely because the parties have agreed. A court[79] must have a sufficient record of the arbitral proceedings, and complaints must have been preserved, all as if the award were a court judgment on appeal.[80] For efficiency's sake, arbitration proceedings are often informal; procedural rules are relaxed, rules of evidence are not followed, and no record is made. These aspects of arbitration, which are key to reducing costs and delay in resolving disputes, must fall casualty to the requirements for full judicial review. The parties can decide for themselves whether the benefits are worth the additional cost and delay, but the only review to which they can agree is the kind of review courts conduct. If error cannot be demonstrated, an award must be presumed correct.[81]

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[78] *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) (holding that an agreement that did not unambiguously limit the scope of arbitration by choosing a state-law rule did not effectively do so under the FAA).

[79] In ruling on motions to confirm, alter, or vacate an arbitration award, a trial court reviewing the award for reversible error serves an appellate function.

[80] In appeals from judicial proceedings, the requirements for preserving complaints and for the record are set out, respectively, in Rules 33 and 34 of the Texas Rules of Appellate Procedure. Although these rules are not written for appeals from arbitration awards, their principles should govern such appeals.

[81] *See also Cable Connection*, 190 P.3d at 605 ("Some courts have expressed concern that arbitration is so different from judicial proceedings that courts would be unable to adequately review the substance of arbitrators' decisions. . . . Problems with the record are not reflected in the cases, but in the event they arise, there is a ready solution in the familiar rule that the decision under review is presumed correct on matters where the record is silent.").

By the same token, arbitration parties cannot agree to a different standard of judicial review than the court would employ in a judicial proceeding involving the same subject matter. "[A]n arbitration agreement providing that a 'judge would review the award by flipping a coin or studying the entrails of a dead fowl' would be unenforceable."[82]

Here, the parties have submitted a record of the arbitration proceeding, including a transcript of the evidence offered. Nafta has attacked the award on several legal grounds and challenged the sufficiency of the evidence. On remand, the court must determine whether the record is sufficient to review Nafta's complaints.

V

In the trial court, Nafta invoked the provision of its agreement with Quinn limiting the arbitrator's authority "to render a decision which contains a reversible error of state or federal law, or . . . to apply a cause of action or remedy not expressly provided for under existing state or federal law", and raised its arguments under this provision for vacating the award. Since the trial court's order confirming the award gives no basis for its decision, we must presume that the court rejected Nafta's arguments in substance. Nafta raised the same arguments in the court of appeals, but the court did not reach them, concluding instead that even if meritorious, they were not grounds for vacatur. Because we disagree, the judgment of the court of appeals must be reversed and the case remanded to that court for consideration of the merits of Nafta's challenges to the arbitration award.

It is so ordered.

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[82] *Id*. (citations omitted) (quoting *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring)).

Nathan L. Hecht
Justice

Opinion Delivered: May 13, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0613

NAFTA TRADERS, INC., PETITIONER,

v.

MARGARET A. QUINN, RESPONDENT

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

Argued October 8, 2009

CHIEF JUSTICE JEFFERSON, joined by JUSTICE WAINWRIGHT and JUSTICE LEHRMANN, concurring.

Increasingly, our civil disputes are submitted to the private sector rather than a judge or jury. The trend is neither intrinsically good nor bad, but there are consequences. When a case is tried in open court, rules of evidence inherited from Britain and modified by American courts dictate what facts a jury may properly consider. The proceeding is recorded, and dispositive rulings are subject to principles of error preservation. When the facts are established and the law applied, the State of Texas enforces the trial court's judgment. Journalists report the facts, editorial writers critique the judgment, citizens reflect on the state of our laws, and legislators file bills to alter future outcomes. When the parties appeal, the resulting precedent gives predictability to the activities and transactions in which people and corporations engage.

An arbitration is different.[1] It is said to be speedier, often less costly, and overseen by experts in the relevant subject matter. But it is conducted in private.[2] The rules of evidence do not apply. There may be no official transcript of the proceedings. The award is usually final, even when an identical judgment appealed to a state court would be reversed on procedural or substantive grounds. Courts are generally required to confirm an arbitral award because trial judges have little power to reverse it for factual insufficiency or, with certain exceptions, to prevent a miscarriage of justice.[3]

This case asks whether parties can agree to "try" a case privately, but then enlist state courts to review the decision for reversible errors of state or federal law. I agree with the Court that the agreement is enforceable under the TAA, *Hall Street* notwithstanding. ___ S.W.3d at ___. I write only to observe that our system is failing if parties are compelled to arbitrate because they believe our courts do not adequately serve their needs. If litigation is leaving because lawsuits are too expensive, the bench and the bar must rethink the crippling burdens oppressive discovery imposes. If courts have yet to embrace modern case-management practices, the Legislature should ensure that the justice system has resources to improve technology and to hire qualified personnel—two sure ways to improve efficiency.

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[1] *See Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1011 (10th Cir. 1994) ("Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system.").

[2] *See* Gu Weixia, Note & Comment, *Confidentiality Revisited: Blessing or Curse in International Arbitration?*, 15 AM. REV. INT'L ARB. 607, 622 (2004) ("How disputes are actually decided concerns not only the parties to the arbitration, but may also have substantial effects on the world at large, including shareholders, administrative regulators, consumers, and the like. Decisions affecting them should be subject to public scrutiny." (footnote omitted)).

[3] *See* 9 U.S.C. § 9 ("[A]ny party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the FAA]."); TEX. CIV. PRAC. & REM. CODE § 171.087 ("Unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091 [of the TAA], the court, on application of a party, shall confirm the award.").

And it is unlikely, given a choice, that parties to an arbitration would choose, as their arbitrator, a person whose only qualification is the possession of a law license, and who need not have significant experience as an advocate or as a judge.[4] They seek instead a pool of qualified professionals rather than individuals who are swept in and out of office based not on considerations of merit, but on the vagaries of partisan election. *See* TEX. CONST. art. V (outlining the requirements for judicial election). The solution to that quandary is beyond the scope of this case, but the parties' contractual agreement for reviewing the arbitrator's decision demonstrates that people know how to avoid this perceived deficiency. They will, increasingly, select their own specialized tribunal and seek to retain a contractual right to meaningful appellate review in our state courts. As the Court does, I would affirm that right. Nevertheless, we must, in the future, address those aspects of our justice system that compel litigants to circumvent the courts and opt for private adjudication.

Wallace B. Jefferson
Chief Justice

Opinion Delivered: May 13, 2011

[4] *See* TEX. CONST. art. V, § 7 ("Each district judge shall be elected by the qualified voters at a General Election and shall be a citizen of the United States and of this State, who is licensed to practice law in this State and has been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election . . . .").

IN THE SUPREME COURT OF TEXAS

NO. 08-0634

AEP TEXAS CENTRAL COMPANY, PETITIONER,

v.

PUBLIC UTILITY COMMISSION OF TEXAS, ET AL., RESPONDENTS

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

JUSTICE WILLETT delivered the opinion of the Court.

This appeal challenges a final order of the Public Utility Commission in a true-up proceeding under Chapter 39 of the Utilities Code, a part of the Public Utility Regulatory Act (PURA). The district court affirmed the order in part and reversed it in part. The court of appeals affirmed the judgment of the district court in part and reversed it in part.[1] In two recent decisions, we have reviewed PUC orders in true-up proceedings, giving a general description of Chapter 39 and the true-up procedure.[2]

In today's case, AEP Texas Central Co. (AEP), a transmission and distribution utility, and CPL Retail Energy, L.P., its affiliated retail electric provider, initiated a proceeding under Section

[1] 258 S.W.3d 272, 276.

[2] *See State v. Pub. Util. Comm'n*, ___ S.W.3d ___, ___ (Tex. 2011) (*State v. PUC*); *Tex. Indus. Energy Consumers v. CenterPoint Energy Houston Elec., LLC*, 324 S.W.3d 95, 97–100 (Tex. 2010) (*TIEC*).

39.262 to finalize stranded costs and other true-up amounts.[3] The State of Texas, several municipalities, and several other parties who are consumers of electricity or represent consumer interests (collectively the Consumers),[4] intervened in the proceeding.

In its final order (Order), the PUC determined stranded costs, which generally are "based on the difference between the book value of generation assets and the market value of these assets."[5] The PUC also made a separate determination of the capacity auction true-up under Section 39.262(d)(2). The issues before us now concern market value, net book value (NBV), and the capacity auction true-up.

I. Market Value

Generally, "Section 39.262(h) provides that the affiliated power-generation company shall establish the market value of its generation assets using one or more of four methods: the sale of assets method, the stock valuation method, the partial stock valuation (PSV) method, and the exchange of assets method."[6] Section 39.262(h) provides that stranded costs shall be quantified using these methods "[e]xcept as provided in Subsection (i)."

Subsection (i) provides in part: "Unless an electric utility or its affiliated power generation company combines all of its *remaining* generation assets into one or more transferee corporations

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[3] TEX. UTIL. CODE § 39.262. All statutory sections cited herein are found in Chapter 39 of the Texas Utilities Code.

[4] The issues and arguments discussed below are not all raised by the same Consumers. For brevity we identify any issue or argument raised by any Consumer as one raised by "the Consumers."

[5] *State v. PUC*, ___ S.W.3d at ___.

[6] *Id.* at ___.

as described in Subsections (h)(2) and (3), the electric utility shall quantify its stranded costs for nuclear assets using the ECOM method."[7] Subsection (h)(2) pertains to the stock valuation method, and Subsection (h)(3) pertains to the PSV method. These methods involve spinning off assets into a publicly traded corporation. The ECOM method refers to a model developed by the PUC to estimate stranded costs.[8]

In this case, AEP chose to quantify its stranded costs under Subsection (h)(1), the sale of assets method, because it had sold its generation assets including its interest in the South Texas Nuclear Project. The Consumers argue that the market value of AEP's nuclear assets could not be determined using the sale of assets method, because Subsection (i) requires use of the ECOM model for valuing nuclear assets unless the stock valuation or PSV method is used.

The PUC ruled that the sale of assets method could be used to determine the market value of nuclear assets, and that Subsection (i), by its terms, is limited to the valuation of "remaining" nuclear assets. It reasoned that once AEP sold its nuclear assets, they were not remaining. Like the court of appeals, we conclude that the PUC's construction of the provision is reasonable and should be followed.[9] The PUC's construction gives meaning to the word "remaining," consistent with our view that every word in a statute is presumed to have a purpose and should be given effect if reasonable and possible.[10] The PUC construction is also consistent with the last sentence of

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[7] TEX. UTIL. CODE § 39.262(i) (emphasis added).

[8] *See State v. PUC*, ___ S.W.3d at ___ n.15 and accompanying text.

[9] *See id.* at ___ ("[A]n agency's interpretation of the statute it administers is entitled to serious consideration so long as it is reasonable and does not conflict with the statute's language.").

[10] *See Tex. Workers' Comp. Ins. Fund. v. DEL Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000).

Subsection (h)(1), providing that "[i]f not all assets are sold" through a sale of assets, "the market value of the remaining generation assets shall be established by one or more of the other methods in this section." A plausible reading of Section 39.262(i) is that it provided a backup method, namely the ECOM method, for assigning a market value to a nuclear plant that might prove difficult to sell or exchange, and hence would be a "remaining" asset of the utility, and that stock market conditions might also make spinning off the plant into a publicly traded company difficult.

Further, we have noted that "[w]hile other methods are provided to determine market value indirectly, we think the actual sale of all the generation assets . . . provides the best measure of market value,"[11] in part because Section 39.251(4) generally defines market value as "the value the assets would have if bought and sold in a bona fide third-party transaction or transactions on the open market." By its language this statutory definition applies to "nonnuclear assets and certain nuclear assets."[12] Where, as here, the utility managed to sell its stake in a nuclear plant, we see no error in using the sale of assets method, which is, if anything, the preferred method for valuing generation assets. There is nothing sacrosanct about the ECOM computer model, which turned out to be a very inaccurate predictor of stranded costs.[13] Further, as the PUC urges, if under Section 39.251(4) the market value of "certain nuclear assets" is the value obtained in a "bona fide third-party transaction or transactions on the open market," Subsection (i) should not be read to impose

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[11] *State v. PUC*, ___ S.W.3d at ___.

[12] TEX. UTIL. CODE § 39.251(4).

[13] At one point, the ECOM model predicted "that no generation company was projected to have stranded costs," *CenterPoint Energy, Inc. v. Pub. Util. Comm'n*, 143 S.W.3d 81, 91 (Tex. 2004), but ultimately billions of dollars in stranded costs were assessed at the final true-ups of the utilities subject to Chapter 39.

a categorical prohibition against using the sale of assets method set out in Subsection (h)(1) to value nuclear assets. Such a reading would conflict with Section 39.251(4), which contemplates that at least "certain nuclear assets" can be valued using the sale of assets method. The PUC's interpretation of the relevant statutory provisions is reasonable and gives meaning and consistency to each of the relevant statutory terms.

II. Net Book Value

A. Excess Mitigation Credits

The PUC required AEP to issue excess mitigation credits to customers based on interim projections that AEP would have no stranded costs. The projections turned out to be erroneous, and at the true-up proceeding, the PUC reasoned that the EMCs, including the EMCs paid to the affiliate retailer CPL Retail Energy, had by design increased the net book value (and decreased stranded costs) on a dollar-for-dollar basis, and accordingly stranded costs should reflect the total amount of EMCs paid. In *State v. PUC*, we affirmed the PUC's order regarding the identical treatment of EMCs in the CenterPoint true-up proceeding.[14] We reversed the court of appeals' judgment on this issue.[15]

In today's case, the same court of appeals remanded this issue to the PUC for reconsideration in light of its decision in the CenterPoint true-up case and its decision in another case holding that

[14] *State v. PUC*, ___ S.W.3d at ___.

[15] *Id.*

the PUC never had authority to issue EMCs.[16]

AEP argues that the PUC did not err in including in stranded costs all EMCs that had been paid. The Consumers argue that stranded costs should be reduced by the amount of EMCs paid by AEP to its affiliated retail provider, CPL Retail Energy. Consistent with our decision in *State v. PUC*, we agree with AEP that no adjustment to the PUC's calculation of stranded costs is warranted to account for EMCs paid to CPL Retail Energy. We rejected the same argument in *State v. PUC*, reasoning that regardless of whether the EMCs were paid to the affiliated retail electric provider or another retail provider, "the purpose of the EMCs was to increase the NBV of CenterPoint's generation assets,"[17] the impact on stranded costs was the same, and "CenterPoint should recover whatever stranded costs it would have recovered if the EMCs had never been paid."[18]

AEP separately argues that the PUC miscalculated interest on the excess earnings. In this proceeding, the PUC calculated interest on stranded costs monthly, running from January 2002. As discussed further below, the interest rate and the start date for the running of interest were correct under our holdings in *TIEC*. Schedule II to the Order shows the PUC's calculation of interest on the stranded cost true-up award, with the column for net book value increasing monthly to reflect the unrefunded EMC balance. The EMCs, by design, increased the net book value and were credited against excess earnings, and therefore correspondingly increased stranded costs and the interest on

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[16] 258 S.W.3d at 295–96 (remanding for reconsideration in light of *CenterPoint Energy Houston Elec., LLC v. Gulf Coast Coalition of Cities*, 252 S.W.3d 1 (Tex. App.—Austin 2008), *rev'd in part sub nom. State v. Pub. Util. Comm'n*, __ S.W.3d ___ (Tex. 2011), and in light of *City of Corpus Christi v. Pub. Util. Comm'n*, 188 S.W.3d 681 (Tex. App.—Austin 2005, pet. denied)).

[17] ___ S.W.3d at ___.

[18] *Id.* at ___.

the principal amount of stranded costs. We see no error in the PUC's treatment of interest in this true-up proceeding. We are not persuaded by AEP's argument that the Order double-counted interest.[19]

B. Construction Work in Progress

The Consumers complain that the PUC erred in including construction work in progress (CWIP) in the net book value determination. They argue that ratemaking standards must be met before the inclusion of CWIP in net book value. We rejected this argument in *State v. PUC*.[20]

C. Adjustments to NBV for Commercially Unreasonable Conduct

AEP argues that once the PUC determined market value by concluding that the sale of its generation assets was, under Section 39.262(h)(1), a bona fide sale under a competitive offering, the PUC was not free to adjust net book value to account for specific instances of commercially unreasonable conduct that affected the value of its generation assets. The Consumers argue that not only is an adjustment to NBV permitted, but the PUC did not make sufficiently large reductions to NBV to account for AEP's commercially unreasonable conduct. A majority of the court of appeals agreed with AEP that an adjustment to NBV was not permitted in these circumstances.[21] The dissenting justice agreed with the PUC that an adjustment to NBV was permitted, and would have rejected the arguments of the Consumers that greater adjustments should have been made by the

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[19] The PUC suggests in its briefing that some recovery of interest on retained excess earnings should be made on remand of the PUC docket that ordered the EMCs. We express no opinion on this question, and our decision today is not intended to foreclose an adjustment to interest on excess earnings in another proceeding.

[20] ___ S.W.3d at ___.

[21] 258 S.W.3d at 308–14.

PUC.[22]

On these issues, we agree with the PUC across the board. First, we agree that commercially unreasonable conduct can result in a reduction to net book value even when the PUC uses the sale of assets method to determine market value, and finds that the sale of assets was "a bona fide third-party transaction under a competitive offering," as specified in Section 39.262(h)(1).

Section 39.252(d) provides:

> An electric utility shall pursue commercially reasonable means to reduce its potential stranded costs, including good faith attempts to renegotiate above-cost fuel and purchased power contracts or the exercise of normal business practices to protect the value of its assets. The commission shall consider the utility's efforts under this subsection when determining the amount of the utility's stranded costs; provided, however, that nothing in this section authorizes the commission to substitute its judgment for a market valuation of generation assets determined under Sections 39.262(h) and (i).

A similar issue arose in *State v. PUC*. We held that market value should be determined under the sales of assets method, concluding that the sale of assets in that case "was indeed 'a bona fide third-party transaction under a competitive offering'" as provided in Subsection (h)(1).[23] We then considered whether a separate transaction called the "RRI Option" was commercially unreasonable conduct that should result in a reduction in NBV. We discussed whether the Option had depressed the market value of the affiliated power generation company, and concluded the option had no effect if the sale of assets method was used, since the sale of the assets took place after the Option expired.[24] Before reaching this conclusion, however, we accepted the legal proposition

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[22] *Id.* at 287–93 (Patterson, J., dissenting).

[23] ___ S.W.3d at ___.

[24] *See id.* at ___.

that a reduction in NBV is permitted if commercially unreasonable conduct had negatively affected the market value of the utility's assets:

> The PUC could consider the commercial reasonableness of the RRI Option in determining NBV. The PUC adjusted NBV in making the stranded cost determination, after finding that the conveyance of the Option was commercially unreasonable and did not represent normal business practices. Section 39.252(d) expressly directs the PUC, when making the stranded cost determination, to consider whether the utility used "commercially reasonable means" and "normal business practices" to reduce stranded costs. Since Section 39.252(d) bars the PUC from adjusting the market value component of stranded costs, it necessarily authorizes an adjustment to NBV, the other principal component of stranded costs.[25]

Hence, we accepted, as we do here, that even if the sale of assets is, overall, sufficiently "bona fide" and "competitive" to qualify for a market value determination under Section 39.262(h)(1), commercially unreasonable conduct by the utility affecting the value of the assets sold is subject to an adjustment to net book value under Section 39.252(d). This authority flows from Section 39.252(d), requiring the PUC, when determining stranded costs, to consider whether the utility engaged in "commercially reasonable" conduct and "normal business practices." This authority also flows from Section 39.252(a), providing that a utility may only recover its "nonmitigable" stranded costs, and Section 39.262(a), providing that a utility "may not be permitted to overrecover stranded costs" at the true-up proceeding. These provisions should be read together in construing Chapter 39.[26] In harmonizing the provisions as it did, the PUC was able to make a market value determination under Section 39.262(h)(1), an essential step in determining stranded costs, while still

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[25] *Id.* at ___.

[26] *See State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002) ("[W]e determine legislative intent from the entire act and not just from isolated portions."); *State v. Pub. Util. Comm'n*, 883 S.W.2d 190, 196 (Tex. 1994) ("In ascertaining the scope of the Commission's authority, we must read PURA as a whole to ascertain the underlying legislative intent.").

giving effect to the Section 39.252(d) duty to mitigate stranded costs. While there is obviously some overlap between the concepts of a "bona fide" and "competitive" sale under Section 39.262(h)(1), and the concepts of "commercially reasonable means" and "normal business practices" under Section 39.252(d), the PUC reasonably harmonized these provisions, gave meaning to both, and conformed to the overall goal of awarding the utility its nonmitigable stranded costs.

In today's case, the utility's election to use the sale of assets method under Section 39.262(h)(1), and a PUC finding that the sale of assets was conducted through a bona fide and competitive sale,[27] does not preclude an adjustment to NBV under Section 39.252(d) for specific, commercially unreasonable conduct. The language of Section 39.262(h) requires the utility to "quantify its stranded costs using one or more of the following methods," but Chapter 39 as a whole provides "that the PUC ultimately determines stranded costs . . . . The true-up procedure set out in Chapter 39 unmistakably assigns the Commission to act as an adjudicative body in 'determining the amount of the utility's stranded costs' and issuing a 'final order' in the true-up proceeding, subject to judicial review."[28] The PUC's authority to ultimately determine stranded costs carries with it the authority to make particularized adjustments to net book value to account for commercially unreasonable conduct. While Section 39.252(d) states that the PUC shall not, in considering whether the utility used commercially reasonable means to reduce stranded costs, "substitute its judgment for a market valuation of generation assets determined under Sections 39.262(h) and (i),"

[27] In concluding that AEP's auction of its generation assets met the test of a bona fide transaction under a competitive offering, the PUC was persuaded by evidence that AEP used competent and independent advisers, engaged in broad marketing efforts, employed an auction structure that promoted competitive bids, provided bidder access to equal and accurate data, and negotiated vigorously with bidders.

[28] *State v. PUC*, ___ S.W.3d at ___ (quoting Sections 39.252(d) and 39.262(j)).

the PUC did not "substitute its judgment" as to the market-based methods set out in Chapter 39 for determining market value. It accepted AEP's election to employ the sale of assets method to determine market value, but made authorized NBV adjustments to account for specific instances of commercially unreasonable conduct by AEP prior to the sale of those assets that negatively affected the prices received. Therefore, we disagree with the court of appeals that employment of the sale of assets method to determine market value under Section 262(h)(1) automatically and necessarily means that the PUC can make no adjustments to NBV under the separate Section 39.252(d) duty to mitigate stranded costs. The authority to review the commercial reasonableness of specific utility conduct in selling generation assets derives from the nature of stranded-cost recovery and the effect it might have on normal business incentives. Conduct that unreasonably reduces the price of assets sold will reduce the proceeds of the sale, one measure of market value, but such a reduction simply increases the stranded cost recovery on a dollar-for-dollar basis, since stranded costs are measured by the difference between book value and market value. To counter this lack of incentive to minimize stranded costs, the Legislature empowered the PUC to make adjustments to net book value under Section 39.252(d).

Our agreement with the PUC and the court of appeals dissent that an NBV adjustment is allowed in these circumstances leaves the question whether the PUC's dollar adjustments to NBV are supported by substantial evidence. After considering numerous alleged instances of commercially unreasonable conduct, the PUC made two adjustments to NBV. AEP argues that one of the adjustments was too large, while the Consumers complain that both of the adjustments were too small.

Under substantial evidence review of fact-based determinations, "[t]he issue for the reviewing court is not whether the agency's decision was correct, but only whether the record demonstrates some reasonable basis for the agency's action."[29]

The PUC reduced AEP's net book value by $68.7 million on grounds that AEP's conduct before the sale of its interest in the South Texas Nuclear Project was commercially unreasonable. It found fault in AEP's failure to prepare an adequate pre-sale valuation analysis so that it had an estimate of the intrinsic value of its interest, and to establish ahead of the sale a "walk-away" or reserve price. It arrived at the $68.7 million figure by comparing the price received by AEP and the price received by Texas Genco (Genco), a co-owner of the Project that also sold its interest. This figure was based on the relative sizes of the interests sold by the two companies. AEP and the Consumers, relying on conflicting evidence in the record, argue that the PUC miscalculated the relative sizes of the Genco and AEP interests. AEP further argues that the PUC offered no rational explanation for how its alleged unreasonable conduct affected the price for its interest in the Project. We have reviewed the evidence and conclude that the PUC's calculation is supported by substantial evidence. The PUC gave rational reasons for the disallowance.[30] The Consumers concede that the sale of the Genco interest "was part of an extremely complex transaction" and the comparison with

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[29] *Id.* at ___ (quoting *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999)).

[30] The PUC plausibly reasoned in its Order:

> If [AEP] had determined an intrinsic value for its STP share, and established a walk-away price, it may have attempted to negotiate a higher price for STP, modified its auction procedure to ensure that it obtained such a price, or ceased negotiations and either reopened bidding or considered pursuing another valuation method if it became apparent that the auction results would not approach this price. Obtaining a walk-away price, referencing it throughout the auction process, and modifying or terminating the sale if the offered price does not approach the walk-away price are all measures that a commercially reasonable seller would take to maximize the sales price of an asset.

the sale of AEP's interest in the same nuclear project was not at all straightforward. The PUC relied on documentary and testimonial evidence relating to the Genco transaction that provides a reasonable basis for the PUC's calculation, thus satisfying the substantial evidence standard.

The PUC also made an $8 million adjustment to NBV on grounds that AEP had unreasonably bundled the sale of its Coleco Creek coal-fired plant with other plants instead of considering whether it could obtain a higher price by selling this plant separately. It noted that AEP had sold the bundled facilities for less than one bidder had offered for Coleco Creek plant by itself. The Consumers argue that a much greater adjustment was warranted. The PUC considered conflicting evidence and argument on this issue. In response to AEP's contention that the other plants actually had negative value, the PUC noted evidence that AEP "was only concerned about selling these facilities as generation units, rather than examining other options such as selling the facilities for their land, parts and scrap metal, or the water rights associated with the facilities." The PUC relied on an actual "nonconforming" bid for the Coleco Creek plant by itself, and compared that bid to the sale price of the bundled assets in reaching the $8 million figure. The bid was nonconforming in that it did not fully comply with AEP's bidding instructions, but the PUC argues that evidence on which the Consumers relied were not actual bids at all, but less reliable evidence such as sales of allegedly similar plants or expressions of interest that occurred before the potential bidder had conducted any due diligence. Given the conflicting evidence and reasonable inferences to be drawn therefrom, the PUC's adjustment is sustained under the substantial evidence test.

The Consumers also argue that the PUC should have made a further adjustment to NBV because AEP failed to execute "bridge power sales" agreements relating to the sale of certain assets.

Some of the generation assets were sold under agreements that closed at a future date. AEP received the profits from these assets during the period between the signing of the agreements and the transfer of the assets to the buyer. Under a bridge power sales agreement, the purchaser of generation facilities receives the profits from power sales while the sale is pending. The Consumers argue that such agreements would have increased the calculated market value of the assets and correspondingly reduced stranded costs. The PUC, district court, and court of appeals have all rejected this argument.[31] The PUC points out that no statute requires a bridge power sales agreement or an adjustment to stranded costs to reflect profits earned between the time a sale of assets is negotiated and the formal transfer of those assets to the purchaser. The PUC further considered expert testimony that bridge power sales agreements are not a normal business practice due to regulatory uncertainties in finalizing the sale of generation assets. The PUC's ruling that such agreements were not mandated under a commercial reasonableness standard is affirmed under the substantial evidence test.

AEP argues that, assuming the NBV adjustments were legally and factually warranted, the PUC erred in "grossing up" the disallowances to reflect the federal corporate income tax benefits of the adjustments to stranded costs. The PUC adjustments had lowered stranded costs, with the result that AEP would owe less tax on stranded costs than anticipated. But the utility already had an accumulated deferred federal income tax (ADFIT) account to pay taxes that it now would not owe. The PUC concluded that without the gross up to reflect the effect of taxes, AEP would retain funds in its ADFIT account for the payment of taxes collected from rates charged to customers in

[31] *See* 258 S.W.3d at 293, 314–15.

previous years that would never be paid, resulting in an overrecovery of stranded costs.[32]

We see no error in the PUC approach. With the benefit of expert testimony, the PUC concluded that without the gross ups an overrecovery of stranded costs would occur, because straight-line depreciation is used for ratemaking while accelerated depreciation is used for paying taxes to the IRS. The result of these divergent depreciation methods is that the ADFIT account to pay income taxes accumulates funds in the early years of an asset's life, as regulatory tax expense paid by ratepayers exceeds the actual tax expense, and then reverses in the later years. The excess funds from early years are held in the ADFIT account and then paid out in later years. Grossing up the adjustment assured that AEP would not receive a windfall in the form of customer charges to cover taxes that would never be paid. As one expert opined, without the gross ups AEP would retain a tax benefit that partially offset the disallowances, resulting in "the government partially subsidizing the disallowance[s]."

Grossing up a true-up amount to reflect the effect of taxes is not novel to this case. We have recognized, in the ratemaking context, that "[t]he propriety of including all taxes among cost of service expenses has been long established."[33] In *TIEC*, we affirmed a PUC order in a Chapter 39 case that authorized the utility to recover a competition transition charge.[34] The charge allowed the utility to recover a true-up award where carrying costs were grossed up to assure the utility an

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[32] *See* § 39.262(a) (providing that a utility "may not be permitted to overrecover stranded costs" at the true-up proceeding).

[33] *Suburban Util. Corp. v. Pub. Util. Comm'n*, 652 S.W.2d 358, 363 (Tex. 1983).

[34] 324 S.W.3d at 97.

appropriate after-tax return.[35] The gross-up worked in the utility's favor in that case, and in today's case, the interest rate AEP received on its stranded costs was also grossed up.

III. Capacity Auction True-Up

AEP complains that the PUC and the court of appeals erred in declining to base the capacity auction true-up under Section 39.262(d)(2) on actual prices obtained in the capacity auctions it conducted under Section 39.153. Specifically, it contends: "The court of appeals erred by upholding an order that disregards the true-up statute and rule, both of which prescribe a formula that must be applied regardless of whether a utility sells 15% of its capacity at auctions in compliance with the statute and rule that govern the auctions themselves." We agree.

AEP contends that due to lack of market demand it was unable to sell the full 15 percent of its capacity specified in Section 39.153 and PUC rules thereunder specifying four separate gas products, but that the Section 39.262(d)(2) capacity auction true-up should still be based on the prices actually obtained in the capacity auctions conducted under Chapter 39. The same issue arose in *State v. PUC*, and we agreed with the utility, as we agree with AEP today, that "Section 39.262 unambiguously specifies that the statutory capacity auction price, not some other blended price the PUC finds more appropriate, must be used in calculating the capacity auction true-up amount."[36] On remand, the PUC must recalculate the capacity auction true-up in a manner consistent with our decision in *State v. PUC*, rather than relying on the proxy price it selected in the true-up proceeding.

IV. Interest on Stranded Costs

[35] *Id.* at 104 n.57.

[36] ___ S.W.3d at ___.

The Consumers argue that interest on stranded costs should not have been assessed under PUC Rule 25.263(*l*)(3). They argue that we invalidated the Rule in *CenterPoint Energy, Inc. v. Public Utility Commission*.[37] The PUC contends that we only invalidated the date on which interest began to run, not the interest rate. In *TIEC*, we agreed with the PUC on this issue.[38] The PUC therefore correctly applied Rule 25.263(*l*)(3), with a modified start date, in calculating interest on stranded costs.

V. Conclusion

We grant the petition for review, and without hearing oral argument,[39] affirm in part and reverse in part the court of appeals' judgment, and remand this case to the PUC for further proceedings consistent with this opinion.

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Don R. Willett
Justice

OPINION DELIVERED: July 1, 2011

[37] 143 S.W.3d 81 (Tex. 2004).

[38] 324 S.W.3d at 101–05.

[39] *See* TEX. R. APP. P. 59.1.

IN THE SUPREME COURT OF TEXAS

NO. 08-0658

CARROLL G. ROBINSON, BRUCE R. HOTZE,
AND JEFFREY N. DAILY,
PETITIONERS,

v.

ANNISE D. PARKER, MAYOR; CITY OF HOUSTON;
HOUSTON CITY COUNCIL, ET AL.,
RESPONDENTS

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

Argued November 18, 2009

JUSTICE GREEN delivered the opinion of the Court.

JUSTICE GUZMAN did not participate in the decision.

In this case, we are asked to decide (1) whether citizens who signed a petition proposing a local ballot initiative have standing to assert their declaratory judgment claims that the voter-approved initiative is valid and must be enforced; and (2) the validity of the voter-approved initiative. Because the citizens' claims are not ripe, however, we cannot reach those issues.

I

Petitioners Carroll G. Robinson, Bruce R. Hotze, and Jeffrey N. Daily are citizens of Houston who participated to varying degrees in efforts to place a proposition regarding city revenues and spending on the ballot for public referendum. Hotze and Daily organized the petition drive and helped draft the final language of the proposal. All three Petitioners signed the petition, donated time and money to campaigns promoting the passage of the proposition, and voted in favor of it.

On November 2, 2004, Houston voters passed the proposition, called Proposition 2, as well as Proposition 1, which the Houston City Council had placed on the ballot by its own act in response to Prop. 2.[1] Prop. 1 garnered more votes, with 280,596 favorable votes, or 64% of the total, as opposed to 242,697 favorable votes for Prop. 2, or 56% of the total. However, the City of Houston determined that, because Prop. 1 and Prop. 2 conflict, Prop. 2 was ineffective and unenforceable. The City based that determination both on what Petitioners refer to as Prop. 1's "poison pill

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[1] Prop. 2 was described on the ballot as:

> The City Charter of the City of Houston shall be amended to require voter approval before the City may increase total revenues from all sources by more than the combined rates of inflation and population, without requiring any limit of any specific revenue source, including water and sewer revenues, property taxes, sales taxes, fees paid by utilities and developers, user fees, or any other sources of revenues.

Prop. 1 was described on the ballot as:

> The Charter of the City of Houston shall be amended to require voter approval before property tax revenues may be increased in any future fiscal year above a limit measured by the lesser of 4.5% or the cumulative combined rates of inflation and population growth. Water and sewer rates would not increase more than the cumulative combined rates of inflation and population growth without prior voter approval. The Charter Amendment also requires minimum annual increases of 10% in the senior and disabled homestead property tax exemptions through the 2008 tax year.

provision,"[2] and on the conflicting-ordinance provision in the Houston City Charter. *See* Hous., Tex., Code Ordinances, City Charter art. IX, § 19 (2006) ("[A]t any election for the adoption of amendments if the provisions of two or more proposed amendments approved at said election are inconsistent the amendment receiving the highest number of votes shall prevail."). The mayor therefore did not certify the results of the passage of Prop. 2 to the secretary of state, and the city council did not enter an order in the city records declaring that Prop. 2 had been adopted. *See* TEX. LOC. GOV'T CODE §§ 9.005(b) (requiring city council to pass an ordinance declaring the adoption of an initiative that receives a majority of the vote), 9.007 (requiring mayor to certify results of an election that passes a charter amendment to the secretary of state).

Petitioners sought relief from the court of appeals, which granted their petition for writ of mandamus, holding that the City had failed to perform the ministerial duties of certifying the results to the secretary of state and entering an order declaring the charter amendments to have been adopted. *In re Robinson*, 175 S.W.3d 824, 826–32 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). On the same day that they petitioned for mandamus relief, Petitioners filed the underlying suit seeking a declaratory judgment that Prop. 2 is effective and must be enforced. While that case was pending, the city council passed an ordinance recognizing that both Prop. 1 and Prop. 2 had passed but also declaring that Prop. 1 had received the higher number of votes. As a result, both propositions became part of the Houston City Charter. *See* Hous., Tex., Code Ordinances, City

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[2] Prop. 1 provides:

> If another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective.

Charter art. III, § 1; art. VI-a, § 7; art. IX, § 20 (2006). The trial court ultimately granted summary judgment in favor of Petitioners. The court of appeals, however, ruled that Petitioners lacked standing to assert their claims, relying on our holding in *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). 260 S.W.3d 463, 470–72 (Tex. App.—Houston [14th Dist.] 2008, pet. filed). The court remanded the case to the trial court to allow Petitioners to amend their pleadings and establish standing. *Id.* at 466.

Robinson, Hotze, and Daily petition for review on two grounds.[3] First, they assert that the court of appeals erred when it determined that Petitioners lack standing. Second, they ask us to consider the merits of their claim that Prop. 2 should be enforced.

II

Ripeness "is a threshold issue that implicates subject matter jurisdiction . . . [and] emphasizes the need for a concrete injury for a justiciable claim to be presented." *Patterson v. Planned Parenthood of Hous. & Se. Tex.*, 971 S.W.2d 439, 442 (Tex. 1998). In evaluating ripeness, we consider "whether, *at the time a lawsuit is filed*, the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.'" *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851–52 (Tex. 2000) (emphasis in original) (quoting *Patterson*, 971 S.W.2d at 442). Although a claim is not required to be ripe at the time of filing, if a party cannot demonstrate a reasonable likelihood that the claim will soon ripen, the case must be dismissed. *See Perry v. Del Rio*, 66 S.W.3d 239, 251 (Tex. 2001).

[3] The current Houston mayor has been substituted for her predecessor. *See* TEX. R. APP. P. 7.2(a) (automatic substitution when public officer is party in official capacity).

The record is silent as to whether the City has, in fact, failed to comply with the Prop. 2 spending caps. As the parties acknowledged at oral argument, the record in this case indicates that then-mayor Bill White, in response to Prop. 2's inclusion in the City Charter, stated his intention to comply with the caps Prop. 2 imposed. In an attempt to show noncompliance, Petitioners presented several documents with their post-submission brief. Petitioners point to a May 2009 letter from then-controller Annise Parker, who is now mayor of Houston, stating that the controller's office is "no longer responsible for analyzing the budget for compliance with Proposition 2." However, nothing in that letter or elsewhere in the record indicates that the City has actually failed or will soon fail to comply with Prop. 2's spending caps. Petitioners also point to a series of letters they sent to the City's accounting firm. In the letters, they demanded documentation of the City's compliance with Prop. 2, as well as correction of alleged errors in the City's calculation of its compliance with Prop. 2's allowable spending caps. In a transmittal letter to this Court, Petitioners stated that "proper calculations by an independent outside auditor would show that the City is not in compliance [with] the spending controls" set forth in Prop. 2. But a case is not ripe when the determination of whether a plaintiff has a concrete injury can be made only "on contingent or hypothetical facts, or upon events that have not yet come to pass." *Gibson*, 22 S.W.3d at 852. From such inconclusive documentation and mere allegations and speculation, we cannot ascertain with necessary certainty that the City has failed to comply with Prop. 2's spending caps or that it is likely to exceed the spending caps in the near future. *See Perry*, 66 S.W.3d at 249 (stating that a case based on "uncertain or contingent future events" is not ripe for judicial determination); *Patterson*, 971 S.W.2d

at 444 (explaining that a potential injury cannot be ripe unless it is established with certain and definite documentation).

Because there is no showing that Petitioners have suffered a concrete injury, we hold that Robinson, Hotze, and Daily have failed to present a sufficiently ripe, justiciable claim. We express no opinion on whether, even if the case were ripe, Robinson, Hotze, and Daily would have standing to assert their declaratory judgment claims, as "[t]he essence of the ripeness doctrine is to avoid premature adjudication . . . [and] to hold otherwise would be the essence of an advisory opinion, advising what the law would be on a hypothetical set of facts." *Patterson*, 971 S.W.2d at 444.

III

Because Petitioners' claims are not ripe for adjudication, the trial court did not have jurisdiction to hear this dispute. *See Gibson*, 22 S.W.3d at 852. Accordingly, we vacate the judgments of the court of appeals and trial court and dismiss the case for want of jurisdiction.

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Paul W. Green
Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0667

EBERHARD SAMLOWSKI, M.D., PETITIONER,

v.

CAROL WOOTEN, RESPONDENT

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

Argued November 18, 2009

JUSTICE MEDINA announced the judgment of the Court and delivered an opinion in which CHIEF JUSTICE JEFFERSON and JUSTICE HECHT joined.

JUSTICE GUZMAN filed an opinion concurring in the judgment in which JUSTICE LEHRMANN joined and in Parts I & II.B of which JUSTICE WAINWRIGHT joined.

JUSTICE WAINWRIGHT filed an opinion dissenting in part and concurring in the judgment.

JUSTICE JOHNSON filed a dissenting opinion in which JUSTICE GREEN and JUSTICE WILLETT joined.

Texas Civil Practice and Remedies Code section 74.351 requires that a trial court dismiss a health care liability claim unless the claimant serves an expert report within 120 days after filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(b). This dismissal requirement is subject to the trial court's discretion to grant one thirty-day extension for the claimant to cure a timely served but deficient report. *Id.* § 74.351(c). The trial court in this health care liability case determined that claimant's

timely served report was deficient and dismissed her suit without granting her request for an extension of time to cure the report. The court of appeals agreed the report was deficient but concluded the trial court abused its discretion by denying the requested extension. 282 S.W.3d 82, 91.

We granted the petition to consider under what circumstances a trial court might abuse its discretion when denying such an extension. Like most cases involving trial court discretion, a single rule will not fit every situation, but generally a trial court should grant an extension when the deficient report can be cured within the thirty-day period the statute permits. The court of appeals concluded, among other things, that the case should be remanded to the trial court for further proceedings, and a majority of the Court agrees with that judgment. There is no majority reasoning for why we remand, however. Three members of the Court essentially agree with the court of appeals' analysis, three members disagree with that analysis and would reverse and render, and three members disagree with the court of appeals' analysis but would nevertheless remand in the interests of justice. I am in this last group.

Because the record does not establish that the deficient expert report would have been cured if the extension had been granted in this case, I cannot say that the trial court abused its discretion in denying the extension. Although I disagree with the court of appeals' analysis of the statute and its application of the abuse of discretion standard, I conclude that the interests of justice require a remand to the trial court in this case. Accordingly, I would affirm the court of appeals' judgment remanding this cause as modified by this opinion.

I

Carol Wooten was admitted to Walls Regional Hospital in Cleburne, complaining of severe abdominal pain. Dr. Eberhard Samlowski assumed Wooten's primary care and two days later performed laparascopic gall bladder surgery. The surgery failed to relieve Wooten's pain. Following additional tests and a consult recommending further surgery to explore the abdomen, Dr. Samlowski performed an exploratory laparotomy that revealed a complete bowel obstruction with perforations in the pelvic region. Dr. Samlowski attempted to repair the perforations and adhesions he found during this surgery.

Postoperative complications resulted in Wooten's transfer to Hughley Memorial Medical Center in Fort Worth. Her admission diagnosis there included postoperative cholecystectomy and repair of bowel perforation, sepsis syndrome, acute respiratory distress syndrome, renal insufficiency/failure, acute blood loss anemia, respiratory failure, type 2 diabetes mellitus, and sarcoidosis. Four additional surgical procedures were performed on Wooten at Hughley where she remained for over sixty days.

Wooten subsequently sued Dr. Samlowski for medical negligence, serving Dr. R. Don Patman's expert report 105 days later.[1] In this report, Dr. Patman discusses the standard of care and several instances where Dr. Samlowski's care fell short. In Dr. Patman's opinion, the patient's lab results, complaints, and history did not indicate the need for gall bladder surgery. Instead, Dr. Patman states that Dr. Samlowski should have performed additional tests to discover the actual cause

[1] Dr. Patman is a board-certified general and vascular surgeon and Clinical Assistant Professor of Surgery at the University of Texas Southwestern Medical School and Attending Surgeon at Baylor University Medical Center in Dallas.

of the patient's acute abdominal pain—a complete pelvic bowel obstruction with several areas of necrosis and perforation. Regarding causation, Dr. Patman concludes that Dr. Samlowski's inaccurate diagnosis and incomplete preoperative evaluation proximately caused the patient's subsequent complications and prolonged hospitalization, and that in all likelihood the patient would require future treatment and additional surgery.

Dr. Samlowski promptly filed a motion challenging the report as "wholly deficient in providing any expert opinions regarding specifically how the care [he] rendered . . . proximately caused the injury, harm, or damages claimed." Dr. Samlowski subsequently filed a motion to dismiss after the statutory deadline for serving expert reports had passed. Wooten responded to both motions, arguing that her expert report was sufficient, but also asking for a thirty-day extension to cure the report, if the trial court found it deficient.

The trial court heard the motions and a few days later signed an order dismissing Wooten's case. No record was made at the hearing. The court's order expressly granted both of Dr. Samlowski's motions but did not mention Wooten's request for a thirty-day extension to cure. The court's order, however, disposed of Wooten's pending motion by reciting that all relief not expressly granted was denied. Wooten appealed.

A divided court of appeals reversed and remanded with directions that Wooten be granted a thirty-day extension. 282 S.W.3d 82, 91. Although the court agreed that the expert report was deficient, it nevertheless concluded that the trial court had abused its discretion[2] by not giving

[2] In *Walker v. Gutierrez*, we held that a trial court's denial of an extension to cure an expert report under former Section 13.01(g) of the Medical Liability and Insurance Improvement Act, Texas Revised Civil Statute art. 4590i, was to be reviewed for abuse of discretion. 111 S.W.3d 56, 62 (Tex. 2003). The procedures in former section 13.01 and

Wooten additional time to cure that deficiency. *Id.* at 90–91. The report was deficient, according to the court of appeals, because it did "not represent a good-faith effort to summarize the causal relationship between Dr. Samlowski's failures to meet the applicable standards of care and Wooten's claimed injury, harm, and damages." *Id.* at 90 (citing TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6)). But the court concluded that the trial court should have given Wooten additional time to cure that deficiency because the expert report was a "good-faith attempt" to comply with the statute that could easily be cured with a supplemental report. *Id.* at 91. A dissent argued that the trial court had not abused its discretion in dismissing the underlying lawsuit because the report was not "an objective good faith effort to comply with the [statutory] definition of an expert report." *Id*. at 93 (Gray, C.J. dissenting).

II

Dr. Samlowski's argument here is similar to the dissent in the court of appeals. He complains the court's concession that Wooten's expert report was not a "good faith effort" conflicts with its abuse-of-discretion holding and submits that the former negates the latter. He further submits that the court of appeals' characterization of the report as a "good faith attempt" is a meaningless distinction through which the court has merely substituted its judgment for that of the

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section 74.351 for serving expert reports and granting extensions of time to correct deficiencies are similar, although the requirements and deadlines are not exactly the same. The former statute required, and current statute requires, dismissal of the suit in the event a timely expert report is not served. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b); former TEX. CIV. STAT. art. 4590i § 13.01(e). The former statute authorized the trial court, under certain circumstances, to grant extra time to meet the statutory requirements. *See* former TEX. REV. CIV. STAT. art. 4590i § 13.01(g). So does the current statute. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c). Given the structural and substantive similarities between section 74.351 and former section 13.01, the abuse of discretion standard likewise applies to a trial court's decision to deny an extension of time under section 74.351(c).

trial court. Dr. Samlowski thus views a good faith effort in producing an expert report as the predicate for the trial court's discretion under section 74.351(c).

Wooten, on the other hand, argues that trial court discretion under section 74.351(c) should be judged by the relative good faith exhibited in a deficient expert report. The court of appeals' opinion similarly adopts this view, suggesting that the deficiency in Dr. Patman's report was too small to permit the denial of Wooten's motion to cure. 282 S.W.3d at 90. Wooten concludes that the court of appeals' judgment should be affirmed because a fair reading of Dr. Patman's report shows that her claim has merit and the report's defect easily cured.[3]

Neither party's argument proposes a reasonable scheme for the exercise or review of the trial court's discretion under section 74.351(c). Dr. Samlowski's argument suggests that trial court discretion in this instance is absolute, while Wooten's indicates that appellate review is not for abuse of discretion, but de novo. Both arguments are based on a similar faulty premise: that trial court discretion under section 74.351(c) should be measured or controlled by some notion of good faith. Good faith, however, is not mentioned in section 74.351(c).

Subsection (c) merely states that "the court may grant one 30-day extension" if elements of the expert report are deficient. TEX. CIV. PRAC. & REM. CODE § 74.351(c).[4] The term "good faith"

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[3] Wooten also argued in the court of appeals and in her brief to this Court that Dr. Patman's report was sufficient, but at oral argument she conceded that the report was deficient.

[4] Section 74.351(c) provides in full:

> (c) If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.

is used in the statute, but it appears in a later provision discussing motions that challenge "the adequacy of the expert report." *Id*. § 74.351(*l*). Subsection (*l*) states that "[a] court shall grant a motion challenging the adequacy of an expert report [when] the report does not represent an objective *good faith* effort to comply with the definition of an expert report[.]" TEX. CIV. PRAC. & REM. CODE § 74.351(*l*) (emphasis added).

We have explained that a "good faith effort" in this context simply means a report that does not contain a material deficiency. Therefore, an expert report that includes all the required elements, *Jernigan v. Langley*, 195 S.W.3d 91, 94 (Tex. 2006), and that explains their connection to the defendant's conduct in a non-conclusory fashion, *Bowie Memorial Hospital v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002), is a good faith effort. In contrast, a report that omits an element or states the expert's opinions in conclusory form is not a good faith effort. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001). Under these cases, a "good faith effort" will produce an adequate expert report for which no extension under section 74.351(c) is needed. A deficient expert report then is the predicate for the exercise of the trial court's discretion under section 74.351(c), and not, as Dr. Samlowski suggests, proof that the trial court decided the matter correctly.

Dr. Samlowski's complaint that the court of appeals has merely substituted its judgment for that of the trial court, however, is more troubling. The court of appeals described Dr. Patman's report as "thorough, well-detailed, and—except for one small and easily curable deficiency—patently

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TEX. CIV. PRAC. & REM. CODE § 74.351(c).

and sufficiently specific." 282 S.W.3d at 90. But the underlying merit of Wooten's claim and the relative ease of curing Dr. Patman's report are matters in dispute. It is not enough that the court of appeals would have decided the dispute differently because the abuse of discretion standard generally "insulates the trial judge's reasonable choice from appellate second guessing." W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L. J. 47, 62 (2006). As we have said, "to find an abuse of discretion [when factual matters are in dispute], the reviewing court must conclude that the facts and circumstances of the case extinguish any discretion in the matter." *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985).

A trial court therefore abuses its discretion when it renders an arbitrary and unreasonable decision lacking support in the facts or circumstances of the case. *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997). Similarly, a trial court abuses its discretion when it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles. *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). Section 74.351(c)'s text, however, provides no particular guidance on how the court should exercise its discretion, stating merely that "the court may grant one 30-day extension to the claimant in order to cure [a timely but deficient report]." *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c). Guidance must come instead from the broader purposes of the Texas Medical Liability Act of which section 74.351(c) is a part.

III

A core purpose of this legislation was to identify and eliminate frivolous health care liability claims expeditiously, while preserving those of potential merit. Act of June 2, 2003, 78th Leg., R.S.,

ch. 204, § 10.11(b)(1), (3), 2003 Tex. Gen. Laws 847, 884 (seeking to reduce frivolous claims but "in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis"); *see also Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (noting that in "section 74.351, Legislature struck a careful balance between eradicating frivolous claims and preserving meritorious ones"). To further this goal, the statute sets a deadline for the claimant to substantiate the underlying health care liability claim with expert reports.

The claimant is required to serve each defendant physician or other health care provider with an expert report within 120 days of filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(a). This report must provide a fair summary of the expert's opinions "regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." *Id*. § 74.351(r)(6). If the report is deficient, it may be challenged, and a deficient report may likewise lead to dismissal. *Id*. § 74.351(a), (b) & (*l*). But a deficient report does not invariably require dismissal of the underlying health care liability claim. The statute incorporates a significant exception "explicitly giv[ing] trial courts discretion to grant a thirty day extension so that parties may, where possible, cure deficient reports." *Ogletree v. Matthews*, 262 S.W.3d 316, 320 (Tex. 2007) (citing TEX. CIV. PRAC. & REM. CODE § 74.351(c)).

The overriding principle guiding trial court discretion under section 74.351(c) then is the elimination of frivolous claims and the preservation of meritorious ones. An adequate expert report is how the statute distinguishes between the two. A trial court should therefore grant an extension when a deficient expert report can readily be cured and deny the extension when it cannot. In

making that determination, a trial court may sometimes err and dismiss a claim when the report could have been cured. A reasonable error in judgment, however, is not an abuse of discretion. *See Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (noting that reviewing court may not substitute its judgment as to factual matters committed to trial court's discretion).

Wooten has conceded in this Court that her report was deficient but maintains that she was entitled to an extension because her expert report could easily have been cured. The court of appeals agreed, but this is only the court's best judgment in the matter. The record does not establish that the deficient report *would* have been cured if the extension had been granted, and a claimant's mere assertion or belief that it *could* have been cured with an extension of time does not demonstrate an abuse of discretion under section 74.351(c). When the trial court denies a motion to cure, the claimant must make a record that demonstrates the deficiency would have been cured.

The claimant must therefore be prepared to cure a deficient expert report whether or not the trial court grants the claimant's motion. When, as in this case, the trial court simultaneously finds the expert report deficient, denies a motion to cure, and dismisses the underlying health care liability claim, the claimant must move the court to reconsider and promptly fix any problems with the report. This should further be done within the statutory, thirty-day period, thereby demonstrating that the report would have been cured had the extension been granted. If this is accomplished and the court refuses to reconsider, the now compliant report will typically establish the trial court's abuse of discretion. Wooten didn't make such a record in the trial court, and thus we are left to speculate about whether she could have cured her expert report with an extension.

IV

I, however, agree with Justice Guzman's view that "trial courts should err on the side of granting claimants' extensions to show the merits of their claims." ___ S.W.3d at ___. The right answer in many cases will be for the trial court to grant one thirty-day extension upon timely request and be done with it. Justice Guzman agrees that this report was deficient, but good enough to warrant an extension, and again I do not disagree.

The statute, however, grants the trial court discretion in the matter, and Justice Guzman's analysis appears to be no different from that of the court of appeals, which I view as merely a substitution of the appellate court's discretion for that of the trial court. Under her analysis, it remains unclear how we are to distinguish between deficient reports that demonstrate merit and deficient reports that do not, other than by Justice Potter Stewart's famous maxim: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring) (stating his test for determining hard-core pornography outside the bounds of constitutional protection). Because the expert report was deficient as served, I cannot agree unequivocally that the trial court abused its discretion when denying the motion to cure. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b) (stating that if an expert report has not been served, the court shall, subject to the court's discretionary power to grant one 30-day extension, dismiss the claim).

V

Although the record in this case does not clearly indicate that the trial court abused its discretion, Dr. Patman's report is largely as described by the court of appeals—"thorough and well-detailed." 282 S.W.3d at 90. The court of appeals was plainly concerned about whether justice had

been done in the trial court. And although the claimant did not follow the procedure I set out in this opinion, I too am not unsympathetic. A claim is not typically saved by doing precisely what the trial court has refused permission to do. But when a motion to cure under section 74.351(c) is denied, the claimant must act to correct any problems with the expert report in a timely manner to demonstrate an abuse of discretion.

The statute, however, does not express the procedure I have outlined today. Because the statute is silent on the principles and procedure that should control the trial court's discretion in this area and the arguments of the parties unfocused as a result, I conclude that the interests of justice will best be served by a remand to the trial court. *See, e.g., Low v. Henry*, 221 S.W.3d 609, 621 (Tex. 2007) (remanding "to allow the parties to present evidence responsive to our [new] guidelines"); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 195 (Tex. 2004) ("Because the parties have not focused on the issue we think is crucial, we conclude that the interests of justice would be best served by a new trial.").

* * *

The court of appeals' judgment is modified to reflect a remand to the trial court for further proceedings, and the court's judgment, as modified, is affirmed.

David M. Medina
Justice

Opinion Delivered: February 25, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0667

EBERHARD SAMLOWSKI, M.D., PETITIONER,

v.

CAROL WOOTEN, RESPONDENT

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

Argued November 18, 2009

JUSTICE WAINWRIGHT, dissenting in part and concurring in the judgment.

The requirement to serve an expert report from a qualified health care expert on defendant health care providers within 120 days of filing suit is intended to cull out at an early stage of the litigation medical malpractice claims that have not been shown to have merit. The Texas Medical Liability Act instructs courts to dismiss such claims. TEX. CIV. PRAC. & REM. CODE § 74.351. At that stage, the claims that have been shown likely to have merit may proceed. *See Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (noting that section 74.351 strikes a balance between "eradicating frivolous claims and preserving meritorious ones"). The hurdle dividing the two is the expert report.

The Legislature established an expert report hurdle that should be cost and time efficient. *See In re McAllen Med. Cntr., Inc.*, 275 S.W.3d 458, 467 (Tex. 2008). The question in this case is

how to define the characteristics of an inadequate expert report that nevertheless entitle a claimant to obtain a statutory extension to cure the report.

JUSTICE MEDINA attempts to erect a just standard under the applicable statute for reviewing trial court decisions to grant or deny extensions to cure expert reports. In his view, "generally a trial court should grant an extension when the deficient report can be cured within the thirty-day period the statute permits." ___ S.W.3d ___. Unfortunately, this standard is neither cost nor time efficient. His opinion directs the trial court to consider matters beyond the four corners of the report but leaves undecided the limits on the scope of extraneous matter that a trial court may consider. Whether it's an attorney's busy schedule, the client's unavailability, the expert's mistake, or something else, the trial court must conduct a hearing on, and weigh the credibility of, such extraneous assertions. His opinion then requires the plaintiff to move the trial court to reconsider a denial of an extension with the option of filing a cured expert report, the sufficiency of which the trial court then ponders. More time passes. This procedure will often add to the litigation and raise the costs, extend the time, and undermine the purpose of the intended efficient hurdle. The statute contains no mention of extraneous evidence, additional delay, or additional hearings, and neither it nor the opinion place deadlines on completion of these new procedures.

In my view, for an extension to be considered, an expert report must address all of the elements required by statute to be in the report—duty, breach, and a causal relationship between the breach and the plaintiff's injury.[1] An expert report is:

[1] There is no challenge in this case to the expert's qualifications.

> [A] written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6). The Legislature determined that a medical malpractice claim supported by an expert report that satisfies subsection (r)(6) possesses the requisite merit to proceed beyond that hurdle. If such a report has not been served on the defendant health care provider within 120 days after the original petition is filed, on motion of the defendant the court "shall" dismiss the claim. *Id.* § 74.351(b). However, if the report fails to satisfy subsection (r)(6) "because elements of the report are found deficient," then the trial "court may grant one 30-day extension to the claimant in order to cure the deficiency." *Id.* § 74.351(c). The legislative requirement that elements of the expert report be found deficient as a condition to considering an extension presumes that the elements at least be included in the report. *See Ogletree v. Matthews*, 262 S.W.3d 316, 320 (Tex. 2007) ("[A] deficient report differs from an absent report."); *Leland*, 257 S.W.3d at 207 ("The statute does not allow for an extension unless, and until, elements of a report are found deficient . . . ."). Unless an expert report addresses all of the required elements, section 74.351(c) does not authorize a trial court to consider an extension. As we explained in *Walker v. Gutierrez*, a claimant's expert report that omits one or more of the statutorily required elements fails to be eligible for a grace period. 111 S.W.3d 56, 65 (Tex. 2003) (interpreting the predecessor statute—the Medical Liability and Insurance Improvement Act, TEX. REV. CIV. STAT. art. 4590i,

§ 13.01(r)(6), *repealed by* Act of June 2, 2003, 78th Leg., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884).[2]

I also question whether the standard for a court's determination of the adequacy of an expert report, a precondition to considering an extension, should be an abuse of discretion. In *American Transitional Care Centers of Texas, Inc. v. Palacios*, we held that to be the standard. 46 S.W.3d 873 (Tex. 2001). But *Palacios* relied in large part on the statement in the predecessor statute, article 4590i, § 13.01(e), that upon failure of the report to satisfy statutory requirements the court must "enter an order as sanctions." *Id.* at 877. In the amended language of the Chapter 74 recodification of article 4590i, if an expert report is not timely served, the trial court shall "enter an order" that dismisses the claim. TEX. CIV. PRAC. & REM. CODE § 74.351(b). The characterization that such an order is a "sanction" has been removed from the text of the statute. Along with it, *Palacios*'s proper and supporting rationale that "[s]anctions are generally reviewed under an abuse-of-discretion standard" was removed as well. *See* 46 S.W.3d at 877.

Appellate review of an expert report is analogous to review of a summary judgment. Appellate courts review the same pieces of paper that the trial court reviews. Personal observations

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[2] While a trial court's consideration of a motion to dismiss and a motion for an extension are inseparable, *see Ogletree*, 262 S.W.3d at 321, the statutory grounds for dismissal of a claim versus granting an extension to cure an expert report are, to some degree, distinct. Section 74.351(*l*) instructs that a claim for which the corresponding expert report does not represent a good faith effort to provide an adequate expert report "shall" be dismissed on proper motion. TEX. CIV. PRAC. & REM CODE § 74.351(*l*). If that mandate governed the entirety of section 74.351, then the authorization to grant an extension in section 74.351(c) would be meaningless. *See Ogletree*, 262 S.W.3d at 321. Further, "good faith" is a consideration in dismissal of claims but not in extensions to cure the report. I agree with JUSTICE MEDINA's opinion that "good faith" is not a consideration in the analysis of an extension under section 74.351(c). ___ S.W.3d ____. "Good faith" is important to determining the adequacy of an expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(*l*). The term is in the text of section 74.351(*l*) but not in the text of section 74.351(c). It therefore appears that the grounds for considering the dismissal of a report versus the extension of time to serve an adequate report are independent, except for the initial determination that the report is inadequate.

of human behavior that appropriately suggest deference to certain trial court rulings in proceedings with live witnesses do not arise when the trial court interprets a document. *See Otis Elevator Co. v. Parmelee*, 850 S.W.2d 179, 181 (Tex. 1993) ("[Where] the trial court heard no evidence but expressly based its decision on the papers filed and the argument of counsel . . . there are no factual resolutions to presume in the trial court's favor."). I would suggest a de novo standard of review on appeal for rulings on the adequacy of expert reports under Chapter 74. *Cf. Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003) (reviewing a trial court's grant of summary judgment de novo); *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650–51 (Tex. 1999) (reviewing a trial court's legal conclusions on an unambiguous contract de novo).

JUSTICE JOHNSON argues that the word "may" in section 74.351(c) provides a trial court discretion in granting or denying an extension. But the Code Construction Act also instructs that "may" could also denote a legislative grant of power to act. TEX. GOV'T CODE § 311.016(1) ("'May' creates discretionary authority *or grants permission or a power*." (emphasis added)). If courts are interpreting a document and are not issuing a sanction, the logic for an abuse of discretion standard falls away. JUSTICE MEDINA expands the extension analysis to include extraneous evidence, both before and after the trial court's decision, laying the groundwork for his argument for an abuse of discretion standard. Besides the increased litigation expense, such a standard will also result in disparate rulings in different courts addressing materially indistinct expert reports. In these circumstances, a de novo standard would promote consistency and predictability across the state.

Applying a de novo standard of review to this case, I would reverse the trial court's ruling because although elements of the expert report were found deficient, the report addressed each of

the elements required by the statute. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c); *Walker*, 111 S.W.3d at 65. I therefore concur in the Court's judgment, for the reasons explained herein. I also join Parts I and II.B of JUSTICE GUZMAN's concurrence.

_____

Justice Dale Wainwright

OPINION DELIVERED: February 25, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0667

EBERHARD SAMLOWSKI, M.D., PETITIONER,

v.

CAROL WOOTEN, RESPONDENT

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

Argued November 18, 2009

JUSTICE JOHNSON, joined by JUSTICE GREEN and JUSTICE WILLETT, dissenting.

Texas Civil Practice and Remedies Code section 74.351 provides that a trial court must dismiss a health care liability suit unless the claimant serves an expert report within 120 days after filing suit. It also provides that if a report is served timely but is deficient, the trial court "may" grant one thirty-day extension for the claimant to cure the report.

I agree with Justice Medina that the trial court did not abuse the discretion afforded it by statute in denying Wooten's motion for an extension. I do not agree with him to the extent he indicates that if Wooten had served a cured report and motion for reconsideration within thirty days after the trial court denied her motion for extension, those actions and the cured report could be considered in determining if the trial court abused its discretion by denying the motion for extension.

The trial court's ruling on a motion for reconsideration or motion for new trial would have been reviewable for abuse of discretion had Wooten filed either of them, which she did not. But events occurring after a trial court's ruling on a motion should not be considered in determining whether the ruling was an abuse of discretion.

The Court's action in affirming and modifying the court of appeals' judgment results in the reversal of an errorless trial court judgment. I would reverse the court of appeals' judgment and affirm that of the trial court. Because the Court does not, I dissent.

I. Background

After Carol Wooten sued Dr. Samlowski, alleging that he negligently treated her, she timely filed and served a report by R. Don Patman, M.D. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a) (requiring a healthcare liability claimant to file an expert report within 120 days of filing suit). Dr. Samlowski timely objected to the report, asserting that the report was conclusory as to the causal relationship between his care and the damages Wooten claimed. *See id.* In her response to the motion, Wooten essentially repeated part of the report's contents, claimed the report met the requirements of section 74.351, and requested a thirty-day extension to cure any inadequacies the trial court found in the report. *See id.* § 74.351(c). Dr. Samlowski then filed a motion to dismiss Wooten's suit because the report was deficient. *See id.* § 74.531(b).

After a hearing where no evidence was introduced, the trial court determined that Dr. Patman's report did not represent a good faith effort to comply with the expert report requirements of section 74.351 and granted Dr. Samlowski's motion to dismiss. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001) (noting that a report that does not set out

elements required by the statute or states those elements in conclusory fashion does not constitute a good faith effort to comply with the statute). Without taking any further action in the trial court, Wooten appealed.

II. Discussion

A. Expert Report

The claimant in a health care liability suit must serve each defendant with an expert report within 120 days of filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(a).[1] If an expert report is not timely served, the trial court "shall" dismiss the claim. *Id.* § 74.351(b). The statutory directive to

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[1] In relevant part, Texas Civil Practice and Remedies Code section 74.351 reads as follows:

> (a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the original petition was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.
>
> (b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to subsection (c), 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.
>
> (c) If an expert report has not been served within the period specified by subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.
>
> . . . .
>
> (l) A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in subsection (r)(6).

dismiss applies to both absent and deficient reports. *See id.* § 74.351(c); *Lewis v. Funderburk*, 253 S.W.3d 204, 207 (Tex. 2008). However, if an expert report has not been timely served because elements of the report are found deficient, the court "may" grant one thirty-day extension to allow the claimant to cure the deficiency. TEX. CIV. PRAC. & REM. CODE § 74.351(c).

B. Standard of Review

As Justice Medina discusses, the standard by which the trial court's order is reviewed is abuse of discretion. *See* ___ S.W.3d at ___ n.2. And when a trial court order is reviewed for abuse of discretion, the order necessarily is reviewed based on the record as it was at the time the trial court made its ruling. *See Univ. of Tex. v. Morris*, 344 S.W.2d 426, 429 (Tex. 1961); *Stephens County v. J.N. McCammon, Inc.*, 52 S.W.2d 53, 55 (1932) ("When an appellate court is called upon to revise the ruling of a trial court, it must do so upon the record before that court when such ruling was made."); *Beard v. Comm'n for Lawyer Discipline*, 279 S.W.3d 895, 902 (Tex. App.—Dallas 2009, pet. denied); *Methodist Hosps. of Dallas v. Tall*, 972 S.W.2d 894, 898 (Tex. App.—Corpus Christi 1998, no pet.) ("It is axiomatic that an appellate court reviews actions of a trial court based on the materials before the trial court at the time it acted.").

C. Abuse of Discretion and Section 74.351

The Legislature has provided that in statutes "unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute . . . '[m]ay' creates discretionary authority or grants permission or a power" and "'[s]hall' imposes a duty." TEX. GOV'T CODE § 311.016. The parties do not contend, and the context does not indicate, that in section 74.351 either "shall" or "may" should be given different

meanings than those prescribed by section 311.016. *See 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). Thus, if the trial court properly determines that an expert report is deficient, then the statutory language not only authorizes dismissal of the suit, it imposes a duty on the trial court to dismiss it. TEX. CIV. PRAC. & REM. CODE § 74.351 (b)(2). That duty, however, is subject to the permissive power afforded in the same section for the trial court to grant an extension. *Id.* § 74.351(c).

The situation is similar to the one the Court faced in *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670 (Tex. 2007). There, the Court was called upon to construe a statute providing that if a trial court "finds that in the interest of justice a claim or action to which this section applies would be more properly heard in a forum outside this state, the court *may* decline to exercise jurisdiction." *See* TEX. CIV. PRAC. & REM. CODE § 71.051(a) (emphasis added), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.09 2003, Tex. Gen. Laws 855. We had previously held that section 71.031 of the Civil Practice and Remedies Code afforded non-residents an absolute right to try cases such as the one filed against Pirelli in Texas courts. *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 676, 678 (Tex. 1990). Thus, the issue before us in *In re Pirelli* was whether the trial court abused its discretion by failing to grant a forum non conveniens motion to dismiss pursuant to the permission granted in section 71.051, despite section 71.031's effective mandate that the trial court exercise jurisdiction over the case. We held that the trial court abused its discretion. We explained that the purposes of the forum non conveniens doctrine informed the guiding principles against which we measured the trial court's exercise of discretion. *In re Pirelli*, 247 S.W.3d at 675-76.

In construing the trial court's authority under the permissive statute, the Court relied, in part, on *In re Van Waters, Inc.*, 145 S.W.3d 203 (Tex. 2004), where the Court concluded mandamus relief was available because the trial court abused its discretion by consolidating twenty cases for trial even though the rule governing consolidations was permissive in nature. *See* TEX. R. CIV. P. 174(a). The Court looked to the principles underlying the rule and said that in *Van Waters* "the trial court's consolidation order did not comport with the principles we have articulated that must guide a court's exercise of discretion under the rule." *In re Pirelli*, 247 S.W.3d at 676.

Similarly, in *In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998), the Court considered the permissive language of Texas Rule of Civil Procedure 174(b), which provides that a trial court "in furtherance of convenience or to avoid prejudice may order a separate trial" of claims or issues. *See* TEX. R. EVID. 174(b). The Court referenced with approval *Womack v. Berry*, 291 S.W.2d 677 (Tex. 1956) and the principle set out there: the permissive "may" does not afford a trial court unlimited discretion, but rather requires the exercise of sound discretion based on all the circumstances of the particular case. *Ethyl Corp.*, 975 S.W.2d at 610.

Just as the Court determined that the trial court's discretion was not unlimited in *In re Pirelli* and *Womack*, a trial court's discretion should not be unlimited pursuant to the permissive "may" in section 74.351(c). Section 74.351(c) requires the court to exercise sound discretion under all the facts and circumstances of the case, including the language and purposes of Chapter 74. *See Ethyl Corp.*, 975 S.W.2d at 610.

D. Factors for a Trial Court to Consider

Wooten argues that if a report such as Dr. Patman's is deficient, the trial court should not be limited to the report in deciding whether to grant an extension. I agree.

When a defendant challenges the adequacy of an expert report, the trial court is to determine whether the report is adequate based only upon the contents of the report. *See Palacios*, 46 S.W.3d at 878. As we noted in *Palacios*, the prior statute focused on the contents of the report with regard to the trial court's determination of whether the report was an objective good faith effort. *Id.* at 878. The current statute also focuses on the report's contents. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(l) (stating that a motion challenging the adequacy of a report shall be granted only if "it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply" with the statutory expert report requirements). In contrast, section 74.351 is not so focused. It places no limitation on what the court may consider in exercising its discretion:

> (c) If an expert report has not been served within the period specified by subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency.

Id. § 74.351(c). So, although the deficient report's content is one factor the trial court must consider in determining if it will grant an extension to cure, the court should not be limited to considering only the content of the report. *See id.*; *Womack*, 291 S.W.2d at 683.

The statute provides guidance as to what factors a trial court may consider when determining whether to grant an extension to cure. Part of the purpose of requiring an expert report in health care liability suits is to remove unwarranted delays and the attendant litigation expense involved in disposing of non-meritorious claims. *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 467 (Tex.

2008). Hard-and-fast deadlines for both serving and objecting to reports advance that purpose by accelerating the disposition of such cases. *See Intracare Hosp. N. v. Campbell*, 222 S.W.3d 790, 797 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Mokkala v. Mead*, 178 S.W.3d 66, 76 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). From the Legislature's establishing of a deadline for serving a report and directing that the suit shall be dismissed unless the deadline is met or the trial court grants an extension "in order *to cure* the deficiency," at least three criteria for the granting of an extension of time can be distilled. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c) (emphasis added). First, the deficient report must qualify as a report, albeit a deficient one. Second, the deficient report must have been served within the statutorily-specified time limit. Third, the deficient report will be cured during the extension if one is granted.

In many, if not most, instances the determination of whether a report will be cured if an extension is granted will be a fact question. And a trial court generally will not have abused its discretion by denying a motion for an extension if there is conflicting evidence on the matter. *See Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) ("With respect to resolution of factual issues or matters committed to the trial court's discretion, for example, the reviewing court may not substitute its judgment for that of the trial court."); *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978) (noting that an abuse of discretion does not exist where the trial court bases its decision on conflicting evidence). So, the trial court's discretionary refusal to grant an extension will not ordinarily be an abuse of discretion unless the record conclusively shows that the report would have been timely cured if an extension had been granted.

The import of Justice Medina's opinion is that a cured report served within thirty days after the denial of an extension can be considered in determining whether the trial court abused its discretion in denying the extension. Because a trial court's actions are reviewed based on what was before the court at the time it ruled, I disagree. *See Univ. of Tex.*, 344 S.W.2d at 429; *Stephens County*, 52 S.W.2d at 55. Which is not to say that if a claimant such as Wooten were to make a proper record on a motion to reconsider or motion for new trial, an appellate court could decline to fully review the trial court's action on the motion. For example, if a trial court denied an extension to a claimant whose timely-served report was deficient, then the claimant timely filed a motion for new trial or motion to reconsider and served a cured report, the trial court's ruling on the motion would be reviewable on appeal. *See In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006) ("We review a trial court's denial of a motion for new trial for abuse of discretion."); *Simon v. York Crane & Rigging Co., Inc.*, 739 S.W.2d 793, 795 (Tex. 1987) (concluding that the decision whether to grant a motion for new trial is addressed to the trial court's discretion, and the court's ruling will not be disturbed on appeal absent a showing of an abuse of discretion). And that review would necessarily be in light of the Legislature's purpose to have non-meritorious cases promptly disposed of while allowing meritorious cases to proceed.

E. Application

Wooten timely served Dr. Patman's report, but there was no evidence before the trial court when it ruled on the motions of Dr. Samlowski and Wooten to prove that the report would have been cured if a thirty-day extension had been granted. Dr. Samlowski's motion to dismiss was heard on August 28, 2007, over three months after he filed his objection to Dr. Patman's report. As relevant

to this matter, the record before the trial court at the hearing consisted of Dr. Patman's report dated April 15, 2007 and served on April 26, 2007, Dr. Samlowski's objection, and Wooten's response to the objection. Wooten's response asserted the report was sufficient and requested an extension of time to cure the report if it was not. Yet there was no evidence in the record about whether the report could or would be cured if an extension were granted. Certainly, Wooten did not conclusively prove that the report would be cured by offering evidence such as a supplemental report actually curing the deficiency in Dr. Patman's report. Thus, she has not shown that the trial court abused its discretion by denying her request for an extension.

III. Remand

Even though a majority of the Court is not of the opinion that the trial court abused its discretion or otherwise committed error by dismissing Wooten's case, the Court nevertheless determines that remand for further proceedings is appropriate. I disagree with that decision for two reasons.

First, our rules provide that a judgment may not be reversed on appeal on the ground that a trial court committed an error of law unless that error (1) probably caused the rendition of an improper judgment, or (2) probably prevented the appealing party from properly presenting the case to the appellate courts. *See* TEX. R. APP. P. 44.1, 61.1; *In re Columbia Med. Ctr. of Las Colinas, L.P.*, 290 S.W.3d 204, 211 (Tex. 2009) ("[A]ppellate courts are limited to the issues urged and record presented by the parties and . . . are specifically limited to reversing judgments only for errors that probably resulted in entry of an improper judgment or precluded a party from properly presenting its case on appeal."); *Pat Baker Co., Inc. v. Wilson*, 971 S.W.2d 447, 450 (Tex. 1998) ("It

is axiomatic that an appellate court cannot reverse a trial court's judgment absent properly assigned error."); *Sears, Roebuck & Co. v. Marquez*, 628 S.W.2d 772, 773 (Tex. 1982) (noting that it is not within the power of an appellate court to reverse a judgment absent error); *Barnum v. Lopez*, 471 S.W.2d 567, 568 (Tex. 1971) (noting that an appellate court may only reverse a case for error committed by the trial court). Neither of those situations exist here because the trial court did not commit error. The substance of the Court's action today is to endorse an erroneous court of appeals judgment that reversed an errorless trial court judgment. The Court then, in effect, grants a new trial even though the rules of procedure adopted by this Court vest such discretion in trial courts, *see* TEX. R. CIV. P. 320, not appellate courts. *See* TEX. R. APP. P. 44.1, 61.1.

Second, when a litigant is faced with a motion to dismiss because of some defect in her pleadings or filings, there is nothing procedurally new about her filing a corrected pleading or, in this case, a corrected report, before seeking relief from the trial court. *Cf. Leland v. Brandal*, 257 S.W.3d 204, 205 (Tex. 2008) (discussing a supplemental expert report served in response to defendants' objections). Nor is there anything new about a litigant whose case has been dismissed seeking a new trial or moving the trial court to reconsider its dismissal ruling and filing post-dismissal affidavits or presenting evidence in support of his or her motion. *See, e.g.*, TEX. R. CIV. P. 320, 329b.

The "procedure . . . outlined today" by Justice Medina is not new, *see* ___ S.W.3d at ___; it encompasses well-known procedural devices. Wooten was not ambushed; she knew exactly what Dr. Samlowski's objection was and had adequate opportunity to show the trial court that the alleged defect in Dr. Patman's report was curable—if it was. She failed to either file a supplemental report attempting to address Dr. Samlowski's objection or present other such evidence at the hearing. Nor

did she seek relief by filing a post-dismissal motion for reconsideration or motion for new trial, serving a supplemental report or offering other evidence to demonstrate that Dr. Patman's report was curable, and requesting a trial court ruling.

In sum, Wooten did not avail herself of standard procedural avenues. She does not present a record that supports reversing the trial court's judgment.

IV. Conclusion

The court of appeals' judgment is erroneous because it reverses an error-free trial court judgment. I would reverse the judgment of the court of appeals and affirm that of the trial court.

Phil Johnson
Justice

OPINION DELIVERED: February 25, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0667

EBERHARD SAMLOWSKI, M.D., PETITIONER,

v.

CAROL WOOTEN, RESPONDENT

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

Argued November 18, 2009

JUSTICE GUZMAN, joined by JUSTICE LEHRMANN, and by JUSTICE WAINWRIGHT as to Parts I and II-B, concurring.

I agree with the Court that the proper disposition is to remand this case to the trial court for further proceedings; accordingly, I join the Court's judgment. However, I do not join Justice Medina's opinion because I disagree with the new procedure Justice Medina sets out to challenge a trial court's failure to grant a thirty-day extension to cure. Additionally, I disagree with Justice Medina's conclusion that the trial court did not abuse its discretion.

I. Procedural Issues

At issue in this case is whether the trial court abused its discretion by denying Carol Wooten a thirty-day extension to cure her inadequate expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c). Justice Medina holds the trial court did not abuse its discretion, but then proceeds into

new territory to address the manner in which a claimant must challenge a trial court's denial of a motion to cure. Justice Medina concludes that when a trial court finds an expert report inadequate and denies a motion to cure, the claimant "*must* move the court to reconsider and promptly fix any problems." __ S.W.3d at __ (emphasis added). Justice Medina states that a subsequently filed compliant report will demonstrate the trial court abused its discretion by failing to grant the extension. *Id.* Justice Medina's approach thus establishes a new procedure for challenging the denial of a motion to cure.

But rules already exist governing the manner in which a person may challenge the trial court's denial of a motion to cure, *see, e.g.*, TEX. CIV. PRAC. & REM. CODE § 74.351(c); TEX. R. CIV. P. 329b (establishing timeline for filing certain motions); TEX. R. APP. P. 26.1 (establishing timeline for perfecting appeal), and it is unclear how these rules intersect with the procedure created in Justice Medina's opinion. For example, what if a plaintiff believes the initially-served report is not deficient and seeks to challenge the trial court's finding on that issue as well as the failure to grant an extension, as Carol Wooten did in this case? Is that plaintiff also required to submit a new report and, if so, would that action waive the plaintiff's complaint that the initial report was not deficient? Additionally, when a claimant files a new report after the trial court has denied a motion for extension, what happens if a trial court declines to timely set a motion for reconsideration for hearing? Is a claimant then required to challenge the trial court's failure to set the motion for a hearing, further delaying resolution of the question of whether the trial court erroneously denied the extension in the first place? Or must the court of appeals consider whether the amended report is sufficient to establish the trial court abused its discretion in denying an extension? Justice Medina

also does not address when the appellate deadlines begin to run—whether from the time the trial court signs the order of dismissal or, because a claimant must move the court to reconsider, from the denial of a motion to reconsider. Nor does Justice Medina consider whether this deadline is different if a claimant chooses not to file an amended report, but to stand on the initial report filed.

Aside from the procedural questions raised, Justice Medina erroneously concludes that an amended report filed *after* the trial court has denied a motion for extension will "typically establish the trial court's abuse of discretion." __ S.W.3d at __. It is well-established that a reviewing court is to determine whether a trial court abused its discretion based on the record before the trial court at the time the decision was made. *Univ. of Tex. v. Morris*, 344 S.W.2d 426, 429 (Tex. 1961); *see Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 52 n.7 (Tex. 1998). I believe, based on this principle and the purposes of the expert report requirement and the thirty-day extension to cure, that rather than considering an amended report submitted after the trial court has denied an extension, a reviewing court should analyze whether a trial court abused its discretion based on the expert report initially submitted.

II. Abuse of Discretion

A. Discretion in Reviewing Expert Reports

If a trial court finds an expert report deficient, it "may" grant one thirty-day extension to cure the report. TEX. CIV. PRAC. & REM. CODE § 74.351(c). This statutory authority is couched in permissive terms, but it is not unfettered. *See In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 676 (Tex. 2007) (orig. proceeding). While "may" gives a trial court discretion, discretionary decisions must not be arbitrary or unreasonable and must be made with reference to guiding principles. *Id.* (citing

Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997)); *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956) (orig. proceeding) (noting that use of the permissive word "may" does not vest a court with unlimited discretion, but requires a trial court to exercise that discretion within "limits created by the circumstances of the particular case"). The principles that are to guide a trial court's discretionary decision are determined by the purposes of the rule at issue. *See In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 207 (Tex. 2004) (orig. proceeding); *Womack*, 291 S.W.2d at 683. Justice Medina acknowledges this and looks to the "broader purposes" of the Texas Medical Liability Act (TMLA) to determine the principles that should guide a trial court's determination of whether to grant an extension. __ S.W.3d at __. But the purpose of the actual rule permitting a trial court to grant an extension must also be considered. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c).

B. Scope of the Trial Court's Review

One stated purpose of section 74.351 is to "reduce excessive frequency and severity of health care liability claims." *Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (quoting Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1), 2003 Tex. Gen. Laws 847, 884). The expert report requirement helps accomplish this purpose by providing a basis for the trial court to determine a claim has merit. *Id.* at 206-07. Justice Medina and the dissent both conclude that factors other than the report should be considered to determine whether the trial court abused its discretion by denying an extension. But if one purpose of the report is to inform the trial court of the merits of a claim, then the purpose of an extension is to provide a claimant the opportunity to amend a report to a point that would allow the trial court to make that determination. We have previously held that a trial court should look no further than the four corners of an expert report when considering a motion

challenging the adequacy of the report because all the information relevant to that inquiry is contained within the report. *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). Section 74.351(l) does not explicitly state that a trial court may not look beyond the report to determine adequacy, but we have held this is so because the statute specifically focuses on what the report discusses. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001). The same is true in a trial court's consideration of a motion for extension: the extension provision focuses only on the report itself. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c) (providing that a trial court may grant an extension if "elements of the report are found deficient"). Further, the expert report requirement is not a substitute for a trial on the merits—just as a trial court should not consider the defendant's pleadings and other evidence when ruling on a motion to dismiss on adequacy grounds, the trial court should similarly refrain from considering these extraneous matters when considering a motion for an extension to cure. *See Palacios*, 46 S.W.3d at 878.

Even though the trial court should only consider the expert report when determining whether to grant an extension, that is not to say a claimant is only entitled to an extension when the report contains specific information or is not entitled to an extension when the report lacks certain information. The Legislature clearly contemplated that trial courts would grant extensions when reports contained varying degrees of deficiencies. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c) (providing that a trial court may grant one thirty-day extension when "elements" of the report are deficient). Therefore, as long as a claimant has filed a report (as defined by the statute), the specific deficiencies of a report should not determine whether the trial court should grant an extension. Rather, a trial court should be able to determine, based on the initial report, if a claim warrants an

extension—that is, whether a claim could potentially have merit if the report were cured. A report from a qualified health care professional stating a belief that a plaintiff has a claim against a defendant, even though elements of the report are deficient, should be sufficient for a trial court to determine the curability of the report.[1]

As further evidence that a trial court need not consider more than the report itself, nothing in section 74.351 requires a trial court to hold a hearing before denying an extension to cure a deficient report and dismissing a case. *Compare id.* § 74.351(b)–(c) (requiring dismissal if an extension to cure a deficient report is not granted), *with* TEX. REV. CIV. STAT. art. 4590i § 13.01(g) (requiring a court to hold a hearing before granting a single thirty-day extension for good cause under the former statute);[2] *see, e.g.*, *Johnson v. Willens*, 286 S.W.3d 560, 565-66 (Tex. App.—Beaumont 2009, pet. filed) (trial court granted order dismissing case without holding a hearing). Had the Legislature intended for a trial court to consider more than the report when determining whether to grant an extension to cure, it could have required a hearing to allow a claimant to present additional evidence.

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[1] Justice Medina contends this approach mirrors that of the court of appeals, and that it is unclear the manner in which a court will distinguish between deficient reports that are curable and those that are not. But this mischaracterizes my position—a court will be able to determine from the four corners of the report whether it is from a qualified health care professional stating a belief that the plaintiff has a claim against a defendant.

[2] Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, sec. 13.01(g), 1995 Tex. Gen. Laws 985, 986, *amending* the Medical Liability and Insurance Improvement Act of Texas, 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. Former article 4590i section 13.01 was replaced by Texas Civil Practice and Remedies Code section 74.351, as amended.

III. Application

In this case, Wooten's expert report by R. Don Patman, M.D. was over nine single-spaced pages. The report contained Wooten's medical history, the applicable standard of care, and a numbered list of Dr. Samlowski's alleged standard-of-care breaches, including failing to perform a comprehensive diagnostic work-up and thereby failing to determine the extent of Wooten's illness. Dr. Patman concluded that Dr. Samlowski's actions constituted negligence and were the proximate causes of Wooten's developing multiple life-threatening complications. The report inferred that Dr. Samlowski performed an unnecessary surgery, delaying treating Wooten's condition. The report, however, did not contain an explanation of how Dr. Samlowski's actions caused Wooten's injuries and was, as Wooten now acknowledges, deficient. 282 S.W.3d at 90. But the report did not demonstrate, on its face, that it was incurable. To the contrary, it demonstrated that it had the potential to be cured since the report was from a qualified health care professional and explained a belief that Samlowski's actions caused Wooten's injuries. Nothing outside of this report would have aided in the trial court's determination that Wooten's report could have been cured. Therefore, I would hold the trial court abused its discretion in denying Wooten's motion for an extension to cure her report, and allow her the opportunity to attempt to cure her report.

IV. Additional Considerations

Justice Medina and the dissent conclude that the trial court did not abuse its discretion in denying the thirty-day extension because Wooten failed to prove that the report would have been cured. But the provision allowing for an extension is not punitive—it says nothing about withholding an extension when a claimant has failed do something. Rather, the provision is curative,

intending to give claimants an opportunity to save their claims from dismissal. While the Legislature, by enacting the TMLA, sought to "reduce excessive frequency and severity of health care liability claims," Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1), 2003 Tex. Gen. Laws 847, 884, it intended to "do so in a manner that will not unduly restrict a claimant's rights," *id.* § 10.11(b)(3); *Leland*, 257 S.W.3d at 208. "In enacting section 74.351, the Legislature struck a careful balance between eradicating frivolous claims and preserving meritorious ones . . . ." *Leland*, 257 S.W.3d at 208. In order to preserve the highest number of meritorious claims, trial courts should err on the side of granting claimants' extensions to show the merits of their claims. The price of preserving a meritorious claim will be thirty days, compared to a much higher price of dismissal.

V. Conclusion

Because Wooten filed an expert report from a qualified expert explaining a belief that Samlowski's actions caused Wooten's injuries, even though elements of the report were deficient, I would hold the trial court abused its discretion by denying her motion for an extension to cure. I join the Court's judgment remanding the case to the trial court.

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Eva M. Guzman
Justice

OPINION DELIVERED: February 25, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0727

TEXAS INDUSTRIAL ENERGY CONSUMERS, PETITIONER,

v.

CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC,
AND PUBLIC UTILITY COMMISSION OF TEXAS, RESPONDENTS

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

Argued October 6, 2009

JUSTICE WILLETT delivered the opinion of the Court.

This appeal concerns a Public Utility Commission order setting a "competition transition charge" under Chapter 39 of the Utilities Code. The order followed a true-up proceeding initiated by CenterPoint Energy Houston Electric, LLC to recover from ratepayers its investments "stranded" by Texas's transition to a less regulated, more competitive retail electricity market. Groups representing electricity consumers challenged the order, contesting CenterPoint's (1) recovery of interest,[1] and (2) recovery of costs of a valuation panel. The court of appeals affirmed the PUC's order in favor of CenterPoint. We affirm the court of appeals' judgment.

[1] We use "interest" and "carrying costs" interchangeably and intend no distinction between them.

I. Background

A. Overview of Relevant Provisions of Chapter 39

The Legislature in 1999 overhauled the Public Utility Regulatory Act (PURA or Act) to create a "fully competitive electric power industry" in Texas.[2] As part of this restructuring, utilities were required, not later than January 1, 2002, to split into three distinct units: (1) a power-generation company, (2) a retail electric provider, and (3) a transmission and distribution utility.[3] After that date, known as the date of consumer choice, retail consumers could choose among competing retail providers.[4]

As for the transmission and distribution utility, its rates continue to be regulated by the PUC.[5] This unit also continues to provide metering services[6] and to charge retail electric providers for "nonbypassable delivery charges" under rates approved by the Commission.[7] The transmission and distribution utility may also, at the retail provider's request, bill retail customers directly.[8]

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[2] TEX. UTIL. CODE § 39.001(a). *See also City of Corpus Christi v. Pub. Util. Comm'n*, 51 S.W.3d 231, 237 (Tex. 2001).

[3] TEX. UTIL. CODE § 39.051(b).

[4] *Id.* § 39.102(a).

[5] *See id.* §§ 39.201–.205; *In re TXU Elec. Co*, 67 S.W.3d 130, 132 (Tex. 2001) (Phillips, C.J., concurring) ("Because the generating companies and retail electric providers must use the existing power lines to move electricity from the plant to the retail customer's home or business, the transmission and delivery companies will remain regulated monopolies.").

[6] TEX. UTIL. CODE § 39.107(a).

[7] *Id.* § 39.107(d).

[8] *Id.* § 39.107(e).

1. Stranded Costs

The Legislature recognized that utilities had made investments in power-generation assets that produced a reasonable return under the existing regulated environment "but might well become uneconomic and thus unrecoverable in a competitive, deregulated electric power market."[9] The Act thus allows utilities to recover these "stranded costs," which consist generally of "the portion of the book value of a utility's generation assets that is projected to be unrecovered through rates that are based on market prices."[10]

The Act deregulated the market in phases. Retail rates were frozen from September 1, 1999 until January 1, 2002.[11]

PURA Section 39.201 directed transmission and distribution utilities to file, on or before April 1, 2000, proposed tariffs that included nonbypassable delivery charges to retail electric providers.[12] It also directed the PUC to approve rates as of January 1, 2002.[13] The nonbypassable delivery charges included a "competition transition charge" (CTC) based on an estimate of stranded costs projected to exist at the end of the freeze period on December 31, 2001.[14] The CTC is "nonbypassable" in "that with limited exceptions, all retail electric customers in an existing utility's

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[9] *CenterPoint Energy, Inc. v. Pub. Util. Comm'n*, 143 S.W.3d 81, 82 (Tex. 2004).

[10] *City of Corpus Christi*, 51 S.W.3d at 237–38; *see also* TEX. UTIL. CODE §§ 39.001(b)(2), .251(7), .252(a).

[11] TEX. UTIL. CODE § 39.052.

[12] *Id.* § 39.201(a)–(b).

[13] *Id.* § 39.201(d).

[14] *Id.* § 39.201(b), (d), (g).

service area will pay charges to allow that utility to recover stranded costs regardless of whether those customers purchase their electricity from that utility, switch to one of its competitors, or generate their own electricity."[15] In estimating stranded costs, utilities were required to use the "ECOM" model,[16] an estimation model earlier used in a 1998 PUC report to the Texas Senate.[17] Section 39.201 allowed a utility to recover estimated stranded costs at any time after the start of the freeze period on September 1, 1999, by issuing bonds and using a "transition charge" (TC) to service the bonds, a process known as "securitization" or "securitization financing,"[18] or by imposing a CTC.[19] But no such charges were imposed because the PUC concluded that under the ECOM model no utility would incur stranded costs.[20]

Under Section 39.262, utilities were required, after January 10, 2004, to file with the PUC a reconciliation of stranded costs and the previous estimate of stranded costs that had been used in determining rates under Section 39.201.[21] By this time, the utility had been unbundled into a transmission and distribution utility, a generating company, and a retail electric provider. Section 39.262 further directed the PUC to conduct a "true-up proceeding" and enter a final order adjusting

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[15] *City of Corpus Christi*, 51 S.W.3d at 238 (citing TEX. UTIL. CODE § 39.252).

[16] TEX. UTIL. CODE § 39.201(h).

[17] *See id.* § 39.262(i). "ECOM" stands for excess costs over market, *see id.* § 39.254, and is another term for stranded costs.

[18] *See* TEX UTIL. CODE §§ 39.201(i), .301.

[19] *Id.* § 39.201(i).

[20] *CenterPoint Energy*, 143 S.W.3d at 91.

[21] TEX. UTIL. CODE § 39.262(c).

the CTC to reflect the ultimate valuation of stranded costs.[22] "If, based on the proceeding, the competition transition charge is not sufficient, the commission may extend the collection period for the charge or, if necessary, increase the charge."[23] The adjusted CTC is applied to the nonbypassable delivery rates of the transmission and distribution utility.[24]

For purposes of finalizing the measure of stranded costs, a power-generation company must quantify its stranded costs using "one or more" of four valuation methods specified in the Act: (1) the sale of assets method, (2) the stock valuation method, (3) the partial stock valuation (PSV) method, and (4) the exchange of assets method.[25] If the PSV method is used, the PUC may convene "a valuation panel of three independent financial experts to determine whether the percentage of common stock sold is fairly representative of the total common stock equity or whether a control premium exists for the retained interest."[26]

2. Non-Stranded Cost Adjustments at the True-Up Proceeding

In addition to adjustments for stranded costs, the PUC is directed at the true-up proceeding to make other adjustments to the nonbypassable delivery charges of the transmission and distribution

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[22] *Id.* §§ 39.201(*l*), .262(c).

[23] *Id.* § 39.201(*l*).

[24] *Id.* §§ 39.201(*l*), .262(c). Alternatively, stranded costs may be securitized, as discussed below.

[25] *Id.* § 39.262(h)(1)–(4). These methods apply except for the valuation of stranded costs for certain nuclear assets. *See id.* § 39.262(h)–(i).

[26] *Id.* § 39.262(h)(3).

utility. These adjustments are made to what are sometimes labeled non-stranded costs, and can result in an increase or decrease in the amount of or collection period of the CTC.[27]

From January 1, 2002, until January 1, 2007, affiliated retail electric providers were required to charge rates six percent below average rates that were in effect on January 1, 1999, subject to certain adjustments including a fuel factor.[28] This price is known as the "price to beat." After January 1, 2002, each affiliated power-generation company is required to file a final fuel reconciliation that calculates a final fuel balance as of December 31, 2001.[29]

To foster competition, each utility or its unbundled power-generation company was required, at least 60 days before January 1, 2002, to conduct a "capacity auction" that sold entitlements to at least 15 percent of the utility's generation capacity.[30] The obligation continued until the earlier of 60 months after the date customer choice is introduced or the date the PUC determined "that 40 percent or more of the electric power consumed by residential and small commercial customers within the affiliated transmission and distribution utility's certificated service area before the onset of customer choice is provided by nonaffiliated retail electric providers."[31]

Under Section 39.262(d), the Act directs the affiliated power-generation company at the true-up proceeding to reconcile and either bill or credit the transmission and distribution utility for the

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[27] *See id.* § 39.262(g).

[28] *Id.* § 39.202(a).

[29] *Id.* § 39.202(c).

[30] *Id.* § 39.153(a).

[31] *Id.* § 39.153(b).

net sum of (1) the former integrated utility's final fuel balance,[32] and (2) the capacity auction true-up balance, which consists of the difference between the price of power realized at the capacity auctions and the power-cost projections used in the ECOM model.[33]

Section 39.262(e) directs the affiliated retail electric provider at the true-up proceeding to credit the affiliated transmission and distribution utility for "any positive difference between the price to beat established under Section 39.202, reduced by the nonbypassable delivery charge established under Section 39.201, and the prevailing market price of electricity during the same time period."[34] This credit is known as the "retail clawback."

Section 39.262(f) directs the PUC at the true-up proceeding to modify the transmission and distribution utility's nonbypassable rates to reflect adjustment to the amount of "regulatory assets," a special category of assets[35] we have described as "essentially bookkeeping entries."[36]

B. Proceedings Below

Pursuant to Chapter 39, Reliant Energy, Inc., an integrated electric utility, separated into three entities:

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[32] *Id.* §§ 39.202(c), .262(d)(1).

[33] *Id.* § 39.262(d)(2).

[34] *Id.* § 39.262(e). This credit is subject to a cap. *Id.*

[35] The Act defines regulatory assets as "the generation-related portion of the Texas jurisdictional portion of the amount reported by the electric utility in its 1998 annual report on Securities and Exchange Commission Form 10-K as regulatory assets and liabilities, offset by the applicable portion of generation-related investment tax credits permitted under the Internal Revenue Code of 1986." *Id.* § 39.302(5).

[36] *CenterPoint Energy*, 143 S.W.3d at 85.

- CenterPoint Energy Houston Electric, LLC — the transmission and distribution utility,
- Reliant Energy Retail Services, LLC — the retail electric provider, and
- Texas Genco, LP — the power-generation company.

These entities filed an application with the PUC to determine stranded costs and other true-up balances pursuant to Section 39.262. In this proceeding (the true-up proceeding), the PUC determined that CenterPoint was entitled to recover approximately $2.3 billion in stranded costs and other non-stranded costs. CenterPoint then initiated parallel proceedings to recover these costs either through securitization or a CTC.

The PUC approves securitization financing with a financing order.[37] CenterPoint filed an application for a financing order, and in that proceeding the PUC issued an order in 2005 allowing CenterPoint to securitize most of the previously determined costs, including stranded costs, carrying costs on the stranded costs, and certain regulatory assets, but held that certain non-stranded costs were not "qualified costs"[38] that could be securitized.

In the separate CTC proceeding under review in today's case, CenterPoint sought a CTC that would cover the costs it was not allowed to securitize. In July 2005, the PUC issued an order (the Order) determining that CenterPoint could recover approximately $570 million in non-stranded costs

[37] TEX. UTIL. CODE § 39.303.

[38] *See id.* § 39.302(4). Various sections of Chapter 39 were amended in 2007 to expand the categories of costs that can be securitized. Act of May 28, 2007, 80th Leg., R.S., ch. 1186, 2007 Tex. Gen. Laws 4049. The CTC at issue in this case was eventually securitized, after the PUC order and the interest-rate period at issue in this appeal.

through a CTC, to be imposed over a 14-year period.[39] This amount consisted of a positive capacity auction true-up amount, net of a negative final fuel adjustment, a downward adjustment for the retail clawback, and an additional downward adjustment to reflect the retention of deferred federal income taxes. The final CTC amount included accrued interest on the true-up balance. The Order further allows CenterPoint to receive interest on the unrecovered CTC balance over the 14-year recovery period. One commissioner dissented from the part of the Order allowing CenterPoint to recover interest on the true-up balance under PUC Rule 25.263(*l*)(3), discussed below.

The PUC also allowed CenterPoint to recover certain rate-case expenses, including a roughly $5.2 million fee charged by J.P. Morgan Securities Inc. and its law firm. This fee pertained to services by three J.P. Morgan bankers as the valuation panel convened by the PUC under Section 39.262(h)(3), after Texas Genco elected to rely on the PSV method to value its generating assets.

Two consumers groups, Texas Industrial Energy Consumers (TIEC) and Gulf Coast Coalition of Cities (GCCC), intervened in the CTC proceeding. Both challenged CenterPoint's recovery of interest, and TIEC additionally challenged CenterPoint's recovery of the valuation-panel fee. They appealed the Order to state district court.[40] The trial court agreed with the consumer groups that CenterPoint could not recover interest on the CTC balance from ratepayers because this Court had invalidated the PUC rule allowing such recovery in *CenterPoint Energy, Inc. v. Public Utility*

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[39] *Application of CenterPoint Energy Houston Electric, LLC for a Competition Transition Charge*, PUC Docket No. 30706 (July 14, 2005) (Order), *available at* http://interchange.puc.state.tx.us.

[40] *See* TEX. UTIL. CODE § 15.001.

Commission.[41] The trial court further held that CenterPoint could not recover the valuation-panel fee.

The court of appeals reversed the trial court's judgment and rendered judgment affirming the PUC's Order.[42]

II. Discussion

A. Interest on the CTC True-Up Balance

The PUC allowed CenterPoint to recover interest on the CTC balance under its Rule 25.263(*l*)(3), which at the time provided:

> The TDU [transportation and distribution utility] shall be allowed to recover, or shall be liable for, carrying costs on the true-up balance. Carrying costs shall be calculated using the utility's cost of capital established in the utility's UCOS [unbundled cost-of-service] proceeding, and shall be calculated for the period of time from the date of the true-up order until fully recovered.

The consumer groups argue that interest on the true-up balance is not allowed because we invalidated Rule 25.263(*l*)(3) in its entirety in *CenterPoint Energy*. The PUC and CenterPoint argue that we only invalidated the *timing* portion of the Rule — the date that interest begins to accrue. We agree with the PUC and CenterPoint. Any fair reading of our *CenterPoint Energy* decision makes clear we were focused on the date, not the rate.

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[41] 143 S.W.3d 81 (Tex. 2004).

[42] 263 S.W.3d 448, 468.

We stated in *CenterPoint Energy* that "Rule 25.263(*l*)(3) is invalid,"[43] and we reasonably read that statement in context.[44] We explained:

> No one disputes that the Legislature intended electric utilities to recover carrying costs on stranded costs to compensate for the financing costs incurred during the stranded cost recovery period. Nor does anyone dispute that prior to deregulation, carrying costs on investments in generation plants were included in rates. The only issue before us is the date from which carrying costs may be recovered once deregulation commenced: January 1, 2002, which was the first day of deregulation, or two or more years later, at the end of final true-up proceedings.[45]

We did not hold utilities cannot recover interest on their stranded costs or other costs. Indeed, we held that the rule was too parsimonious because it did not provide for the recovery of interest for the period between January 1, 2002, the date consumer choice commenced, and the date of the final true-up order. The basis of our holding was that failure to allow the recovery of interest during this period would fail to compensate the utilities fully for their stranded costs that existed on December 31, 2001, the last day of the freeze period.[46] "A two- or three-year gap in recovery of carrying costs would not permit generation companies full recovery of their stranded costs as the Legislature intended."[47] We further noted that in allowing securitization to reduce stranded costs, the Act specifically states that the purpose of securitization is to enable utilities to use this financing

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[43] 143 S.W.3d at 84, 99.

[44] *See Dresser Indus., Inc. v. Lee*, 880 S.W.2d 750, 753 (Tex. 1993) ("The Court's language must be read in the context of the issues decided.").

[45] *CenterPoint Energy*, 143 S.W.3d at 83. *See also id.* at 86 ("The only issue is whether the Act contemplates roughly a two-year gap in recovery of carrying costs between the date regulation ceased (January 1, 2002) and the date of a final true-up order (2004 or perhaps beyond).").

[46] *Id.* at 84 (citing TEX. UTIL. CODE §§ 39.252(a), .201(g)).

[47] *Id.*

technique "to recover regulatory assets and stranded costs, because this type of debt will lower the carrying costs of the assets."[48]

We invalidated Rule 25.263(*l*)(3) only insofar as it picked the wrong start date for the accrual of carrying costs:

> We conclude that the Commission's construction of chapter 39 was incorrect regarding the *date* as of which stranded costs are to be determined. . . . Because the Commission's rule is based on an incorrect construction of the Act *in this regard*, it is infirm.[49]

We did not hold broadly that the PUC could not allow utilities to recover interest on the CTC balance.

The consumer groups argue that even if the Court only invalidated the timing element of Rule 25.263(*l*)(3) — the date interest begins to accrue — that portion of the Rule is not severable, and the whole Rule is therefore invalid. The consumer groups provide no persuasive reason why the PUC cannot follow the Court's directive regarding the accrual date but otherwise enforce its Rule by allowing the recovery of interest. The Rule is part of Chapter 25 of Title 16 of the Texas Administrative Code, covering substantive rules of the PUC applicable to electric service providers. Rule 25.3(a) of the same Chapter states that "[i]f any provision of this chapter is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end, the provisions of this chapter are declared to be severable." The PUC thus followed its own severability rule and enforced Rule

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[48] TEX. UTIL. CODE § 39.301, quoted in *CenterPoint Energy*, 143 S.W.3d at 89.

[49] *CenterPoint Energy*, 143 S.W.3d at 87 (emphasis added).

25.263(*l*)(3), but with an accrual date consistent with *CenterPoint Energy*. We see no error in this approach, which complied with our decision while also enforcing the remainder of the PUC's rule allowing the recovery of interest.

By analogy to statutory construction, severability is a question of legislative intent.[50] Here, the body enacting the regulation in issue has expressly stated by general rule that it intends invalid provisions to be severable. Absent an expression of intent regarding severability, the valid remaining portions of a statute remain enforceable if the invalidity of one portion "does not affect other provisions or applications of the [rule] that can be given effect without the invalid provision or application."[51] Here, the PUC was able to otherwise enforce its rule by modifying only the date that interest begins to accrue. It specifically concluded in the Order that PURA's function is not impaired by *CenterPoint Energy*'s invalidation of a portion of Rule 25.263(*l*)(3) and that the remainder of the Rule should be given effect.[52] We agree with the PUC that there is no ground to invalidate the entire rule because of the one defect we found in *CenterPoint Energy*. In fact, invalidating the whole rule and barring any recovery of interest whatsoever would *contradict* our view in *CenterPoint Energy*

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[50] *See* TEX. GOV'T CODE §§ 311.032(a)–(b), 312.013(b).

[51] *Id.* §§ 311.032(c), 312.013(a).

[52] The Order states that the interest-rate portion of Rule 25.263(*l*)(3) is severable from the invalidated accrual start date in the Rule because "[t]here is no logical connection between the accrual of interest at a utility's UCOS WACC [weighted-average cost of capital] and the time period specified by the rule." In Conclusion of Law 12 to the Order, the PUC concludes: "The function of PURA is not impaired by [*CenterPoint Energy*'s] invalidation of the portion of [Rule] 25.263(*l*)(3) that required interest on a utility's true-up balance to accrue starting on the date of the Commission order in the utility's true-up case." Conclusion of Law 13 further reasons: "Because [Rule] 25.263(*l*)(3) requires that interest accrue starting on a date not fixed by the rule or PURA, and because such interest would accrue for a period of time that was unknown at the time of adoption of the rule, there is no connection between the interest-accrual start date and the portion of the rule requiring accrual at a utility's UCOS WACC."

"that the Legislature intended electric utilities to recover carrying costs on stranded costs to compensate for the financial costs incurred during the stranded cost recovery period," consistent with the prior ratemaking principle that "carrying costs on investments in generation plants were included in rates."[53]

GCCC separately argues that regardless of the validity of Rule 25.263(*l*)(3), the 11.075 percent interest rate chosen by the PUC was arbitrary and capricious, and not supported by substantial evidence, because there was no evidence in the record that it reflected CenterPoint's current weighted-average cost of capital (WACC).[54] For several reasons, we are unpersuaded.

First, given our conclusion that Rule 25.263(*l*)(3) remains valid with the corrected start date mandated by *CenterPoint Energy*, we agree with the court of appeals that, as a general proposition, an agency cannot be said to "err or act arbitrarily or capriciously by complying with the mandate of its own rule,"[55] assuming that the rule is based on a valid delegation of legislative authority and is a reasonable exercise of that authority. Indeed, we have stated that if an agency "does not follow the clear, unambiguous language of its own regulation, we reverse its action as arbitrary and capricious."[56]

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[53] *CenterPoint Energy*, 143 S.W.3d at 83.

[54] We understand TIEC to argue that the interest rate chosen by the PUC is improper only if Rule 25.263(*l*)(3) is invalidated in its entirety. It argues in its brief on the merits that "[b]ecause the rule was invalidated in its entirety, the use of an 11.075% interest rate is arbitrary and capricious," and that "[b]ecause this Court invalidated the Rule in *CenterPoint Energy*, the Commission had no authority to rely on the Rule by applying the interest rate adopted in the UCOS proceeding."

[55] 263 S.W.3d at 458.

[56] *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999).

Second, GCCC does not persuade us that the PUC can as a practical matter constantly re-determine a utility's cost of capital or is required by law to do so. The PUC selected the 11.075 percent rate in the true-up proceeding where a final order issued in December 2004 and in the financing order proceeding where a final order issued in March 2005. This rate was based on the weighted-average cost of capital established in the utility's 2001 unbundled cost-of-service (UCOS) proceeding, adjusted for federal income taxes,[57] and GCCC offers no proof or argument that the earlier proceedings in which CenterPoint's cost of capital was determined were flawed. Further, as all parties agree, the PUC in 2006 prospectively reset the interest rate on the CTC to reflect changed economic conditions. The rate was lowered to 8.06 percent.[58]

Finally, the PUC points to expert testimony in the administrative record offered by CenterPoint that the 11.075 percent interest rate was appropriate given the risk associated with the recovery of CTCs, the fact that the rate was a pre-tax rate that had to be grossed up to ensure the

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[57] As the Order explains, the 11.075 percent rate is "stated on a pre-tax basis. By accruing interest at a pretax rate, CenterPoint will recover the interest due at its actual UCOS WACC, after the effect of taxes."

[58] As the court of appeals explained, "[i]n July 2006, the Commission amended rule 25.263(*l*)(3) to both conform to *CenterPoint Energy, Inc.*, and alter the rate methodology." 263 S.W.3d at 457 n.10 (citing 31 Tex. Reg. 5603 (2006)). And as TIEC explains in its brief on the merits, the revised rule "replaced the interest rate from the utility's WACC as established in the UCOS proceeding with a new method for calculating interest, which relies on updated information regarding the utility's marginal cost of long term debt and results in a significantly lower interest rate. . . . In response to the new rule, CenterPoint made a compliance filing seeking to adjust the interest rate to reflect its current financial status and the risk associated with recovering the CTC balance from ratepayers. CenterPoint agreed to reduce its interest rate, on a going forward basis, from 11.075% to 8.06% based on this new rule." CenterPoint further explains that it agreed to the lower interest rate as part of the settlement of a then-pending rate case. CenterPoint thus contends that since the consumer groups did not appeal the 11.075 percent interest rate selected in the true-up proceeding, they can only complain in today's case about the use of the 11.075 percent interest rate for the period from December 17, 2004, the date of the final order in the true-up proceeding, until August 1, 2006, the date CenterPoint began using the 8.06 percent interest rate. CenterPoint also points out that some time after August 1, 2006, the CTC balance was securitized. Once the CTC balance was received through a bond offering, the interest rate on the CTC balance earlier assigned by the PUC became irrelevant.

recovery of income taxes on the CTC, the use of the same rate in other proceedings, and other factors. The consumer groups do not challenge the credentials of the expert, whose testimony was offered by CenterPoint to rebut the argument that the previously determined rate had become outdated and that one of several other rates proposed by intervenors and PUC staff should be used. While there was some conflicting testimony on the appropriate interest rate, under the applicable substantial evidence standard of review,[59] we ask only whether some reasonable basis exists in the record for the agency's action.[60] That standard was met here.[61]

In sum, the PUC did not act in an arbitrary or capricious manner in (1) following its own rule, (2) relying on a previously determined cost of capital in proceedings whose fairness is not challenged here, (3) ultimately choosing an interest rate for which a reasonable basis exists in the record, and (4) substantially lowering the interest rate when circumstances warranted.

B. Control Premium Valuation-Panel Fee

The PUC convened the valuation panel under Section 39.262(h)(3) to help determine the market value of transferred generation assets under the PSV method. The PUC retained J.P. Morgan to serve as the valuation panel and approved its $5.2 million fee. J.P. Morgan insisted that CenterPoint guarantee payment of the fee on behalf of Texas Genco. Texas Genco and CenterPoint

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[59] TEX. UTIL. CODE § 15.001.

[60] *See Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999) ("A court applying the substantial evidence standard of review may not substitute its judgment for that of the agency. The issue for the reviewing court is not whether the agency's decision was correct, but only whether the record demonstrates some reasonable basis for the agency's action. Courts must affirm administrative findings in contested cases if there is more than a scintilla of evidence to support them.") (citations omitted).

[61] Under substantial evidence review, "an administrative decision may be sustained even if the evidence preponderates against it." *Id.*

(then Texas Genco's corporate parent) ultimately signed a contract agreeing to be jointly obliged for the fee, and CenterPoint ultimately paid it. As part of the fee negotiations, CenterPoint sought agreement that PUC staff would support recovery by CenterPoint of the valuation-panel fee. PUC staff agreed not to contest such recovery.

The PUC allowed CenterPoint to recover this fee from ratepayers through the CTC. It found the fee reasonable, and also noted in the Order that "[t]he true-up applicants were required to incur this expense by the Commission, and the expense was necessary for the resolution of the case."

TIEC argues the valuation-panel fee must be borne by Texas Genco, the company receiving the transferred generation assets, and the PUC exceeded its authority in allowing CenterPoint to recoup the fee through its retail customers. TIEC argues that this sentence from Section 39.262(h)(3) prohibits cost-shifting and requires Texas Genco to incur the fee alone: "The costs and expenses of the panel, as approved by the commission, shall be paid by each transferee corporation." The PUC and CenterPoint respond that Section 39.262(h)(3) only specifies that the transferee (as opposed to the PUC or someone else) is *initially* responsible for paying the valuation-panel fee, but the statute does not limit how the transferee satisfies that obligation or prohibit the PUC from allowing CenterPoint to recover the fee through its rates. They contend that since CenterPoint guaranteed the fee and ultimately paid it, it can recoup it under Section 36.061(b)(2), applicable generally to ratemaking proceedings. Under this provision, the PUC may allow recovery of "reasonable costs

of participating in a proceeding under this title not to exceed the amount approved by the regulatory authority."[62]

So does "shall be paid by the transferee corporation" in Section 39.262(h)(3) mean Texas Genco must exclusively underwrite the fee, or does it merely require Texas Genco to cover the fee in the first instance, while letting other law (including Section 36.061(b)(2)) determine how that obligation is ultimately funded or perhaps recouped through rates like other rate-case expenses?

The court of appeals' careful analysis persuades us that CenterPoint and the PUC, whose reasonable construction of PURA merits "serious consideration,"[63] have the better argument:

> [B]y providing that the transferee corporations "shall pay" valuation panel expenses, the legislature did not intend to preclude those expenses ultimately being recovered through rates under PURA 36.061(b)(2). [Section 39.262(h)(3)], in other words, reflects not a mandate that such expenses be borne exclusively by transferee corporations, as TIEC suggests, but merely an expectation that the expenses would be "paid" by transferee corporations in the same manner that parties to rate proceedings routinely pay legal expenses, consultant fees, and myriad other "costs of participating in a proceeding" that are potentially eligible for later recovery under PURA section 36.061(b)(2).[64]

It is true, as TIEC contends, that state-agency powers are limited, and agencies may not "on a theory of necessary implication from a specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and additional power or one that contradicts the statute,

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[62] TEX. UTIL. CODE § 36.061(b)(2).

[63] *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008).

[64] 263 S.W.3d at 462.

no matter that the new power is viewed as expedient for administrative purposes."[65] But that admonition is inapposite here.

PURA nowhere discusses the interplay between Sections 36.061(b)(2) and 39.262(h)(3), much less suggests any conflict between them. Contrast that to other examples within PURA where the Legislature acknowledged potential conflicts and clarified which provision would control.[66] PURA's drafters knew how to resolve perceived inconsistences, and absent any indication that lawmakers desired one PURA provision to prevail over another, we must presume they wanted both sections here to be fully effective.

TIEC argues principally that Section 39.262(h)(3) must control because its specific focus on valuation panels gives it a precision that Section 36.061(b)(2)'s ordinary cost-recovery regime lacks. But the specific-controls-over-general maxim "applies only when overlapping statutes cannot be reconciled."[67] Here, we can construe the two provisions in a way that harmonizes rather than conflicts.[68] Section 39.262(h)(3) does not restrict, or even address, how the transferee corporation fulfills its panel-fee obligation. It nowhere prohibits, even implicitly, a transferor corporation from

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[65] *Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995) (quoting *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137–38 (Tex. App.—Austin 1986, writ ref'd n.r.e.)). *See also Pub. Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001).

[66] *See* TEX. UTIL. CODE §§ 36.007(d), 36.204, 36.351(a), 39.158(d), 39.263(d). In addition, the fact that Section 39.262(h)(3) is the later-enacted provision — and is silent regarding any interplay with Section 36.061(b)(2) — gives additional support for the view that the Legislature intended no impact on PURA's preexisting cost-recovery provision.

[67] *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 86 (Tex. 2006).

[68] *See* TEX. GOV'T CODE § 311.026(a) ("If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both."); *see also Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 531 (Tex. 2002).

covering a transferee's upfront obligation to pay the valuation-panel fee and later seeking recovery as a "reasonable cost[] of participating in a proceeding" under Section 36.061(b)(2).

In short, the provisions do not collide because they govern different subjects — initial payment of the valuation-panel fee (Section 39.262(h)), and separately, the PUC's authority to permit the recoupment of certain rate-case expenses (Section 36.061(b)(2)). True, one provision has a narrower focus, but they are easily harmonized, as the PUC did here. TIEC's construction would create a conflict where none need exist. We agree with the court of appeals' analysis.

III. Conclusion

We affirm the court of appeals' judgment.

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Don R. Willett
Justice

OPINION DELIVERED: October 22, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0751

TEXAS MUTUAL INSURANCE COMPANY, PETITIONER,

v.

TIMOTHY J. RUTTIGER, RESPONDENT

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

Argued April 14, 2010

JUSTICE JOHNSON delivered the opinion of the Court with respect to Parts I, II, III, IV, and VI, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE WILLETT and JUSTICE GUZMAN joined, and an opinion with respect to part V, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE MEDINA joined.

JUSTICE WILLETT filed a concurring opinion, in which JUSTICE GUZMAN joined.

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

In 1989 the Legislature enacted major amendments to the Workers' Compensation Act (Act). TEX. LAB. CODE §§ 401.001–506.002. The amendments included significant reforms, among which were changes in how to calculate income benefits for injured workers, the amount of income benefits workers could recover, the dispute resolution process, the addition of an ombudsman program to provide assistance for injured workers who had disputes with insurers, and increasing sanctions for violations of the Act. In this case, the issues presented involve, among other matters, (1) the interaction of the current Act with the Insurance Code and the Deceptive Trade Practices Act

(DTPA), and (2) whether the 1989 restructuring of the Act and subsequent amendments obviate the need we found in *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210 (Tex. 1988) to engraft an extra-statutory cause of action for breach of the duty of good faith and fair dealing onto the workers' compensation system.

We conclude that (1) claims against workers' compensation insurers for unfair settlement practices may not be made under the Insurance Code, but (2) claims under the Insurance Code may be made against those insurers for misrepresenting provisions of their policies, although in this case there was no evidence the insurer did so.

Further, seven members of the Court would consider whether *Aranda* should be overruled even though the court of appeals did not reach the issues involving the cause of action for breach of the duty of good faith and fair dealing. Four Justices would hold that *Aranda* should be overruled while three would hold that it should not be. Two members of the Court would have the court of appeals first consider the issues involving breach of the duty of good faith and fair dealing before addressing them. In accordance with these views, a majority of the Court joins in the judgment reversing the judgment of the court of appeals and rendering judgment in part and remanding in part for further proceedings as to the issues involving breach of the duty of good faith and fair dealing.

I. Background

On June 21, 2004, Timothy Ruttiger was working for A&H Electric in Galveston when he reported to his supervisor that he was injured while carrying pipe. He went to the University of Texas Medical Branch at Galveston where he was diagnosed as having bilateral inguinal hernias. Later that day he went to A&H's office and filled out a TWCC-1 form reporting that he had been

injured on the job. *See* TEX. LAB. CODE § 409.001.[1] Ruttiger was scheduled for hernia repair surgery to be performed on July 14, 2004.

When A&H's workers' compensation carrier, Texas Mutual Insurance Company (TMIC), received written notice that Ruttiger was claiming an injury, it initiated temporary income benefit payments and began investigating. As part of the investigation process, TMIC's adjuster, Audie Culbert, interviewed A&H employees. One employee told Culbert that Ruttiger had been at a softball tournament the weekend before the alleged injury and had come to work on the morning of the incident with a limp. She later reported that one of Ruttiger's co-workers informed her Ruttiger was injured at the softball game and "bragged about getting it paid by workers' comp." The vice president of A&H said that Ruttiger "wasn't 100 percent" when he arrived at work on the day of the incident and he "never got a straight story" on how Ruttiger was injured. Culbert testified at trial that he attempted to contact Ruttiger by telephone and by mail, but was unable to do so. Ruttiger denied receiving a letter or phone call from TMIC.

On July 11, Ruttiger's doctor notified him that TMIC refused to pay for the hernia surgery. Ruttiger testified that he then called Culbert who told him the claim was denied because the hernias resulted from Ruttiger's playing softball and were not work related.

On July 12, 2004, TMIC filed a "Notice of Refused or Disputed Claim" with the Texas Workers' Compensation Commission[2] and discontinued temporary income benefit payments after

[1] Further references to the Labor Code will generally be by reference to section numbers.

[2] In 2005, the Legislature abolished the Texas Workers' Compensation Commission and transferred its functions to the Texas Department of Insurance, Workers' Compensation Division. *See* Act of May 29, 2005, 70th Leg., R.A., ch. 265, § 8.001, 2005 Tex. Gen. Laws 469, 607-08. For ease of reference we will refer to the Division, or "WCD" instead of the Commission.

having sent one check. *See id.* § 409.021 (providing that a carrier commits an administrative violation if it does not, no later than the 15th day after the carrier receives written notice of an injury, either begin paying benefits or notify the WCD and the employee of its refusal to pay as well as notifying the employee of (1) his right to request a benefit review conference and (2) the means to obtain further information).[3] In its notice, TMIC stated that its investigation revealed Ruttiger sustained the hernias while he was playing softball and that it "disput[ed] this claim in its entirety." *See id.* § 409.022 (providing that an insurer's notice of refusal to pay benefits must specify the grounds for the refusal, that absent new evidence such grounds are the only basis on which the carrier may dispute compensability in a later proceeding, and failure to comply with such requirements is an administrative violation). The notice included the WCD's telephone number and a statement that an injured worker whose claim was denied had the right to contact the Division to request a benefit review conference (BRC). *See id.* § 409.022(a)(2).

Two days after he was notified that TMIC refused to pay for his surgery, Ruttiger hired a lawyer to help with his claim. Approximately two months later, in September, Ruttiger's lawyer

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[3] When TMIC received notice of Ruttiger's claim, it was required to notify the WCD of the claim. TEX. LAB. CODE § 409.005. The WCD was then required to notify Ruttiger of the Act's benefits and procedures:

> **Plain Language Information; Notification of Injured Employee**
> (a) The division shall develop information for public dissemination about the benefit process and the compensation procedures established under this chapter. The information must be written in plain language and must be available in English and Spanish.
>
> (b) On receipt of a report [of injury], the division shall contact the affected employee by mail or by telephone and shall provide the information required under Subsection (a) to that employee, together with any other information that may be prepared by the office of injured employee counsel or the division for public dissemination that relates to the employee's situation, such as information relating to back injuries or occupational diseases.

Id. § 409.013.

contacted TMIC and asked for a copy of the notice of disputed claim. After another month, on October 22, 2004, Ruttiger's lawyer requested the WCD to set a BRC. *See id.* § 410.021 (providing that a benefit review conference is a non-adversarial, informal dispute resolution proceeding designed, among other things, to mediate and resolve disputed issues). The BRC was set for December 2, 2004. *See id.* § 410.025(a); 28 TEX. ADMIN. CODE § 141.1 (providing that a BRC must be set within forty days after the request is received, but providing that in cases warranting expedited processing the BRC must be set within twenty days). The WCD failed to notify TMIC of the setting so the conference was rescheduled for January 6, 2005. At the January conference, Ruttiger and TMIC entered into a benefit dispute agreement. They agreed that (1) Ruttiger suffered a compensable injury on June 21, 2004; (2) he did not have disability from June 22, 2004 through August 22, 2004; and (3) he had disability from August 23, 2004 "to the present." The WCD approved the agreement. Following the BRC, TMIC paid temporary income benefits for the agreed period of past disability and re-initiated weekly benefits. *See* TEX. LAB. CODE § 408.101. TMIC also paid for Ruttiger's surgery and other medical expenses related to his hernias. Ruttiger reached maximum medical improvement on August 1, 2005, and was assigned a 1% impairment rating. *See id.* §§ 408.121–.122.

On June 16, 2005 while his claim was still pending before the WCD and before he had reached maximum medical improvement, Ruttiger sued TMIC and Culbert (generally referred to collectively as TMIC) for violations of article 21.21 of the Insurance Code,[4] the common law duty

[4] Ruttiger's pleadings referenced article 21.21 of the Insurance Code. In 2003 the Legislature recodified the Insurance Code and article 21.21 provisions relevant to this matter were placed in Chapter 541. Further reference to Insurance Code provisions will be to the recodified designations.

of good faith and fair dealing, and violations of the Deceptive Trade Practices Act. TEX. BUS. & COMM. CODE §§ 17.41–.63. Ruttiger did not claim that TMIC failed to fulfill the agreement it entered into at the BRC or that TMIC did not properly pay income and medical benefits after the BRC. Rather, he claimed that TMIC's delay in paying temporary income benefits and agreeing to pay for surgery until January 2005 damaged his credit, worsened his hernias, and caused mental anguish, physical impairment, and pain and suffering over and above what he would have suffered if TMIC had timely accepted liability and provided benefits. His allegations as to Insurance Code violations were that TMIC (1) failed to adopt and implement reasonable standards for promptly investigating claims, (2) refused to pay Ruttiger's claim without having conducted a reasonable investigation, (3) failed to promptly provide a reasonable explanation for denying his claim, (4) failed to attempt to promptly and fairly settle the claim when liability was reasonably clear, and (5) misrepresented the insurance policy to him. He also asserted that TMIC's Insurance Code violations authorized recovery under the DTPA. Ruttiger's common law claim was that TMIC breached its duty to properly investigate his claim and denied necessary medical care and other benefits.

The case was tried to a jury, which found that TMIC (1) breached its duty of good faith and fair dealing; (2) committed unfair and deceptive acts or practices that were a producing cause of damages to Ruttiger; and (3) engaged in the unfair and deceptive acts knowingly. The jury found damages for past physical impairment, past and future pain and suffering, past and future loss of credit, past mental anguish, "additional" damages, and attorneys' fees. The trial court rendered judgment based on the Insurance Code findings, but also provided in its judgment that if the

Insurance Code theory of liability failed on appeal, Ruttiger was entitled to recover for TMIC's breach of the duty of good faith and fair dealing and under the Texas Deceptive Trade Practices Act.

The court of appeals held that there was no evidence of credit reputation damages, but otherwise affirmed the trial court's judgment allowing recovery under the Insurance Code. 265 S.W.3d 651, 672 (Tex. App.—Houston [1st Dist.] 2008). The appeals court did not reach the issues of whether Ruttiger could recover under his DTPA or common law claims. We granted TMIC's petition for review. 53 TEX. SUP. CT. J. 388 (Mar. 15, 2010).

TMIC makes several arguments for reversing the court of appeals' judgment: (1) Ruttiger is not entitled to recover for aggravation of his hernias due to delay in surgery because a worker may only recover for a common law bad faith claim if he suffers an "independent injury" separate from his compensation injury; (2) the trial court lacked jurisdiction to award bad faith damages for wrongful delay of benefits because Ruttiger did not exhaust his administrative remedies by obtaining a determination by the WCD that benefits were due; (3) the Insurance Code causes of action do not apply to Ruttiger's claims as a matter of law, and even if they do, there is no evidence to support the jury findings that TMIC violated the Code's provisions; (4) even if Ruttiger's injuries were independent and the trial court had jurisdiction over his claims, this Court should join the majority of states that have considered the issue and disallow common law bad faith claims in the context of workers' compensation; (5) the court of appeals misapplied insurance claims-handling standards for liability and no-evidence appellate review when it held that jurors may disregard conflicting evidence of coverage such as exists here where the statements made by employees of A&H and

medical records indicated Ruttiger's hernias were preexisting;[5] (6) there is no evidence that TMIC knowingly violated the Insurance Code because there is no evidence it was actually aware it was being unfair to Ruttiger; and (7) there is no evidence to support the award for mental anguish damages.[6]

In response, Ruttiger argues that (1) a claim for aggravation of his hernias is separate from his workers' compensation claim; (2) he exhausted his administrative remedies by requesting and attending a BRC where he entered into a benefit dispute agreement with TMIC; (3) claims under the Insurance Code are allowed in the context of the workers' compensation scheme; and (4) the jury findings are supported by legally sufficient evidence.[7]

We begin by considering TMIC's assertion that the trial court lacked jurisdiction because Ruttiger failed to exhaust his administrative remedies.

II. Exhaustion of Administrative Remedies

Citing *American Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801 (Tex. 2001), TMIC asserts that a trial court lacks jurisdiction over a workers' compensation claims-handling suit unless the WCD has made a determination that the worker is entitled to the specific benefits wrongly denied or delayed. TMIC argues that in this case the WCD has not done so.

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[5] Medical records obtained during lawsuit discovery revealed that Ruttiger had been diagnosed as having bilateral inguinal hernias on two different occasions before he began working for A&H. He denied knowing of the diagnoses and denied having hernias before he was injured on June 21, 2004.

[6] Amicus briefs were submitted in support of TMIC's position by Liberty Insurance Corporation, the American Insurance Association, and the Property Casualty Insurers Association of America.

[7] Amicus briefs were submitted in support of Ruttiger's position by the Texas Trial Lawyers' Association, attorney Peter N. Rogers, and attorney Joe K. Longley.

Ruttiger and TMIC attended a BRC and entered into a benefit dispute agreement in which the parties agreed that Ruttiger sustained a compensable injury and had disability beginning August 23, 2004. The WCD approved the agreement. TMIC asserts that this agreement was not a WCD determination sufficient to give the trial court jurisdiction. Ruttiger counters that because at the time he filed this suit there were no disputed issues to be resolved by the WCD, he was not required to continue through the administrative process. We agree with Ruttiger.

As the court of appeals pointed out, the Act provides a dispute resolution process consisting of four possible steps. 265 S.W.3d at 657. Those steps are a BRC, a contested case hearing (CCH), review by an administrative appeals panel, and judicial review. TEX. LAB. CODE §§ 410.021, 410.104, 410.201, 410.251. A claimant is not required to continue through every step; the provisions of the Act contemplate that disputes may be resolved at any level. *See id.* § 410.025(b) (providing that the WCD shall schedule a contested case hearing "to be held not later than the 60th day after the date of the benefit review conference if the disputed issues are not resolved at the benefit review conference"); *id.* § 410.029 ("[A] dispute may be resolved either in whole or in part at a benefit review conference."); *id.* § 410.169 (providing that the decision of a contested case hearing officer is final in the absence of an appeal).

Here, the parties entered into a benefit dispute agreement at the first BRC held in January 2005. The agreement stated that it resolved the issues in dispute and it was signed by Ruttiger, his attorney, and a representative of TMIC. The agreement was binding on both parties "through the conclusion of all matters relating to the claim" absent circumstances not involved here. *Id.* § 410.030. The agreement was approved by the WCD and was a sufficient resolution of Ruttiger's

claim by the WCD to constitute exhaustion of his administrative remedies as to whether he suffered an injury in the course of his employment for which medical and income benefits were payable.

TMIC also asserts that under *Fodge* Ruttiger was required to obtain a determination from the division that he was entitled to the specific benefits he claims he was wrongly denied. In *Fodge*, a CCH hearing officer concluded that Anne Fodge had suffered a compensable injury. 63 S.W.3d at 802. She did not claim medical benefits or claim that the carrier, American Motorists Insurance Co., had denied medical benefits. *Id.* Five months later she filed suit against American Motorists for mishandling her claim by, among other things, denying and delaying payment for medical treatment. *Id.* We noted that only the WCD can determine whether a claimant is entitled to particular benefits, and held that just as a trial court could not award medical benefits, neither could it award damages for a denial of payment of benefits without a determination that the benefits were due. *Id.* at 804.

TMIC asserts that in this case the benefit dispute agreement addressed whether Ruttiger sustained a compensable injury and had a disability, but it did not address medical benefits. In *Fodge* we noted that only the WCD can determine entitlement to particular compensation benefits and it has jurisdiction over both income and medical benefit disputes. *Id.* at 803-04. At the time Fodge filed suit, a dispute still existed between Fodge and American Motorists regarding denial of benefits that had not been first presented to the Commission. But in this case, at the time Ruttiger filed suit there was no dispute over either income benefits or medical benefits. TMIC had agreed to pay for and paid for Ruttiger's hernia surgery, agreed to pay and paid income benefits for the

disability the parties agreed Ruttiger suffered from August 2004 through the BRC, and was continuing to pay benefits.

If a dispute exists or arises between the parties, then resolution must first be sought from the WCD. But the Act does not require a claimant to seek review of issues not in dispute. Nor would it make sense for courts to impose such a requirement, even if the claimant could convince the WCD to set a hearing when there was no disputed issue. We conclude that as to the claims underlying his suit, Ruttiger exhausted his administrative remedies and the trial court had jurisdiction over his suit.

We next consider TMIC's contentions relating to the Insurance Code.

III. Insurance Code Claims

A. Section 541.060

Chapter 541 of the Insurance Code is entitled "Unfair Methods of Competition and Unfair or Deceptive Acts or Practices."[8] Ruttiger brought claims for violations of sections 541.060 and 541.061, for which section 541.151 provides a private cause of action. Section 541.060, as relevant to Ruttiger's claims, provides as follows:

> **Unfair Settlement Practices**
> (a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:
>
> (1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;
>
> (2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:

[8]Ruttiger asserts that TMIC waived its position that the Insurance Code does not provide a legal basis for him to recover damages. The record reflects that TMIC objected to the jury charge on that basis and challenged the legal sufficiency of the evidence to support a judgment against it in the court of appeals. TMIC did not waive error.

> (A) a claim with respect to which the insurer's liability has become reasonably clear; . . .
> (3) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;
>
> . . . .
>
> (7) refusing to pay a claim without conducting a reasonable investigation with respect to the claim . . . .

TEX. INS. CODE § 541.060.

TMIC asserts that because the Labor Code and WCD rules set specific deadlines and procedures for both paying and denying workers' compensation claims and impose administrative penalties for failing to comply with them, allowing recovery under the Insurance Code would be inconsistent with what the Legislature has deemed to be adequate protections for workers. TMIC concludes that as between section 541.060 and the Act, the Act is the exclusive remedy. Ruttiger responds that under *Aetna Casualty & Surety Co. v. Marshall*, 724 S.W.2d 770 (Tex. 1987), an employee has a cause of action under the Insurance Code against a workers' compensation carrier.

In *Marshall* we considered whether an injured worker who had settled his compensation claim by agreed judgment could recover damages under former article 21.21[9] of the Insurance Code when the carrier failed to comply with the agreed judgment. *Marshall*, 724 S.W.2d at 770. At that time, article 21.21 provided a cause of action to a person who sustained actual damages as a result of an insurance carrier's deceptive acts or practices. *Id.* at 772. Marshall sued Aetna under article 21.21, claiming that Aetna represented to him that it would provide benefits under the agreed

[9] Act of Apr. 25, 1957, 55th Leg., R.S., ch. 198, § 1, 1957 Tex. Gen. Laws 401.

judgment and then refused to do so. *Id.* Aetna argued, in part, that Marshall was limited to relief provided by the Act: a suit to recover unpaid medical expenses and a 12% penalty. *Id.*

We disagreed with Aetna and held that Marshall could recover under the Insurance Code stating that "[t]he mere fact that Marshall was injured while working should not be used as a shield by Aetna to escape the punitive provisions of article 21.21." *Id.* So, we agree with Ruttiger that at the time it was decided, *Marshall* answered the question of whether an employee could assert a claim under the Insurance Code against a workers' compensation carrier. However, the workers' compensation landscape changed after *Marshall* was decided. As we explain below, a cause of action under section 541.060 is incompatible with the provisions of the current Act.

Various aspects of the Texas workers' compensation system have been criticized from the time the first Employers' Liability Act was enacted in 1913. *See Tex. Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 512-13 (Tex. 1995). In the early 1980s, unusually heavy criticism of the system, its costs to employers, benefits to injured workers, and dispute resolution procedures began surfacing. *Id.* (citing Joint Select Committee on Workers' Compensation Insurance, A Report to the 71st Texas Legislature 3 (1988) (hereafter "Joint Committee Report")). In response to the increasing criticism, in 1987 the Legislature appointed an interim committee to study the system.[10] Tex. H.R. Con. Res. 27, 70th Leg., 2d C.S., 1987 Tex. Gen. Laws 920. The committee held hearings around the state and in 1988 formulated its report to the Legislature, noting

[10] The Senate representatives on the committee were Senators Bob Glasgow, Kent Caperton, Cyndi Krier, John Montford, and Frank Tejeda. The House representatives were Representatives Richard Smith, David Cain, Robert Early, Alex Moreno, and Rick Perry. Senator Glasgow and Representative Smith were co-chairs. A six member advisory panel assisted the committee.

several major areas of concern about the existing system. Joint Committee Report at 2-4. In 1989, the Legislature undertook to reform the workers' compensation statutes in what has been called "the most divisive legislative endeavor in contemporary Texas politics" up until that time. 1 JOHN T. MONTFORD ET AL., A GUIDE TO TEXAS WORKERS' COMP REFORM 1 (1991) (hereafter MONTFORD). After failing in the regular and first special session to enact reforms, the Legislature finally did so in a second special session. The key, and most controversial, reforms were in the areas of employee benefits and dispute resolution. *See id.*, at ix. As to the dispute resolution process, the reform amendments "culminated in an essentially new set of Texas workers' compensation laws." *Id.* at 6-14.

Differences between the dispute resolution processes under the former law and the amended Act[11] are stark. When a claim was disputed under the former law, the injured employee and the workers' compensation carrier attended an informal pre-hearing conference. *Garcia*, 893 S.W.2d at 512. Testimony was not taken and generally the only discernable result of the conference was a written recommendation by the pre-hearing officer. *Id.* That recommendation was presented to the Industrial Accident Board (IAB) at a "formal" hearing in Austin. *Id.* The formal hearing in most instances was more formality than hearing: attendance by the parties or their representatives was discouraged and for the overwhelming majority of claims no one attended and no testimony was taken or submitted. 1 MONTFORD, at 6-32 n.18 (noting that of more than 17,000 claims scheduled for IAB hearing in 1989, only 70 were actually heard while the remainder were simply passed

[11] For ease of reference the Act as amended will generally be referred to as the Act, or in some cases the amended Act; the law as it was before the 1989 amendments will be referred to as the old law or the former law.

through as a matter of course so they could proceed to the judicial level). After the IAB made its award, either party could appeal for judicial review by trial de novo. *Garcia*, 893 S.W.2d at 512. Once a claim was appealed, the IAB lost jurisdiction over the claim and the IAB proceedings, directives, and award were of no further effect. 1 MONTFORD, at 6-33. Under the old law, the IAB's involvement was many times secondary and frequently the IAB proceedings were no more than a "way station" on the way to the courthouse. *Id.*

The 1989 amendments and the current Act provide significantly more meaningful proceedings at the administrative agency level so as to reduce the number and cost of judicial trials, speed up the time for the entire dispute resolution process, and facilitate interlocutory payment of benefits pending final resolution of disputes. *Id.* at 6-28. To achieve these purposes the amended Act contains detailed procedures and penalties for failures of the various interested parties to comply with statutory and regulatory requirements.

We recently considered the relationship between a general statutory cause of action and one in which the statute had a more detailed, specific claims resolution process in *City of Waco v. Lopez*, 259 S.W.3d 147 (Tex. 2008). In that case, Lopez filed a whistleblower suit based on allegations that he was discharged in retaliation for reporting age and race discrimination that violated the City's EEO policy. *Id.* at 149. The City argued that the Texas Commission on Human Rights Act (CHRA), TEX. LAB. CODE §§ 21.001–.556, provided the exclusive remedy for Lopez's claim. *Lopez*, 259 S.W.3d at 150. Lopez did not file a claim under the CHRA and urged that he could elect to proceed under either the CHRA or the Whistleblower Act. *Id.* at 151-52. The Whistleblower Act generally prohibits governmental entities from suspending or terminating the employment of a

public employee who in good faith reports a violation of law by the employing governmental entity to an appropriate law enforcement authority, and provides a general remedy for retaliation based on the report of any violation of law. *See* TEX. GOV'T CODE §§ 554.001–.010. The CHRA, on the other hand, prohibits retaliation against employees on the basis of employment discrimination. *Lopez*, 259 S.W.3d at 154.

We held that relief under the more general Whistleblower Act with its comparatively simple administrative exhaustion procedures was incompatible with and foreclosed by the more specific and comprehensive anti-retaliation remedy in the CHRA. *Id.*; *see id.* at 153 (noting that in determining legislative intent, we are guided by the principle that a specific statute will prevail over a more general statute). In reaching our conclusion, we compared the policies behind each statute as well as the procedural requirements and remedies provided by each. *Id.* at 154. We noted that the CHRA embodied policies that included administrative procedures involving informal conference, conciliation and persuasion, as well as judicial review of administrative action. *Id.* (quoting *Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 487 (Tex. 1991)). We concluded that

> [i]t is conceptually untenable that the Legislature would have erected two alternative state statutory remedies, one that enacts a structured scheme favoring investigation and conciliation and carefully constructs rights, remedies, and procedures under that scheme (the CHRA) and one that would significantly undermine that scheme (the Whistleblower Act).

Id. at 155-56.

As we did in *Lopez*, we must consider the purposes, policies, procedural requirements, and remedies of the Insurance Code and the Workers' Compensation Act to determine whether the

Legislature intended to effectively provide two different remedies to injured workers. The purpose of Chapter 541 of the Insurance Code is to

> regulate trade practices in the business of insurance by:
>
> > (1) defining or providing for the determination of trade practices in this state that are unfair methods of competition or unfair or deceptive acts or practices; and
> > (2) prohibiting those trade practices.

TEX. INS. CODE § 541.001. The Chapter provides a private action for damages against someone who has engaged in a specified act or practice. *Id.* § 541.151. A plaintiff who prevails on such an action is entitled to actual damages and treble damages if the trier of fact finds that the defendant "knowingly" committed the act. *Id.* § 541.152.

The purpose of the Act is

> to provide employees with certainty that their medical bills and lost wages will be covered if they are injured. An employee benefits from workers' compensation insurance because it saves the time and litigation expense inherent in proving fault in a common law tort claim. But a subscribing employer also receives a benefit because it is then entitled to assert the statutory exclusive remedy defense against the tort claims of its employees for job related injuries.

HCBeck, Ltd. v. Rice, 284 S.W.3d 349, 349 (Tex. 2009); *see In re Poly-Am. L.P.*, 262 S.W.3d 337, 349 (Tex. 2008) ("In order to ensure compensation for injured employees while protecting employers from the costs of litigation, the Legislature provided a mechanism by which workers could recover from subscribing employers without regard to the workers' own negligence, while limiting the employers' exposure to uncertain, possibly high damage awards permitted under the common law." (citations omitted)); *see also* TEX. LAB. CODE § 408.001(a) ("Recovery of workers'

compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage . . . .").

To accomplish these purposes, the Act provides detailed notice and administrative dispute resolution proceedings that include specific deadlines and incorporate a "conveyor-belt" approach. That is, once the administrative dispute resolution process is initiated, a dispute continues through the process until the dispute is either resolved by the parties or by a binding decision through the resolution procedures. The claims process begins when an employee reports a lost-time injury or occupational disease to the employer. The employer, as required by the Act, then reports the injury claim to the carrier. *Id*. § 409.005(a). Within fifteen days of receiving written notice of an employee's injury claim, the carrier must initiate benefit payments or notify the WCD and the employee of its refusal to pay. *Id.* § 409.021(a). If the carrier refuses to pay or terminates benefits, it is required to advise the employee of his or her right to request a BRC and of the means to obtain further information from the WCD. *Id.* § 409.021(a)(2)(A). The carrier also must specify its grounds for refusal. *Id.* § 409.022. Once the WCD receives notice of an employee's claim, it must mail the employee a description of (1) the services the WCD provides; (2) the WCD's procedures; (3) the services provided by the Office of Injured Employee Counsel, including the ombudsman program which provides free assistance to injured employees in the dispute resolution process; and (4) the employee's rights and responsibilities under the Act. *Id.* § 409.010. Then, if there are disputed issues, the dispute resolution process begins when a party requests a BRC or the WCD sets a BRC on its own motion. *Id.* § 410.023(a). If a BRC is requested, the WCD must schedule it

within forty days after receiving the request, or within twenty days if compensability or liability for essential medical treatment is in dispute. *Id.* § 410.025(a); 28 TEX. ADMIN. CODE § 141.1.

If all disputed issues are not resolved at the BRC, the dispute resolution process is designed to automatically move to the next step: the Act requires the WCD to schedule a contested case hearing (CCH) before a hearing officer within sixty days. TEX. LAB. CODE § 410.025(b). Sworn testimony and other evidence is received at the CCH and a record of the proceeding is made. *Id.* §§ 410.163–.166. The decision of the CCH hearing officer regarding benefits is final unless it is timely appealed. *Id.* § 410.169. A party dissatisfied with the CCH decision may appeal it to an appeals panel, but the hearing officer's decision is binding during pendency of the appeal. *Id.*

If a CCH decision is appealed, the appeals panel's written decision is based on the CCH record, the written request for an appeal, and the response. *Id.* § 410.203. If the appeals panel does not issue a decision within forty-five days after the response to the appeal request is filed, then the decision of the CCH hearing officer is final absent timely appeal for judicial review. *Id.* §§ 410.204, 410.205(a). And just as the decision of the CCH hearing officer is binding during appeal to the appeals panel, the decision of the appeals panel is binding during pendency of an appeal for judicial review. *Id.* § 410.205(b). Judicial review regarding compensability or income benefits is limited to issues decided by the appeals panel and on which judicial review is specifically sought. *Id.* § 410.302. If trial is by jury, the court must instruct the jury as to the decision of the appeals panel on each of the disputed issues submitted. *Id.* § 410.304(a). If trial is without a jury, the court is required to consider the decision of the appeals panel. *Id.* § 410.304(b).

A carrier's failure to comply with the Act's requirements, deadlines, and procedures is not without consequences. First, the Act specifies administrative penalties both in particular sections and in a general, catchall provision. For example, if a carrier fails to initiate compensation or notify the WCD of its refusal to do so within fifteen days of receiving notice of injury, it is subject to monetary penalties ranging from $500 to $5,000, depending on the length of time it takes the carrier to comply. *Id.* § 409.021(e). The Act also provides that a carrier or its representative commits an administrative violation for any of twenty-two specified actions, including failing to process claims promptly and in a reasonable and prudent manner, controverting a claim if the evidence clearly indicates liability, and failing to comply with the Act. *Id.* § 415.002(11), (18), (22). If a carrier refuses or fails to comply with an order of the WCD, either interlocutory or final, or a decision of the commissioner, within twenty days of when the decision or order becomes final, it commits an administrative violation. *Id.* § 410.208(e). Also, both the WCD and claimant are specifically authorized by the Act to file suit to enforce the order and recover attorneys' fees. *Id.* § 410.208(a)–(c). A claimant who brings suit is entitled to recover 12% of the amount of benefits recovered in the judgment as a penalty. *Id.* § 410.208(d).

Further, the WCD is required to monitor the actions of carriers, as well as other parties in the workers' compensation system, for compliance with "commissioner rules, [the Act], and other laws relating to workers' compensation." *Id.* § 414.002(a). In addition to its mandate to monitor carriers and other participants in the system, the WCD has a separate mandate to, at the carriers' expense, "review regularly the workers' compensation records of insurance carriers as required to ensure compliance with [the Act]." *Id.* § 414.004(a), (c). The Act also provides that in addition to

other sanctions or remedies, the WCD commissioner has authority to assess administrative penalties of up to $25,000 per day per occurrence for violations of the Act. *Id.* § 415.021(a).

It is apparent that the Act prescribes detailed, WCD-supervised, time-compressed processes for carriers to handle claims and for dispute resolution. It has multiple, sometimes redundant but sometimes additive, penalty and sanction provisions for enforcing compliance with its requirements. Permitting a workers' compensation claimant to additionally recover by simply suing under general provisions of Insurance Code section 541.060 would be inconsistent with the structure and detailed processes of the Act. Not only would such a recovery be inconsistent with the Act's goals and legislative intent exhibited in the Act, it could also result in rewarding an employee who is dilatory in utilizing the Act's detailed dispute resolution procedures, regardless of whether the delay was intentional or inadvertent, because whether and when the dispute resolution begins is by and large dependent on the employee.

For example, Ruttiger's damages claim was based on TMIC's delay in providing both compensation and medical benefits and the delay's effect on him over and above what the effects of his injury would have been had TMIC not terminated benefits in July 2004. But Ruttiger and his lawyer did not seek immediate resolution of his dispute with TMIC by promptly requesting a BRC. Rather, they waited over three months from the time they knew TMIC was contesting the claim to do so. Ruttiger and TMIC resolved their dispute by agreement at the first BRC they attended—just as is contemplated by the Act's procedures.[12] As we stated in *Lopez*, "[i]t is conceptually untenable

[12] The record does not reflect, and Ruttiger does not argue, that the WCD determined TMIC committed administrative violations by failing to process claims in a reasonable and prudent manner, *see* TEX. LAB. CODE § 415.002(11); by refusing to pay benefits without having reasonable grounds, *see id.* § 409.022(c); or by terminating

that the Legislature would have erected two alternative statutory remedies, one that enacts a structured scheme . . . and carefully constructs rights, remedies and procedures . . . and one that would significantly undermine that scheme." *Lopez*, 259 S.W.3d at 155-56. If allowed to bring Insurance Code claims, workers' compensation claimants will actually have incentive to delay seeking resolution of disputes through the carefully crafted administrative dispute resolution procedures of the Act. As is demonstrated by the facts of this case, an employee's delay in initiating the Act's expedited dispute resolution procedures can generate both recovery of benefits under the Act and a separate, additional lawsuit for damages and delay in derogation of the Act's carefully crafted dispute resolution procedures. Instead of encouraging claimants to immediately seek resolution of their disputes by means of the legislatively mandated aids such as the ombudsman program and WCD-directed administrative procedures, allowing an Insurance Code cause of action would provide an incentive for employees to wait weeks or months to initiate the Act's expedited dispute resolution procedures and then file suit for damages under the Insurance Code, as was done here.

Further, Insurance Code section 541.060 is entitled "Unfair Settlement Practices." Its text provides that specified acts or practices are "unfair settlement practices" and that those settlement practices are unfair methods of competition and unfair or deceptive acts or practices in the business of insurance. TEX. INS. CODE § 541.060(a). In the Act, settlements are defined as "a final resolution of all the issues in a workers' compensation claim that are permitted to be resolved under terms of [the Act]." TEX. LAB. CODE § 401.011(40). A settlement (1) may not resolve an issue of

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benefits absent substantiating evidence that doing so was reasonable and authorized by law. *See id.* § 415.002(a)(2).

impairment before the employee reaches maximum medical improvement (and settlement agreements even after that point must adopt an impairment rating using guidelines prescribed by the Act); (2) may not provide for payment of benefits in a lump sum except when an employee (a) has returned to work for at least three months earning at least 80% of the employee's average weekly wage and (b) elects to commute impairment income benefits; and (3) may not limit or terminate the employee's right to medical benefits. *Id.* § 408.005(a), (b), (c). At the time Ruttiger filed suit in this matter he had not reached maximum medical improvement, did not have an impairment rating from his doctors, and had not returned to work. Thus, as of the time he filed suit complaining of TMIC's past delays, his workers' compensation claim could not yet have been settled.

In sum, this Court held in 1987 that an injured worker was not limited to recovery under the Act, but could also recover under the Insurance Code. *Marshall*, 724 S.W.2d at 772. But the current Act with its definitions, detailed procedures, and dispute resolution process demonstrating Legislative intent for there to be no alternative remedies was not in effect in 1987. The Legislature's definition of "settlement" under the current Act reflects legislative intent that is at odds with the intent reflected in Insurance Code section 541.060; the limited definition of "settlement" provided in the Act does not fit within the construct of section 541.060.[13] The provisions of the amended Act indicate legislative intent that its provisions for dispute resolution and remedies for failing to comply with those provisions in the workers' compensation context are exclusive of those in section

[13] Ruttiger does not claim that the agreement he reached with TMIC at the BRC was a settlement. *See* TEX. LAB. CODE § 401.011(3) (defining "agreement" as the resolution by the parties of one or more issues regarding an injury, coverage, or compensability, but not a settlement).

541.060. Thus, we agree with TMIC that Ruttiger may not assert a cause of action under section 541.060.

B. Section 542.003

The jury charge also asked whether TMIC, with respect to a claim by an insured or beneficiary, failed "to adopt and implement reasonable standards for prompt investigation of claims arising under its policies." Such action by an insurer is prohibited by Insurance Code section 542.003(a), (b)(3).[14] But as we discussed in the preceding section, the Act contains specific requirements with which a workers' compensation carrier must comply when contesting a claim, and provides that failure to comply with the requirements can constitute waiver of the carrier's rights as well as subject the carrier to significant administrative penalties. The Act's requirements include time limits for payment of benefits, giving notice of a compensability contest and the specific reason for the contest, and necessarily subsume the requirement of proper investigation and claims processing. *See, e.g.*, TEX. LAB. CODE § 409.021(a) (a carrier must initiate benefit payments or notify the WCD and the employee of its refusal to pay within fifteen days of receiving written notice of an employee's injury and if the carrier refuses to pay or terminates benefits, it is required to advise the employee of his or her right to request a BRC and of the means to obtain further information from the WCD); *id.* § 409.022 (when refusing to initiate benefits or when terminating benefits the carrier must specify its grounds and a carrier commits an administrative violation if the carrier does not have reasonable grounds for refusing to pay benefits); *id.* § 409.021(c) (providing

[14] TMIC argues that the Insurance Code does not provide for a private cause of action for a violation of this section. This is the first time TMIC has made this argument. It has not been preserved and we do not address it.

that a carrier waives its right to contest compensability if it does not contest compensability within sixty days of receiving notice of injury); *id.* § 415.002(a) (providing that a carrier commits an administrative violation for, among other actions, failing to process claims promptly and in a reasonable manner, failing to initiate benefits when due if a legitimate dispute does not exist as to the liability of the carrier, terminating or reducing benefits without substantiating evidence that the action is reasonable and authorized by law, or controverting a claim if the evidence clearly indicates liability).

We conclude, as we did with section 541.060, that in light of the specific substantive and procedural requirements built into the Act and the detrimental effects on carriers flowing from and penalties that can be imposed for failing to comply with those requirements, the Legislature did not intend for workers' compensation claimants to have a cause of action against the carrier under the general provision of section 542.003. To the extent *Marshall* is in conflict with any of the foregoing, we overrule it.

C. Section 541.061

The trial court judgment also allowed Ruttiger to recover under section 541.061 of the Insurance Code, which provides:

> **Misrepresentation of Insurance Policy**
> It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to misrepresent an insurance policy by:
>
> (1) making an untrue statement of material fact;
> (2) failing to state a material fact necessary to make other statements made not misleading, considering the circumstances under which the statements were made;
> (3) making a statement in a manner that would mislead a reasonably prudent person to a false conclusion of a material fact . . .

TEX. INS. CODE § 541.061. TMIC asserts that section 541.061 is not a legal basis for Ruttiger to recover damages for the same reasons he may not recover damages under Insurance Code section 541.060. We disagree.

Unlike section 541.060, section 541.061 does not specify that it applies in the context of settling claims. *See id.* § 541.060(a) (defining unfair settlement practices "with respect to a claim"). Section 541.061 applies to the misrepresentation of an insurance policy, but because it does not evidence intent that it be applied in regard to settling claims, it is not at odds with the dispute resolution process of the workers' compensation system.

Nevertheless, we agree with TMIC that there is legally insufficient evidence to support a finding that it misrepresented its policy. TMIC denied Ruttiger's claim on the basis that he was not injured on the job. Ruttiger does not point to any untrue statement made by TMIC regarding the policy or any statement about the policy that misled him. The dispute between Ruttiger and TMIC was over whether Ruttiger's claim was factually within the policy's terms—whether he was injured on the job. And the parties' BRC agreement did not resolve any issues regarding TMIC's policy terms; it resolved whether Ruttiger was injured in the course of his employment with A&H. While we disagree with TMIC's assertion that Ruttiger's claim under section 541.061 is precluded by the Act, we agree with its legal sufficiency challenge to the evidence supporting a finding based on section 541.061.

Because the provisions of section 541.060 and 542.003 cannot support a judgment against TMIC for unfair settlement practices and there is no evidence to support a finding pursuant to

section 541.061 that TMIC misrepresented its insurance policy, we reverse the court of appeals' judgment affirming Ruttiger's recovery on his claim under the Insurance Code.

IV. Deceptive Trade Practices Act

Ruttiger agrees that his DTPA claim as pled and submitted to the jury depended on the validity of his Insurance Code claim. Because we have determined that he cannot recover on his Insurance Code claim, we likewise hold that he cannot recover on his DTPA claim.

V. Good Faith and Fair Dealing

A. Discussion

The trial court's judgment provides that if Ruttiger's Insurance Code and DTPA claims failed on appeal, he could elect to recover on his claim that TMIC breached its common law duty of good faith and fair dealing. The court of appeals did not address the issue, but it has been briefed and argued here, so I will. *See* TEX. R. APP. P. 53.4; *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 520-22 (Tex. 1995).

TMIC asserts, in part, that Ruttiger cannot recover for breach of the duty of good faith and fair dealing because the cause of action is no longer warranted given the provisions of the current Act.

In *Arnold v. National County Mutual Fire Insurance* Co,. the Court held that a duty of good faith and fair dealing arises from the relationship between an insurer and a first-party insured. 725 S.W.2d 165, 167 (Tex. 1987). The Court noted that "without such a cause of action insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed. An insurance company has exclusive control over the evaluation, processing and

denial of claims." *Id.* at 167. In *Aranda v. Insurance Co. of North America*, the Court imposed the holding of *Arnold* onto the workers' compensation system and held that an injured employee was entitled to assert a claim against a workers' compensation carrier for breach of the duty of good faith and fair dealing. 748 S.W.2d 210, 212-13 (Tex. 1988) (sometimes hereafter referred to as an *Aranda* cause of action for ease of reference). The Court pointed out three reasons for holding that an employee should be allowed to assert such a claim outside the workers' compensation dispute resolution system: (1) the disparity of bargaining power between compensation insurers and employees, (2) the exclusive control that an insurer exercises over processing of claims, and (3) arbitrary decisions by carriers to refuse to pay or delay payment of valid claims leave the injured employees with no immediate recourse. *Id.*

Aranda was decided in 1988. Even before it was decided, however, the Legislature had begun an intensive study of how to best modify the workers' compensation system that interested parties and experts agreed needed changing. The study identified numerous deficiencies, including those set out in *Aranda*. *See generally* Joint Committee Report. During the regular and a special legislative session following *Aranda*, the Legislature struggled without success to enact major reforms to the Act. It was only in a second special session that overhaul of the system was finally accomplished. As can be seen from our discussion of the 1989 amendments in section III.A. above, and as I explain in more detail below, those reforms and subsequent amendments to the Act addressed the three deficiencies underlying *Aranda*—and much more.[15]

[15] The factual situation underlying *Aranda* is specifically addressed by the Act. In *Aranda* an employee was injured while working for two employers. 148 S.W.2d at 211. The employers had different workers' compensation carriers. *Id.* The carriers did not contest whether the employee's injury was compensable, but each asserted that the

In *Aranda* the Court expressed concern that a carrier could arbitrarily refuse to pay benefits, leaving an injured worker without immediate recourse because "the mechanisms provided by the Workers' Compensation Act do not afford immediate relief to the injured employee who is denied compensation." 748 S.W.2d at 212. The Joint Committee Report emphasized that one major deficiency of the process for delivering benefits was "[t]he system has no means to render fast decisions in disputes which require them." Joint Committee Report, at 4. A brief review of the former dispute resolution system demonstrates the problems.

As outlined above, under the old law the first step in the administrative dispute resolution process was an informal pre-hearing conference where a record was not made and the result generally was a written recommendation of the pre-hearing officer that was sent to the IAB in Austin. *Garcia*, 893 S.W.2d at 512. The IAB hearing in Austin was not designed to be an actual hearing, but was primarily for the purpose of making an award based on the pre-hearing officer's recommendation. *Id.* After the IAB's award completed the administrative process, either the employee or carrier could appeal the award to the district court for a trial de novo. *See Latham v.*

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other was liable for the employee's benefits and neither provided benefits pending resolution of the dispute by the IAB. *Id.*

Section 410.033 of the current Act is entitled "Multiple Carriers" and provides:

> (a) If there is a dispute as to which of two or more insurance carriers is liable for compensation for one or more compensable injuries, the commissioner may issue an interlocutory order directing each insurance carrier to pay a proportionate share of benefits due pending a final decision on liability. The proportionate share is computed by dividing the compensation due by the number of insurance carriers involved.
>
> (b) On final determination of liability, an insurance carrier determined to be not liable for the payment of benefits is entitled to reimbursement for the share paid by the insurance carrier from any insurance carrier determined to be liable.

TEX. LAB. CODE § 410.033.

Security Ins. Co., 491 S.W.2d 100, 104 (Tex. 1972) (interpreting former TEX. REV. CIV. STAT. art. 8307, § 5). If a party appealed for judicial review, the appeal vacated the award, the IAB lost jurisdiction over the proceedings and the carrier could stop providing benefits; or, if the carrier had been contesting compensability of the claim and had not been paying benefits, it could continue to refuse to provide benefits even if the IAB award was in favor of the employee. *Id.* Plus, there was no effective procedure for resolving disputes over medical care. 1 MONTFORD, at 4-27.

The lack of an immediate, binding dispute resolution process under the old law resulted in carriers, for the most part, having control over claims resolution. That control yielded greatly disparate bargaining positions between insurers and injured workers, and the IAB was considered to have had relatively little power to control the process. *See Garcia*, 893 S.W.2d at 512-13; Joint Committee Report, at 5 (stating that under the old law "[t]he agency lacks either the ability or the resources to effectively control the behavior of participants and to compel appropriate actions when they are required"). As outlined above, the IAB's dispute resolution process was considered a formalistic ritual through which claims had to pass to get to the courthouse. Hearings were rarely meaningful and the procedures did not provide incentive to insurers to make indemnity payments to injured workers nor did they provide a disincentive to insurers to dispute payment for medical benefits. 1 MONTFORD, at 6-32. And because of the delay inherent in and cost of reaching the system's first factfinding process—de novo trials when IAB awards were appealed—disputes were primarily resolved through compromise before an injured worker's medical condition had stabilized. That situation increased the probability that "assessment of disability (and hence, the benefits)

[would] be inaccurate." Joint Committee Report, at 5; *see Garcia*, 893 S.W.2d at 512-13 ("The delay and cost of *de novo* review forced premature and inaccurate settlements.").

The 1989 reforms were intended to reduce the costs to employers and provide greater benefits to injured employees in a more timely fashion. Achieving those goals required, among other changes, reducing the disparity of bargaining power between the employee and insurer, imposing controls over the carriers' processing of claims, and controlling the ability of carriers to make arbitrary decisions about refusing or delaying payment. Those changes were accomplished by providing meaningful, binding administrative dispute resolution procedures, speeding up "the start-to-finish time for the entire comp dispute resolution process, as well as [facilitating] interlocutory payment of comp benefits pending final resolution." 1 MONTFORD, at 6-28.

Some of the amendments relevant to the issue before us have been previously discussed, but nevertheless I review them here because of their importance in giving context and perspective to this discussion. When compared to the old law, the Act provides a reduced amount of time for carriers to file a notice of dispute or start paying benefits. TEX. LAB. CODE § 409.021 (providing that a carrier shall begin paying benefits or file a notice of dispute within fifteen days after receiving written notice of injury). Failure to meet the time limit is an administrative violation subject to penalties of $500 to $5,000 depending on how long it takes a carrier to comply. *Id.* § 409.021(e). The carrier has statutory and regulatory duties to promptly conduct adequate investigations and reasonably evaluate and expeditiously pay workers' legitimate claims or face administrative penalties. *See, e.g., id.* § 409.021. If a carrier on multiple occasions fails to pay benefits promptly as they accrue, except as authorized by the Act, the carrier is subject to an additional administrative

violation and even revocation of its right to do business under the workers' compensation statutes. *Id.* § 409.023(d).

Under the Act's dispute resolution process, the BRC begins a process in which disputes proceed from one part of the process to the next until the dispute is resolved by agreement, final order or decision of the WCD, or judicial order. A BRC must be held within forty days of a request for one, or within twenty days if an expedited setting is needed. 28 TEX. ADMIN. CODE § 141.1(h). Unless the dispute is resolved at the BRC, the WCD must schedule a CCH to take place within sixty days of the BRC, TEX. LAB. CODE § 410.025(b), or within thirty days if an expedited setting is appropriate. 28 TEX. ADMIN. CODE § 142.6(a)(2). At the CCH a record is made and the dispute is heard by a WCD hearing examiner whose decision is final unless an appeal is filed within fifteen days. TEX. LAB. CODE §§ 410.164, 410.169. If the decision is appealed, the decision of the CCH hearing officer is binding during the appeal and an appeals panel must issue a written decision within forty-five days. *Id.* §§ 410.169, 410.204. Appeals for judicial review are circumscribed by the Act to minimize the expense and time for discovery and trial preparation. *See, e.g., id.* § 410.255 (judicial review of issues other than compensability or income or death benefits is by the substantial evidence rule); *id.* § 410.306 (unless an employee's condition has substantially changed, evidence at trial is limited to that presented to the WCD). And during the process the carrier is not in exclusive control. The WCD has the authority to issue interlocutory benefit-payment orders that are binding as to past as well as future benefits. *Id.* §§ 410.032, 410.168(c), 413.055.

The Act addresses the disparity of bargaining power between the employee and the insurer, in part, by providing an Office of Injured Employee Counsel. TEX. LAB. CODE § 404.101. That

office provides assistance to injured employees through an ombudsman program by which employees have trained assistance during the dispute resolution process even if the employee is not represented by counsel. *Id.* The disparity is also addressed by limitations on settling of claims. Lump-sum benefit settlement payments are not permitted except in certain specific, limited circumstances and settlements resolving issues of impairment may not be made before an employee reaches maximum medical improvement. *Id.* § 408.005(c)(1). When settlements regarding impairment issues are permitted, they must be according to the opinion of a treating or designated doctor assessing impairment based on objective, standardized guidelines. *Id.* § 408.005(c)(2). Those provisions limit a carrier's ability to overreach during any dispute resolution proceedings or settlement negotiations with workers.

In sum, the Legislature has substantially remedied the deficiencies that led to this Court's extending a cause of action under *Arnold* for breach of the duty of good faith and fair dealing to the workers' compensation system. The current system (1) reduces the disparity of bargaining power between compensation insurers and employees; (2) removes insurers' exclusive control over the processing of claims; (3) diminishes and in most instances negates the ability of insurers to make arbitrary decisions refusing or unreasonably delaying payment of valid claims; (4) provides employees information about, immediate recourse to, and, through the ombudsman program, free assistance before the WCD with the claims and dispute resolution process; and (5) provides multiple remedies and penalties, including specific provision for revocation of the carrier's right to do business under the workers' compensation laws of Texas if on multiple occasions it fails to pay benefits promptly and as they accrue.

The original creation of, continued existence of, and amendments to update and improve the workers' compensation system are within the Legislative function of establishing public policy. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 628 (Tex. 2004) ("Generally, 'the State's public policy is reflected in its statutes.'" (quoting *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex. 2002)); *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001) ("[T]he administration of the workers' compensation system is heavily imbued with public policy concerns."); *James v. Vernon Calhoun Packing Co.*, 498 S.W.2d 160, 162 (Tex. 1973) (noting that the "policy of the state [is] declared in the Workmen's Compensation Law"). The cornerstone provision of the 1913 Employers' Liability Act by which an employee received workers' compensation benefits in exchange for the common law right to sue his employer for negligence in the event of an on-the-job injury was the product of a legislative public policy decision brought about by the nature and needs of a changing and more industrialized society. That concept, as well as the workers' compensation system which is continually amended, updated, and changed by the Legislature to reflect the State's changing societal needs, have reflected policy decisions. Key parts of the system are the amount and types of benefits, the delivery systems for benefits, the dispute resolution processes for inevitable disputes that arise among participants, the penalties imposed for failing to comply with legislatively mandated rules, and the procedures for imposing such penalties. Those were some of the areas of concern both identified by the Legislature in the Joint Committee Report and underlying *Aranda*.

The essential question before us is not, as the dissent maintains, "whether the Legislature intended to abrogate entirely a common law bad faith remedy when it enacted the Workers'

Compensation Act." ___ S.W.3d at ___ (Jefferson, C.J., dissenting). I do not believe it did. Rather, the question is to what extent the judiciary will respect the Legislature's function of addressing the concerns and adjusting the rights of parties in the workers' compensation system as part of its policy-making function. In reaching this conclusion it is important to keep in mind the fact that the workers' compensation system is wholly a legislatively crafted entity. It exists only because it was created by the Legislature. Its continued existence and nature depends on the Legislature renewing, reviewing, and amending it to meet the changing needs of Texas employees and employers.

The *Aranda* cause of action operates outside the administrative processes and other remedies in the Act and is in tension with—and in many instances works in direct opposition to—the Act's goals and processes. In part, that tension arises because the extra-statutory cause of action provides incentive for an injured worker to delay using the avenues for immediate relief that the Legislature painstakingly built into the law—as happened in Ruttiger's case. Even if a carrier complies with the Act's provisions by timely notifying the employee of its refusal to pay benefits and the specific reasons why, then participating in a BRC, CCH, and even an appeal to a WCD appeals panel or for judicial review, the carrier still risks common law liability. That situation distorts the balances struck in the Act and frustrates the Legislature's intent to have disputes resolved quickly and objectively. *See Lopez*, 259 S.W.3d at 154-56. Further, an extra-statutory cause of action builds additional costs into the system by increasing litigation expense to employees, insurers, and employers. *See Garcia*, 893 S.W.2d at 511-16 (discussing how through the 1989 amendments the Legislature sought to reduce delay and costs). It also discourages insurers from contesting suspect

or questionable claims and medical treatments because of the possibility of unpredictable large damage awards if the carrier loses its contest, or even resolves a dispute as TMIC did with Ruttiger.

This case is a classic demonstration of how a cause of action for breach of the duty of good faith and fair dealing can hinder the prompt resolution of disputes through proper use of the Act's dispute resolution provisions and increase costs to participants in the system. TMIC timely notified Ruttiger that it was disputing his claim, why it was doing so, and notified him of his right to a BRC. When Ruttiger finally requested a BRC to resolve the dispute, one was scheduled and held, the dispute was resolved, and TMIC began paying benefits. The way the dispute was resolved after Ruttiger initiated the dispute resolution process is the way the Act is designed to function. The disruptive factor was Ruttiger's waiting three months to request a BRC. Such a delay is not what is contemplated by the statutes, and the time for which Ruttiger delayed in initiating the Act's dispute resolution procedures is the basis for his claim for damages in this suit.

The issues underlying the Court's decision in *Aranda* were serious. The Legislature recognized that those issues, as well as other serious shortcomings in the old law, needed to be addressed and it has addressed them. It was the Court's prerogative to recognize the need for and extend *Arnold*'s extra-contractual common law cause of action when it decided *Aranda*; it is the Court's prerogative and responsibility to recognize if the cause of action is no longer appropriate. *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 461 (Tex. 2008) ("[O]ur place in a government of separated powers requires us to consider also the priorities of the other branches of Texas government.").

The Act effectively eliminates the need for a judicially imposed cause of action outside the administrative processes and other remedies in the Act. Recognizing and respecting the Legislature's prime position in enacting, studying, analyzing, and reforming the system, and its efforts in having done that, I conclude that *Aranda* should be overruled.

B. Response to the Dissent

The dissent approaches the *Aranda* issue in two primary ways. In one approach it questions whether by the Act the Legislature intended to abrogate *Aranda*'s holding:

> The question presented in this case is whether the Legislature intended to abrogate entirely a common law bad faith remedy when it enacted the Workers' Compensation Act. . . .
>
> . . . .
>
> We must decide, then, whether there is "clear legislative intent," *Dealers Elec. Supply*, 292 S.W.3d at 660, to extinguish entirely this settled common law remedy.

___ S.W.3d at ___ (Jefferson, C.J., dissenting). The dissent concludes that the Act does not reflect Legislative intent to do so, and I agree. There is no language that TMIC argues shows an intent to abolish the duty of good faith and fair dealing, the dissent sees none, and neither do I. Further, there is simply no question about what the Legislature intended. Its intent is taken from what it enacted—limits on the cause of action. *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). Because the Act contains no language intended to extinguish the action, that should end the inquiry because this Court presumes the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact. *See Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635

(Tex. 2010). But although I agree the Legislature did not intend to abolish the *Aranda* action, I disagree that whether it did is the question that must be answered. As I have noted previously, the essential question is not whether the Legislature intended to abrogate the common law bad faith remedy. The question is to what extent the judiciary will respect the Legislature's function of addressing the concerns and adjusting the rights of parties in the workers' compensation system.

The dissent's other approach is that sections 416.001 and 416.002 of the Act specifically recognize the common law cause of action for breach of the duty of good faith and fair dealing without abolishing it, thereby implicitly ratifying it or giving its existence the Legislature's stamp of approval. *See* ___ S.W.3d at ___ (Jefferson, C.J., dissenting) ("Even after the 1989 overhaul, the Act's express language makes plain the Legislature's intent that common law bad faith claims remain available to litigants."). In reaching its conclusion, the dissent inappropriately goes beyond the language of the Act.

When reading statutes, our goal is to ascertain and give effect to the Legislature's intent. *See F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007). That intent is drawn from the plain meaning of the words chosen by the Legislature when it is possible to do so, *see Entergy Gulf States, Inc.*, 282 S.W.3d at 437, using any statutory definitions provided. *See* TEX. GOV'T CODE § 311.011(b); *Texas Dept. of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). Where statutory text is clear, that text is determinative of legislative intent unless the plain meaning of the statute's words would produce an absurd result. *Entergy Gulf States, Inc.*, 282 S.W.3d at 437. Only when statutory text is susceptible of more than one reasonable interpretation is it appropriate

to look beyond its language for assistance in determining legislative intent. *See In re Smith*, 333 S.W.3d 582, 586 (Tex. 2011).

The Act addresses the *Aranda* cause of action in two sections of Chapter 416:

> **Certain Causes of Action Precluded**
> An action taken by an insurance carrier under an order of the commissioner or recommendations of a benefit review officer under Section 410.031, 410.032, or 410.033 may not be the basis of a cause of action against the insurance carrier for a breach of the duty of good faith and fair dealing.

TEX. LAB. CODE § 416.001.

> **Exemplary Damages**
> (a) In an action against an insurance carrier for a breach of the duty of good faith and fair dealing, recovery of exemplary damages is limited to the greater of:
> (1) four times the amount of actual damages; or
> (2) $250,000.
> (b) An action against a governmental entity or unit or an employee of a governmental entity or unit for a breach of the duty of good faith and fair dealing is governed by Chapters 101 and 104, Civil Practice and Remedies Code.

Id. § 416.002. The dissent maintains, and I agree, that the language of both sections plainly and clearly demonstrates the Legislature's intent to limit the *Aranda* cause of action. But there is a great deal of difference between the Legislature's acknowledging the existence of and limiting the effects of the *Aranda* action and its implicitly ratifying or approving the action.

The language of section 416.001 is simple and forthright. And its full intent is clear: carriers cannot be assessed damages in an *Aranda* action for conduct pursuant to orders or directives of the WCD. There is no language in the section to indicate the Legislature intended to ratify or approve the *Aranda* action. The statute is completely silent on the issue. Likewise, nowhere in section 416.002's language limiting exemplary damages can intent to ratify or approve the *Aranda* cause

of action be found. Again, the statute is completely silent on the issue. I presume the silence is a careful, purposeful, and deliberate choice. *See Tex. Lottery Comm'n*, 325 S.W.3d at 635.

Even though the dissent does not maintain that the language of either section 416.001 or section 416.002 is ambiguous, it goes beyond the Act's language to support its argument for legislative intent. It notes that the 1989 reform bill as originally introduced contained language making administrative penalties the exclusive consequence for bad faith or maliciously adjusting claims, but a committee substitute bill deleted that language and included language that only limited damages as to such actions. Generally, however, changes to language in bills as they pass through the legislative process are not relevant to legislative intent regarding legislation eventually enacted. *See Entergy Gulf States, Inc.*, 282 S.W.3d at 443 ("[W]e attach no controlling significance to the Legislature's failure to enact legislation . . . for the simple reason that it is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." (citations omitted)). Language enacted as law frequently differs from a bill as originally introduced as well as from versions that pass through committee and floor debate in one chamber of the legislature and then undergo the same process in the other chamber. And in many instances a bill is finally sent to a conference committee to work out even different compromise language. The reasons for changes in a bill's language are not always expressed in hearings or documented in records. But even if they were, the intent of the Legislature as a whole is not derived from language that was in a bill at some point or from the perceived intent of a committee that produced a committee substitute bill. The intent of the Legislature is derived from the language it finally enacted. *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson,* 209 S.W.3d 644, 651 (Tex. 2006)

("Ordinarily, the truest manifestation of what legislators intended is what lawmakers enacted, the literal text they voted on."). The absence of language in the Act abolishing the *Aranda* cause of action does not mean the Legislature intended to do the opposite, that is, to implicitly ratify or approve it.

Moreover, the fact that language abolishing the *Aranda* action was in the bill as it was originally filed indicates at least some legislative support for the Joint Select Committee's recommendation to abolish the action. On the other hand, the dissent points to no language in any iteration of the Act through three legislative sessions that shows legislative support for ratifying or approving the *Aranda* action. Thus, the dissent's argument that legislative intent to implicitly ratify or approve the *Aranda* action exists because language abolishing it was in the original bill but not the committee substitute is not only speculative as to the reason for the language's being removed, it is also illogical speculation. More logical speculation about the language being in the original bill and removed is that there was legislative support for abolishing the action, while the absence of ratification language in any version of the bill as well as the final enactment indicates there was *no* legislative intent to ratify or approve of the *Aranda* action. But in the final analysis, either argument about legislative intent based on the committee substitute bill can fairly be described as speculative and inappropriate.

Further, legislative intent emanates from the Act as a whole, and not from one isolated portion. *See Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). At least two parts of the Act indicate the absence of language abolishing the *Aranda* action does not reflect legislative intent to do the opposite and keep it available to litigants. First, the Act

specifically provides that under certain circumstances both the WCD and the employee may sue the carrier, and it specifies what either party can recover in such an action. TEX. LAB. CODE § 410.208(a)–(d). If the Legislature intended to ratify or approve an *Aranda* action, it could have made its intent clear by simply saying so in Chapter 416 while it was addressing the issue, just as it said in section 410.208 that both the WCD and employee may sue the carrier. But it did not. Second, one of the major goals of reform and changes made in the Act was to adopt an objective-based standard for determining indemnity benefits in order to reduce disputes and subjective decision making about them. One of two changes that was the "heart and soul" of the 1989 reforms was "a different method to compute benefits: the shift from the subjective standard of 'loss of wage earning capacity' for redress of injured workers to the more objective use of an impairment schedule for a determination of the recoverable loss caused by a compensable injury." 1 MONTFORD, at 3; *see* TEX. LAB. CODE § 408.122 (impairment income benefits are not recoverable unless based on an objective clinical or laboratory finding); *id.* § 408.124 (impairment income benefits must be based on an impairment rating determined by use of the "Guides to the Evaluation of Permanent Impairment," published by the American Medical Association); *see also Garcia*, 893 S.W.2d at 523 n.23 (noting the testimony of John Lewis, a workers' compensation expert retained by the Joint Select Committee to evaluate the former system: "What goes on in [the old law] system is inherently subjective . . . . The hope [in fashioning a new system] is to substitute to a greater degree objectivity so there is less reason to argue, the ability to deliver the benefits much more quickly and without the need for litigation." (quoting Meeting of the Legislative Oversight Committee on Workers' Compensation, April 10, 1989, Tape 4 at 2-3)). One of the Legislature's unquestioned goals was

to make decisions about benefits as objective as possible, and thereby reduce disputes and litigation over them. The *Aranda* cause of action with its subjective standards for damages is antithetical to such a system, and it has no dispute resolution process other than litigation with its associated delays and expense. Holding that there was legislative intent to implicitly approve or ratify the *Aranda* action because of an *absence* of language either abolishing or approving it would turn logic on its head when considered in context of the Act as a whole.[16]

In the final analysis, the *Aranda* cause of action is a common law one and it is this Court's prerogative and responsibility to evaluate whether the cause of action continues to be appropriate. That evaluation, in light of the workers' compensation system being wholly a creation of the

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[16] Because the dissent seeks legislative intent outside the words of the statute, it seems that in fairness to the issue it would consider other factors outside the enacted language, or, the non-enacted language on which it relies. But it does not. Other factors would counsel against the conclusion that by its silence the Legislature implicitly ratified or approved the *Aranda* action. For example, ratifying or approving the *Aranda* action would have been diametrically opposed to the finding of the Legislature's Joint Select Committee that the action was detrimental to the goals and interests that had to be balanced in amending the old law, and its recommendation that the action be abolished in favor of a statutory action. *See* Joint Committee Report, at 16.

Another factor not discussed by the dissent is that the existing cause of action was a common law action and legislatively abolishing or abrogating a common law cause of action is a course not lightly undertaken. Allowing abrogation of an injured worker's common law cause of action against his employer in exchange for the adequate and more certain benefits provided by the Act—a cornerstone of workers' compensation law in Texas—was held constitutional in 1916. *See Garcia*, 893 S.W.2d at 521; *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 562 (1916) (upholding constitutionality of the Employers' Liability Act of 1913). But during the years immediately preceding the 71st Legislature, this Court held that various legislative attempts to "cabin-in"—but not completely abolish—certain common law causes of action violated the Texas Constitution. *See Lucas v. U.S.*, 757 S.W.2d 687, 691 (Tex. 1988) (damages caps in art. 4590i §§ 11.02 and 11.03 as applied to catastrophically injured plaintiffs unconstitutional under due course of law provision); *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985) (limitations provision of art. 4590i § 10.01 unconstitutional under open courts provision); *Nelson v. Krusen*, 678 S.W.2d 918, 922-23 (Tex. 1984) (limitations provision of TEX. INS. CODE art. 5.82, § 4 unconstitutional under open courts provision); *Sax v. Votteler*, 648 S.W.2d 661, 665-67 (Tex. 1983) (limitations provision in TEX. INS. CODE art. 5.82 as applied to minors unconstitutional under open courts provision). So as of 1989 when the Legislature was struggling to enact reforms, the long-standing construct whereby employees exchanged their common law negligence claims against employers for workers' compensation benefits had withstood constitutional challenge, but recent attempts by the Legislature to place limits on various common law causes of action had not. And opponents of the 1989 reforms promised, and brought, constitutional challenges to the new law. *See Garcia*, 893 S.W.2d at 534 (holding the new Act was constitutional and reversing the court of appeals that had affirmed the trial court's determination that the entire Act was unconstitutional). Taken in context of the times, then, the Legislature's action in even *limiting* an *Aranda* cause of action evidenced significant concern about and intent to control its disruptive effects—not intent to approve of or implicitly ratify it.

Legislature as part of its policy-making function, the Legislature's significant reformation of the system in 1989, and its continual supervision, monitoring, improving, and managing of the system, leads to the conclusion that Texas should join the majority of states that do not allow *Aranda*-type suits in the workers' compensation setting.[17] If the Texas Legislature determines, in its role of managing the workers' compensation system for the benefit of injured workers and employers that such a cause of action is appropriate as part of the system, I have confidence that legislators will exercise their prerogative to explicitly provide one.

VI. Conclusion

Justices Hecht, Wainwright, Medina, Johnson, Willett and Guzman join parts I, II, III, IV, and VI of the Court's opinion. Justices Hecht, Wainwright, Medina and Johnson join part V of the opinion, but Justices Willett and Guzman would wait to consider the issues involving Ruttiger's claims that TMIC breached its duty of good faith and fair dealing until the court of appeals first considers them. In light of the foregoing, those six justices join the Court's judgment remanding the case to the court of appeals for further proceedings. *See Bentley v. Bunton*, 94 S.W.3d 561, 607-08 (Tex. 2002).

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[17] *See, e.g.*, *Everfield v. State Comp. Ins. Fund*, 171 Cal. Rptr. 164, 167 (Cal. Dist. Ct. App. 1981); *DeOliveira v. Liberty Mut. Ins. Co.*, 870 A.2d 1066, 1074 (Conn. 2005); *Old Republic Ins. Co. v. Whitworth*, 442 So.2d 1078, 1079 (Fla. Dist. Ct. App. 1983); *Bright v. Nimmo*, 320 S.E.2d 365, 381 (Ga. 1984); *Walters v. Indus. Indem. Co. of Idaho*, 908 P.2d 1240, 1243 (Idaho 1996); *Robertson v. Travelers Ins. Co.*, 448 N.E.2d 866, 870 (Ill. 1983); *Sims v. United States Fid. & Guar. Co.*, 782 N.E.2d 345, 359-60 (Ind. 2003); *Hormann v. New Hampshire Ins. Co.*, 689 P.2d 827 (Kan. 1984); *Zurich Ins. Co. v. Mitchell*, 712 S.W.2d 340, 341 (Ky. 1986); *Kelly v. CNA Ins. Co.*, 729 So.2d 1033, 1034 (La. 1999); *Fleming v. Nat'l Union Fire Ins. Co.*, 837 N.E.2d 1113, 1121 (Mass. 2005); *Gallagher v. Bituminous Fire & Marine Ins. Co.*, 492 A.2d 1280, 1283-84 (Md. 1985); *Denisen v. Milwaukee Mut. Ins. Co.*, 360 N.W.2d 448, 450 (Minn. Ct. App. 1985); *Young v. U.S. Fid. & Guar. Co.*, 588 S.W.2d 46, 48 (Mo. Ct. App. 1979); *Ihm v. Crawford & Co.*, 580 N.W.2d 115, 116 (Neb. 1998); *Burlew v. Am. Mut. Ins. Co.*, 63 N.Y.2d 412, 415 (N.Y. 1984); *see also Whitten v. Am. Mut. Liab. Ins. Co.*, 468 F. Supp. 470, 475 (D.S.C. 1977) (applying South Carolina law).

The judgment of the court of appeals affirming the trial court's judgment as to Ruttiger's Insurance Code and DTPA claims is reversed and judgment is rendered that Ruttiger take nothing on them. The case is remanded to the court of appeals for further proceedings regarding TMIC's contentions as to Ruttiger's claim for breach of the duty of good faith and fair dealing.

Phil Johnson
Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0751

TEXAS MUTUAL INSURANCE, COMPANY, PETITIONER,

v.

TIMOTHY J. RUTTIGER, RESPONDENT

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

CHIEF JUSTICE JEFFERSON, joined by JUSTICE GREEN and JUSTICE LEHRMANN, dissenting.

Timothy Ruttiger allegedly sustained a work-related injury. Because of various complaints about how the Texas Mutual Insurance Company (TMIC) processed his workers' compensation claims, Ruttiger sued under the common law and chapters 541 and 542 of the Insurance Code, alleging that TMIC breached its duty of good faith and fair dealing.

TMIC and its amici ask us to hold that the Texas Workers' Compensation Act is the exclusive remedy for all work-related injuries, thus precluding Ruttiger's suit. We have previously concluded that both the Insurance Code and common law claims are viable—indeed, that they complement the workers' compensation system. Even after the 1989 overhaul, the Act's express language makes plain the Legislature's intent that common law bad faith claims remain available to litigants. As for Ruttiger's Insurance Code claims, the Code's language makes clear that they

apply, and the Act's exclusivity provision does not apply to insurance carriers. Far from having precluded such claims, then, the Legislature has continued to recognize actions like Ruttiger's.

Today the Court holds that most of Ruttiger's Insurance Code claims (and, as a result, his dependent DTPA claims) are no longer viable. A majority of the Court then remands Ruttiger's common law good-faith-and-fair-dealing claim to the court of appeals, so that it can decide this purely legal issue in the first instance. Rather than ask the court of appeals to answer whether claims this Court has previously recognized still exist, or whether our precedent still controls, I would hold today that both claims survived the Legislature's 1989 workers' compensation overhaul and would affirm the court of appeals' judgment. Because the Court does otherwise, I respectfully dissent.

I. The Old Workers' Compensation System

In 1987, we first considered whether a workers' compensation claimant could sue a carrier who engaged in a deceptive trade practice. *AETNA Casualty & Surety Co. v. Marshall*, 724 S.W.2d 770 (Tex. 1987). Interpreting former article 21.21 of the Insurance Code, the predecessor to chapter 541, we said that claims under that article were not foreclosed by the existence of the workers' compensation system. *Id.* at 772. We held that the statute's text "provide[d] a cause of action to a person who has been injured by an insurance carrier who engage[d] in" a deceptive trade practice. *Id.* As to the carrier's arguments that the workers' compensation system barred the employee's claim, we held that the "mere fact that Marshall was injured while working should not be used as a shield" to preclude Marhall's recovery for the separate injury he suffered as the result of the carrier's deceptive practices. *Id.*

The next year, in *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210 (Tex. 1988), we considered the more controversial question of whether an employee could sue a workers' compensation carrier for a breach of the common law duty of good faith and fair dealing. We held that such claims were viable. *Id.* at 215. Interpreting the former workers' compensation statute's exclusivity provision, we held that it "was not intended to shield compensation carriers from the entire field of tort law" and that it could not "be read as a bar to a claim that is not based on a job-related injury." *Id.* at 214. Expanding on this point, we emphasized that the workers' compensation statute was exclusive only as to job-related injuries, which are separate from injuries suffered as the result of a carrier's breach of duty:

> Liability as a result of a carrier's breach of the duty of good faith and fair dealing or intentional misconduct in the processing of a compensation claim is distinct from the liability for the injury arising in the course of employment. Injury from the carrier's conduct arises out of the contractual relationship between the carrier and the employee and is *sustained after the job-related injury*.

Id. (emphasis added). "A claimant," we held, "is permitted to recover when he shows that the carrier's breach . . . is separate from the compensation claim and produced an independent injury." *Id.* We also concluded that the possibility of administrative penalties did not suggest that common law claims were precluded because the penalties did not afford relief from the particular injuries the claimant alleged. *Id.* at 215.

II. The New Workers' Compensation Act

The Legislature overhauled our workers' compensation scheme in 1989. The Legislature examined the successes and failings of the previous system, commissioning a number of studies and reports to address what was driving the system's high cost. Several of these studies suggested

legislative displeasure with *Aranda*, which was cited as a source of rising costs. One legislative report noted that "Texas law allows more cases to be adjudicated outside the scope of the workers' compensation law than laws of other states." JOINT SELECT COMMITTEE ON WORKERS' COMPENSATION INSURANCE, A REPORT TO THE 71ST LEGISLATURE 3 (Dec. 9, 1988). As such, the report suggested that the Legislature "[p]rovide that bad faith handling of claims is not grounds for a suit outside the workers' compensation act." *Id.* at 16. Another report addressed the issues raised by *Marshall*, suggesting that the Legislature "[e]liminate extra contractual liability resulting in treble damage suits under the Deceptive Trade Practices-Consumer Protection Act and the Unfair Claim Settlement Practices Act." HOUSE SELECT INTERIM COMMITTEE ON WORKERS' COMPENSATION INSURANCE, INTERIM REPORT TO THE 70TH LEGISLATURE 41 (Jan. 1987).[1]

The first draft of the new Act adopted the Joint Select Committee's recommendation that common law claims be precluded. The bill as introduced permitted an administrative penalty to be assessed against carriers for "malice or bad faith" in claims-processing, and it made clear that this penalty constituted "the employee's exclusive remedy against the employer *or carrier*" for such conduct. Tex. H.B. 1, 71st Leg., R.S., § 11.12 (1989) (emphasis added). However, the committee substitute removed that provision, opting instead for language that simply limited *Aranda*. Tex. C.S.H.B. 1, 71st Leg., R.S., §§ 10.41, 10.42 (1989). It was this limiting language that ultimately

[1] Similarly, a report published after the passage of the new Act by Senator John Montford, the primary author of the overhaul legislation, made clear that the Legislature, in passing the new law, had considered *Aranda*'s impact: "Following *Aranda*, a rational and common response for carriers was less resistance not only to paying questionable claims, but also to paying more to settle comp claims than their reasonable value." 1 JOHN T. MONTFORD, ET AL., A GUIDE TO WORKERS' COMP REFORM § 4.2(a)(7) (1991); *see also id.* § 4.2(b)(7) ("In sum, *Aranda* dramatically shifted the relative negotiating positions between the claimant and carrier.").

passed, with some changes, as part of the new Act. Texas Workers' Compensation Act, 71st Leg., 2d C.S., ch. 1, 1989 Tex. Gen. Laws 1 (codified at TEX. LAB. CODE 401-19)).[2]

III. The Common Law Claims

The plurality's analysis of common law claims can only properly be considered in light of *Aranda* and with deference to the Legislature's express recognition, in chapter 416 of the Labor Code, that this avenue of relief endures. The question presented in this case is whether the Legislature intended to abrogate entirely a common law bad faith remedy when it enacted the Workers' Compensation Act. Given the existence of chapter 416, it is impossible to conclude that the Legislature had such an intent.

We have repeatedly addressed situations in which common law claims and statutory remedies seem to overlap, and we have embraced a framework to guide our analysis in such cases. The touchstone of this analysis, as in all statutory interpretation, is legislative intent. We start with the proposition that statutes abrogating common law causes of action are disfavored. *Cash America Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000). A statute banishing a common law right "'will not be extended beyond its plain meaning or applied to cases not clearly within its purview.'" *Id.* (quoting *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969)). Abrogation by implication is disfavored. *Id.* For that reason, courts must examine whether the statute's language "indicate[s] clearly or plainly that the Legislature intended to replace" a common law claim with an exclusive

[2] The language limiting *Aranda* was codified as chapter 416 of the Labor Code.

statutory remedy, and we "decline[] to construe statutes to deprive citizens of common-law rights unless the Legislature clearly expressed that intent."[3] *Id.*

We must decide, then, whether there is "clear legislative intent," *Dealers Elec. Supply*, 292 S.W.3d at 660, to extinguish entirely this settled common law remedy. As amended by the Workers Compensation Act, the Labor Code provides:

> An action taken by an insurance carrier under an order of the commissioner or recommendations of a benefit review officer under Section 410.031, 410.032, or 410.033 may not be the basis of a cause of action against the insurance carrier *for a breach of the duty of good faith and fair dealing*.

TEX. LAB. CODE § 416.001 (emphasis added). The fact that certain bad faith claims are thereby eliminated requires the logical inference that others survive. Likewise, the Code's limits on exemplary damages "[i]n an action against an insurance carrier for a breach of the duty of good faith and fair dealing," *id.* § 416.002, implies that other damages remain available. In the context of our precedent, there is but one conclusion to be drawn from these provisions: the Legislature *did not*

[3] We have applied this framework repeatedly. For example, in *Lopez*, which the Court cites but then seems to forget about, we noted that "[w]hether a regulatory scheme is an exclusive remedy depends on whether 'the Legislature *intended* for the regulatory process to be the exclusive means for remedying the problem to which the regulation is addressed." *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008) (quoting *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 624–25 (Tex. 2007)) (emphasis added). Likewise, in *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 802 (Tex. 2010), we held 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." Acknowledging the centrality of legislative intent, *see id.* at 809 n.66, we looked at the statute's "meticulous legislative design," *id.* at 805. Similarly, we have held that "absent *clear legislative intent* we have declined to construe statutes to deprive citizens of common-law rights." *Dealers Elec. Supply Co. v. Scoggins Constr. Co.*, 292 S.W.3d 650, 660 (Tex. 2009) (emphasis added). We have also written that "statutes can modify common law rules, but before we construe one to do so, *we must look carefully to be sure that was what the Legislature intended*." *Energy Serv. Co. of Bowie v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 (Tex. 2007) (emphasis added); *see also, e.g., Employees Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 919 (Tex. 2009) (the proper inquiry is legislative intent); *Pruett v. Harris Cnty. Bail Bond Bd.*, 249 S.W.3d 447, 454 (Tex. 2008) (same); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 208 (Tex. 2002) (same).

intend to abrogate the common law claims. To the contrary, the Legislature, in the clearest way possible, *limited Aranda*-type claims, rather than abolished them.[4]

The inquiry ends there. If the Legislature limited certain *Aranda*-type claims, it could not logically have also intended to eliminate them. The Act's structure further supports this conclusion.

The exclusivity provision of the new Act provides that "[r]ecovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage . . . *against the employer* . . . [for] a work-related injury sustained by the employee." TEX. LAB. CODE § 408.001 (emphasis added). This clause thus emphasizes two important aspects of the old law: (1) it provides that workers' compensation is exclusive *only with respect to the employer*, and (2) it retains the distinction, important to our decisions in *Aranda* and *Marshall*, between a "work-related injury" and an injury caused by a carrier's misconduct. *See id.* A logical inference from this provision, which bars claims against employers, is that claims against carriers may proceed. Indeed, *Aranda*, analyzing the old Act's exclusivity provision, recognized exactly this, holding that the injury alleged in a common law suit is wholly separate, both conceptually and temporally, from the job-related injury to which the exclusivity provision, and the workers' compensation system as a whole, applied. *Aranda*, 748 S.W.2d at 214 ("Injury from the carrier's

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[4] The House Committee that considered the Act referred to the provisions as "provid[ing] *limitations* in actions against a carrier for breach of duty." HOUSE COMM. ON BUS. & COMMERCE, BILL ANALYSIS, S.B. 1, 71st Leg., 2d C.S. (1989) (emphasis added). Senator Montford was even more explicit, noting that the provisions were meant to "temper" *Aranda*:

> In the very important Article 10 of the 1989 Workers' Compensation Act are provisions . . . provid[ing] procedures and implementing provisions assessing . . . administrative penalt[ies] . . . [and] temper[ing] the liability of a comp carrier for breach of good faith/fair dealing under *Aranda* . . . .

2 MONTFORD,§ 10.0 (footnotes omitted).

conduct arises out of the contractual relationship between the carrier and the employee and is sustained after the job-related injury.").

The existence of administrative penalties that can be assessed against workers' compensation carriers does not mandate the contrary. *See* TEX. LAB. CODE ch. 415 (creating administrative penalties for certain acts by employers, carriers, and other parties). The Insurance Code allows for the assessment of substantially similar administrative penalties against insurers operating outside of the workers' compensation system, *see* TEX. INS. CODE § 84.021 (providing for the imposition of administrative penalties for violations of the insurance code and other insurance laws), but we have never held the existence of those penalties precludes the claims at issue here when made against those insurers.[5]

As shown by the presence of chapter 416, not to mention the Act's legislative history and the language of its exclusivity clause, the Legislature pointedly recognized the availability of claims outside of the Act. Therefore, we cannot legitimately conclude that the Legislature intended for the Act to be an exclusive remedy with regard to carriers. If the Act's "comprehensive" administrative scheme had been intended to preclude the common law claims permitted in *Aranda*, there would

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[5] Indeed, each of the particular penalties that the Court says may be assessed against workers' compensation carriers may also be assessed against other insurers. Insurers may be fined for any violation of the Insurance Code, TEX. INS. CODE § 84.021, and that Code specifically prohibits unfair settlement practices. *Compare* TEX. LAB. CODE §§ 409.021, 415.002 (permitting administrative penalties for unfair claims-settlement practices), *with* TEX. INS. CODE § 541.060 (prohibiting unfair settlement practices).

Moreover, the existence of the penalty regime actually clarifies the Legislature's intent *not* to broadly preclude claims under the common law and Insurance Code against workers' compensation carriers. As the Court notes, ___ S.W.3d at ___, failure to comply with a Division order is grounds for an administrative penalty, and a claimant may bring suit to enforce such an order and may be awarded attorney's fees and a twelve percent penalty. TEX. LAB. CODE § 410.208. It is in this lone context—where judicial enforcement is expressly permitted—that the Legislature by statute prohibited claimants from bringing common law claims. *Id.* § 416.001 (barring claims against a workers' compensation carrier for breach of the duty of good faith and fair dealing if the claims are based on actions taken by the carrier pursuant to Division orders).

have been no need for the Legislature to enact chapter 416. *Cf. Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 ("[I]f the Act already excluded [the] defendants who do not furnish the goods or services, . . . there would have been no need for the legislature to exempt media defendants from liablity . . . ."). Indeed, it appears that the penalty provisions and the limitations on *Aranda* were seen as complementary. The 1989 Act, then, did not repudiate, but rather acknowledged, the viability of extra-contractual claims against workers' compensation insurance carriers. This is enough to decide the case before us.

IV. The Insurance Code Claims

TMIC's primary argument against the Insurance Code's applicability to its conduct is the same argument it made with regard to the common law: that the workers' compensation system is so comprehensive that all remedies outside of the Act are necessarily excluded.[6] This is

[6] Though the Court credits this argument, I believe that TMIC failed to properly preserve this issue and that it therefore should not be considered in this Court. Texas Rule of Appellate Procedure 53.2(f) provides that the petition for review

> must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

See also TEX. R. APP. P. 33.1 (preserving issues for appellate review); *id.* 38.1(f) (requiring appellant to "state concisely all issues or points presented for review" in the court of appeals). TMIC, however, did not raise this argument in the court of appeals, instead challenging the judgment on the Insurance Code violations based only on the sufficiency of the evidence. *Cf. Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 868 (Tex. 2007) (holding that the defendant's no-evidence objections at the trial court did not preserve error as to its related legal arguments). Indeed, in the court of appeals, TMIC only argued that Ruttiger's common law claims—and not his Insurance Code claims—were not legally cognizable. TMIC's arguments about the unavailability of remedies under the Insurance Code was raised for the first time on appeal in its Reply Brief in Support of the Petition for Review. As such, they do not meet the requirements of Rule 53.2(f). *See* TEX. R. APP. P. 53.2(f). The Court holds that TMIC's legal sufficiency challenge preserved error on this point (although, inexplicably, the Court holds that error was not preserved as to another of TMIC's Insurance Code claims). If that is enough, there is little that a legal sufficiency challenge will *not* preserve. For the sake of argument, I presume the issue is properly before us.

unconvincing. In addition to the fact that the Act is not, by its terms, an exclusive remedy with respect to carriers, *see* TEX. LAB. CODE § 408.001, the Legislature's recognition of extra-contractual common law claims in chapter 416 makes clear that it did not intend to preclude all claims against carriers for proven misconduct. *See Lopez*, 259 S.W.3d at 153 (holding that we look for legislative intent that a claim be precluded). The Legislature was aware of—and concerned with—our decisions in both *Aranda* and *Marshall*, but it did not endeavor to override them. If the Workers' Compensation Act is not exclusive with respect to carriers, there is no basis upon which to hold that Insurance Code claims are now precluded in this context. Moreover, though we were concerned with the issue of exclusivity in *Aranda*, we decided *Marshall* primarily on the basis of the Insurance Code's text. We held, quite plainly, that the Insurance Code "provides that a person who has sustained actual damages as a result of another's deceptive acts or practices may maintain a suit for treble damages." 724 S.W.2d at 772. Nothing in the Workers' Compensation Act overcame the Insurance Code's plain language, and, therefore, we held that a carrier could not use the act "as a shield" from liability. *Id.* Notwithstanding the Court's overruling of *Marshall* today, the Insurance Code's provisions still apply, and, as such, the Court's preemption approach is without merit.[7]

V. Conclusion

[7] TMIC additionally argues that Ruttiger's claims are precluded by *Aranda*'s independent injury requirement and that they are not among a narrow class of injuries recognized by *Aranda*. Neither of these contentions is correct. In *Aranda*, we wrote that an "[i]njury from the carrier's conduct arises out of the contractual relationship between the carrier and the employee and is sustained after the job-related injury." 748 S.W.2d at 214. Thus, a "claimant is permitted to recover when he shows that the carrier's breach of the duty of good faith and fair dealing . . . is separate from the compensation claim and produced an independent injury." *Id.* The jury found that Ruttiger was injured when the carrier breached its duty, and it found that he sustained damages as a direct result of his injuries. Moreover, Ruttiger's damages are not the sort of "lost compensation benefits" we said could not be recovered in *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607, 612 (Tex. 1996). I agree with the court of appeals on this issue for the reasons stated in its decision. 265 S.W.3d 651. Finally, I agree with this Court that Ruttiger exhausted his administrative remedies, and the trial court had jurisdiction over this suit.

Whether allowing extra-contractual claims makes sense is a different question than whether the laws, as written, permit their pursuit. Because the Legislature has not made the Act exclusive with respect to extra-contractual claims, I would hold that Ruttiger's claims are not barred and 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: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0751

TEXAS MUTUAL INSURANCE COMPANY, PETITIONER,

v.

TIMOTHY J. RUTTIGER, RESPONDENT

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

JUSTICE WILLETT, joined by JUSTICE GUZMAN, concurring.

I join all but Part V of the Court's opinion, which addresses whether the Texas Workers' Compensation Act precludes Ruttiger's common-law "good faith and fair dealing" claim. On this point, the Court is divided 4-3-2. JUSTICE JOHNSON (joined by three colleagues) contends the TWCA's comprehensive regime removes any basis for allowing *Aranda*-type suits.[1] CHIEF JUSTICE JEFFERSON (joined by two colleagues) responds that such suits are limited but not abrogated, noting the TWCA (1) eliminates certain bad-faith claims, meaning others survive, and (2) limits exemplary damages in "good faith and fair dealing" suits specifically, meaning other damages remain

[1] __ S.W.3d at __.

recoverable.[2] My view (shared by JUSTICE GUZMAN) is decidedly agnostic: As the court of appeals never addressed this issue,[3] I would remand it rather than resolve it.

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Don R. Willett
Justice

OPINION DELIVERED: August 26, 2011

[2] __ S.W.3d at __ (Jefferson, C.J., dissenting).

[3] 265 S.W.3d 651, 667 n.22 (not reaching the issue given the affirmance of Insurance Code liability).

IN THE SUPREME COURT OF TEXAS

NO. 08-0833

ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC. AND ANGLO-DUTCH (TENGE) L.L.C., PETITIONERS,

v.

GREENBERG PEDEN, P.C. AND GERARD J. SWONKE, RESPONDENTS

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

Argued September 14, 2010

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

JUSTICE WAINWRIGHT filed an opinion concurring in part and dissenting in part.

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

The parties dispute whether an attorney fee agreement is ambiguous. The client contends that an agreement on law firm letterhead, signed by a lawyer on behalf of the firm, is with the firm, not with the lawyer personally. The lawyer counters that his use of personal pronouns in the agreement, as well as surrounding circumstances, create an ambiguity that must be resolved by a jury. We agree with the client and therefore reverse the judgment of the court of appeals.[1]

[1] 267 S.W.3d 454 (Tex. App.–Houston [14th Dist.] 2008).

I

Scott V. Van Dyke, president of Anglo-Dutch Petroleum International, Inc., asked Gerard J. Swonke, a lawyer "of counsel" with the firm of Greenberg Peden, P.C., to represent Anglo-Dutch as plaintiff[2] in a suit against Halliburton Energy Services, Inc. and Ramco Oil & Gas, Ltd. for disclosing confidential information concerning the development of oil and gas prospects in the Tenge Field in Kazakhstan. Greenberg Peden had represented Anglo-Dutch on various matters for years and had drafted the confidentiality agreement that would be central to the suit. Swonke had been responsible for Anglo-Dutch's initial engagement as a firm client and had done much of its work. He and Van Dyke were friends.

The Tenge Field case was expected to be protracted and difficult, and Anglo-Dutch could not afford to pay Greenberg Peden's hourly rates, as it had done in the past, so it proposed a 20% contingent fee. The firm declined. Anglo-Dutch had fallen behind in its obligations to the firm, and the firm had decided not to accept further business from Anglo-Dutch until it became current. Plus Greenberg Peden believed that it lacked the resources needed to prosecute the case on a contingent-fee basis. Swonke referred Van Dyke to another firm, McConn & Williams, which took the case.

But Swonke's continued counsel, based on his involvement in the events leading up to the litigation, was still needed, and Van Dyke asked him to assist McConn & Williams, again for a contingent fee. Swonke's arrangement with Greenberg Peden required him to offer new business to the firm; if the firm refused, Swonke could undertake the representation individually. Swonke

[2] An affiliate, Anglo-Dutch (Tenge) L.L.C., was also a plaintiff and is a petitioner here, wholly aligned with Anglo-Dutch Petroleum International, Inc.

used personal stationery — "Law Offices of Gerard J. Swonke Attorney at Law" — and signed individually when representing clients who were not also clients of the firm. Even in those situations, the firm sent the bills and retained ten percent of the fees. Swonke agreed to Van Dyke's proposal and dictated the following agreement ("the Fee Agreement"), which his secretary prepared on firm letterhead and he signed on its behalf:

GREENBERG PEDEN P.C.

ATTORNEYS AND COUNSELORS AT LAW

TENTH FLOOR, 12 GREENWAY PLAZA
HOUSTON, TEXAS 77046

TELEPHONE: (713) 627-2720
FACSIMILE: (713) 627-7057
WEBSITE: www.gpsolaw.com

October 16, 2000

Mr. Scott V. Van Dyke
Anglo-Dutch Petroleum International, Inc.
Eight Greenway Plaza, Suite 900
Houston, Texas 77046

Re: Cause No. 2000-22588; *Anglo-Dutch (Tenge) et al. vs. Ramco, et al.;* In the 151st Judicial District of Harris County, Texas.

Dear Scott:

This letter memorializes our agreement with respect to me assisting you and/or the companies which you control (Anglo-Dutch) and the law firm of McConn & Williams, LLP regarding the above-referenced matter.

In that regard, you have executed a Fee Agreement with the law firm of McConn & Williams on March 25, 2000, which is incorporated herein by reference. I agree to assist Anglo-Dutch and that firm with this lawsuit for proportionately the same percentage (20%) of any benefit to McConn & Williams reflected in such agreement. However, I will not be responsible for any expenses other than those I may personally incur. Further, the proportions under which my fees shall be calculated

will be the ratio of the hours I have spent or will spend on this matter relative to the hours the attorneys at McConn & Williams have spent or will spend after the date the lawsuit was filed, rounded to the next whole percentage. For example, if McConn & Williams' attorneys spend 1,000 hours on the lawsuit after the date the lawsuit was filed and I spend 90 hours of my time towards the lawsuit, then by rounding up to the nearest whole number, I would be entitled to receive from you 2% (10% of 20%) of the gross revenues and other benefits recovered, if any, from this lawsuit. In addition, should the Fee Agreement be amended, you agree that I shall be entitled to the benefit of such amendment.

If this comports with your understanding of our agreement, please indicate by signing below and returning this letter to me.

If you have any questions, please contact me.

Very truly yours,

GREENBERG PEDEN P.C.

s/ *G. J. Swonke*
GERARD J. SWONKE

AGREED TO:

_____
SCOTT V. VAN DYKE, PRESIDENT OF
ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC.
DATED: _____

The next day, Van Dyke signed the agreement and returned it to Swonke. He also wrote Swonke the following letter:

ANGLO-DUTCH PETROLEUM INTERNATIONAL

EIGHT GREENWAY PLAZA, SUITE 900
HOUSTON, TEXAS 77046
UNITED STATES

TEL: (713) 993-9303
FAX: (713) 993-9011
email@anglo-dutch.com

October 17, 2000

Mr. Gerard J. Swonke
Greenberg Peden P.C.
Tenth Floor
12 Greenway Plaza
Houston, TX 77046

Re: McConn & Williams, LLP Attorney's Employment Agreement

Dear Jerry:

Pursuant to our Fee Agreement dated October 16, 2000, please find enclosed a copy of the executed Attorney's Employment Agreement with McConn & Williams, LLP related to Cause No. 2000-2258; *Anglo-Dutch (Tenge) et al. Vs. Ramco, et al.;* in the 151st Judicial District of Harris County Texas.

This fee agreement with McConn & Williams, LLP provides the basis for the Agreement between Greenberg Peden P.C. and Anglo-Dutch.

Very truly yours,

s/ *Scott Van Dyke*
Scott V. Van Dyke
President

Of significance is Van Dyke's reference to the Fee Agreement as "the Agreement between Greenberg Peden P.C. and Anglo-Dutch." Swonke received the letter but did not read it and thus did not respond.

Swonke continued to work on the case, and as provided by the Fee Agreement, Greenberg Peden invoiced Anglo-Dutch for expenses. But a year later, Greenberg Peden dissolved, and Swonke moved to McConn & Williams, again in an "of counsel" relationship. In a letter to Van

Dyke, Swonke wrote that he would not take the Anglo-Dutch files with him if Van Dyke objected.[3] Van Dyke did not. Swonke continued to work on the Tenge Field case at McConn & Williams as did other lawyers, including two who were also "of counsel".

As the litigation wore on, Anglo-Dutch and McConn & Williams decided to retain additional counsel, and they hired John M. O'Quinn & Associates. McConn & Williams reduced its 20% fee to 16-2/3%, and Anglo-Dutch agreed to pay O'Quinn 20%, for a total contingent fee of 36-2/3%. Still later, Anglo-Dutch agreed to pay the fee net of expenses. The case was tried to a plaintiffs' verdict and then settled for $51 million. Anglo-Dutch's legal fees and expenses totaled slightly over $20 million.

A few days before the settlement was funded, Swonke told Van Dyke that he expected to be paid under the Fee Agreement not only for the 277 hours he worked while at Greenberg Peden but also for 1,022 hours he worked at McConn & Williams. All the other lawyers at McConn & Williams were to be paid under the firm's agreement with Anglo-Dutch. Greenberg Peden assigned its interest in the Fee Agreement to Swonke. The assignment, which Swonke prepared and signed, recited that "Swonke executed [the Fee Agreement] on behalf of (and while affiliated with) Greenberg Peden as an Of Counsel". Van Dyke offered to pay $293,338.85 for Swonke's work on the case while at Greenberg Peden but refused to pay for the time spent by Swonke at McConn & Williams.

[3] Swonke wrote to Van Dyke on November 6, 2001: "For many years, I have had the pleasure of representing you and your interests through my association with Greenberg Peden, P.C. However, recently Greenberg Peden, P.C. has decided to dissolve. As a result, I will have the pleasure of continuing to represent your interests as 'Of Counsel' with the law firm of McConn & Williams, L.L.P. . . . I am planning to take your files with me to my new firm. If you do not wish for me to take your files, please contact me as soon as possible so that we can make arrangements for you to take possession of them."

Anglo-Dutch sued for a declaration that the Fee Agreement was with Greenberg Peden, not Swonke personally. It also sued Swonke for breach of fiduciary duty. Swonke counterclaimed for breach of contract, asserting that he personally was party to the agreement. Swonke also alleged that Van Dyke had defrauded him. Based on Swonke's testimony that his use of firm letterhead and the firm signature block, and his characterization of the agreement in the assignment, were mistakes, and extrinsic evidence of the parties' relationship, the trial court concluded that the agreement was ambiguous and submitted the parties' dispute to the jury. The jury found that the Fee Agreement was with Swonke, that Swonke had complied with his fiduciary duty to Anglo-Dutch, and that his damages were $1 million. The jury failed to find that Van Dyke had defrauded Swonke. The trial court rendered judgment on the verdict, and the court of appeals affirmed.[4]

We granted Anglo-Dutch's petition for review.[5]

II

We begin by considering what standards to apply in construing lawyer-client contracts. We then apply those standards to the Fee Agreement, first to its text, and then to the circumstances surrounding its execution.

A

"'Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered.'"[6] One

[4] 267 S.W.3d 454.

[5] 53 Tex. Sup. Ct. J. 758 (May 28, 2010).

[6] *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 451 (Tex. 2008) (per curiam) (quoting *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996)).

such circumstance is the existence of a lawyer–client relationship between the parties.[7] Because a lawyer's fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized.[8] Part of the lawyer's duty is to inform the client of all material facts.[9] And so that this responsibility is not a mere and meaningless formality, the lawyer must be clear.

Clarity in fee agreements is certainly important to clients. In an amicus brief supporting Anglo-Dutch, Professor Linda Eads explains:

> [Clients] need to know they can depend on the firm they thought they hired to represent their interests. When there is uncertainty about a firm's or attorney's responsibility for a matter, there is a real risk that loyalty to that client will become watery. And if disputes arise about fees or other issues, clients need to know who has ultimate authority to negotiate the issue, firm management or just the attorney working on the matter.[10]

Clarity is also important to lawyers. Professor Eads continues:

> Law firms need to know whether they are entitled to fees in order to budget their expenses and organizational strategy; firms need to know how much, and what scope of, malpractice insurance to purchase; they need to know who their clients are in

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[7] *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 560 (Tex. 2006) ("When interpreting and enforcing attorney-client fee agreements, it is 'not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship.'" (quoting *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 868 (Tex. 2000) (Gonzales, J., concurring and dissenting))).

[8] *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 699 (Tex. 2000) ("Contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized."); *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) ("Although an attorney is not incapacitated from contracting with his client for compensation during the existence of the relation of attorney and client, and a fair and reasonable settlement of the compensation to be paid is valid and enforceable, if executed freely, voluntarily, and with full understanding by the client, the courts, because of the confidential relationship, scrutinize with jealousy all contracts between them for compensation which are made while the relation exists." (internal quotation marks omitted)); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18, cmt. e (2000) ("Client-lawyer fee contracts entered into after the matter in question is under way are subject to special scrutiny . . . .").

[9] *Keck*, 20 S.W.3d at 699 (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 175 (Tex. 1997)).

[10] Brief of Amicus Curiae Linda S. Eads, Associate Professor of Law, Dedman School of Law, Southern Methodist University, in Support of Petitioner at 21.

> order to analyze potential conflicts of interest; and firms need to know what matters are theirs in order to staff them appropriately and ensure their clients' interests are protected.
>
> * * *
>
> [Individual] lawyers will want the certainty that their law firm stands behind them, that the firm's malpractice carrier will defend them if necessary, and that the fee agreements they draft will be interpreted to avoid readings that would involve violations of the rules of discipline. Further, in cases in which the existence of an ambiguity appears to favor the lawyer, allowing a lawyer initially to benefit from the ambiguity might not be a good thing, even for the lawyer. By suing a former client, the lawyer's reputation often suffers. And if the ambiguity was drafted by the lawyer, Texas courts will have to decide how to handle malpractice claims based on poor draftsmanship of the fee agreement.[11]

A number of law firms also appearing as amicus curiae endorse these views.[12]

Only reasonable clarity is required, not perfection; not every dispute over the contract's meaning must be resolved against the lawyer. But the object is that the client be informed, and thus whether the lawyer has been reasonably clear must be determined from the client's perspective. Accordingly, we agree with the *Restatement (Third) of the Law Governing Lawyers* that "[a] tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it."[13]

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[11] *Id*. at 20-21.

[12] Brief of Amici Curiae Abrams Scott & Bickley, L.L.P., Arnold & Itkin LLP, Caddell & Chapman, Cornell, Smith & Mierl, LLP, Dawson, Sodd, Ellis & Hodge LLP, Law Office of James M. McCormack, and Quilling, Selander, Cummiskey & Lownds, P.C., in Support of Petitioner at 11-12. These firms describe themselves as follows: "Some . . . are larger firms with multiple offices and dozens of attorneys practicing before the Texas bar; others are small firms with just a few attorneys. Some represent primarily defendants, some represent primarily plaintiffs, and some represent plaintiffs and defendants on a regular basis. The *amici curiae* are thus in a balanced position to address the interpretation of fee agreements between lawyers and their clients." *Id.* at 1.

[13] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18(2).

Other circumstances surrounding the execution of a contract may inform its construction, but "[t]here are limits."[14] We have said:

> An unambiguous contract will be enforced as written, and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports. Only where a contract is ambiguous may a court consider the parties' interpretation and "admit extraneous evidence to determine the true meaning of the instrument."[15]

Understanding the context in which an agreement was made is essential in determining the parties' intent *as expressed in the agreement*, but it is the parties' expressed intent that the court must determine. Extrinsic evidence cannot be used to show that the parties probably meant, or could have meant, something other than what their agreement stated.[16]

B

On its face, the Fee Agreement is plainly one with Greenberg Peden, not Swonke personally. The clear indicia of the firm letterhead and signature on the firm's behalf are not contradicted by the personal pronouns in the text. Swonke's uses of "I", "me", and "my" indicate that he would himself be working on the matter, which Anglo-Dutch certainly intended, but none suggests that other attorneys and staff at Greenberg Peden would be excluded from the case any more than they had

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[14] *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981) ("If, in the light of surrounding circumstances, the language of the contract appears to be capable of only a single meaning, the court can then confine itself to the writing. Consideration of the facts and circumstances surrounding the execution of a contract, however, is simply an aid in the construction of the contract's language. There are limits.").

[15] *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450-451 (Tex. 2008) (per curiam) (citation omitted) (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam), and citing *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951)).

[16] *See Gannon v. Baker*, 818 S.W.2d 754, 755-756 (Tex. 1991) (per curiam) ("The parol evidence rule applies only to contractual or jural writings evidencing the creation, modification, termination or securing of a particular right or obligation. *Brannon v. Gulf States Energy Corp.*, 562 S.W.2d 219, 222 (Tex. 1977). The rule does not apply to mere statements or recitals of past facts.").

been from other Anglo-Dutch matters. Since the fee was contingent on recovery and therefore not based on any attorney's hourly rate, it would presumably make no difference to Anglo-Dutch who besides Swonke worked on the case as long as the fee was computed on his hours. One use of "I" clearly included the firm: "I will not be responsible for any expenses". The firm, not Swonke, invoiced the clients for expenses, on firm letterhead. Moreover, the second-person pronouns show that the word "you" refers sometimes only to Van Dyke individually ("you and/or the companies which you control"), sometimes only to Anglo-Dutch ("I would be entitled to receive from you"), and sometimes to Van Dyke and his companies ("you have executed" the McConn & Williams fee agreement — Van Dyke signing for his companies). In sum, the pronouns indicate only inexact drafting; none says that despite the firm letterhead and firm signature, the agreement could only have been with Swonke personally.

Nor does the fee calculation, based solely on the hours Swonke spent individually, suggest that others at Greenberg Peden were excluded from the work. Taking Swonke's time into account provided a way of limiting the fee. If anything, the rounding-up feature of the calculation might suggest a means of providing additional compensation for others who did work on the case. Anglo-Dutch was to reimburse expenses, which were billed by Greenberg Peden, not by Swonke individually.

Even if the Fee Agreement had expressly provided that only Swonke would render the legal services required, the representation could still have been a firm matter. Anglo-Dutch was already a Greenberg Peden client and had been for years. Although Swonke had first engaged Anglo-Dutch as a client and had been responsible for most of its work, Anglo-Dutch had never been Swonke's

non-firm client. From Anglo-Dutch's perspective, nothing in the Fee Agreement reasonably suggested that its relationship with its lawyers was changing.

C

The trial court having determined the Fee Agreement to be ambiguous, the parties offered extensive extrinsic evidence of their intent in the ten-day trial. Given our conclusion that the agreement was not ambiguous, this evidence is of limited relevance. It cannot be used to show the parties' motives or intentions apart from the Fee Agreement; it can only provide the context in which the agreement was reached.

Van Dyke was not an unsophisticated client; indeed, it was he, not Swonke, who proposed the terms of the Fee Agreement. But for years Anglo-Dutch had been a client of Greenberg Peden, not Swonke personally. Van Dyke knew Greenberg Peden was concerned that Anglo-Dutch was delinquent in its payments to the firm, but the Tenge Field representation was on a contingent-fee basis. He also knew that the firm had refused to be lead counsel in the case, but the firm certainly had sufficient resources for a consulting role. Nothing about the parties' relationship preceding the Fee Agreement required Van Dyke to recognize that though the agreement purported to be with Greenberg Peden, it was really with Swonke.

Events following the Fee Agreement do not cast the situation in a different light. The day he signed the Fee Agreement for Anglo-Dutch, Van Dyke wrote Swonke that the agreement was with Greenberg Peden. When the firm dissolved a year later and Swonke moved to McConn & Williams, he treated all of Anglo-Dutch's files as having belonged to Greenberg Peden. Even after

the Tenge Field case settled and the present controversy began to emerge, Swonke stated that he had signed the Fee Agreement on behalf of Greenberg Peden and obtained an assignment of its interest.

In sum, the circumstances in which the Fee Agreement was executed do not suggest that the parties must have intended something different from what they plainly stated. We hold that the agreement was between Anglo-Dutch and Greenberg Peden.

III

Construing client–lawyer agreements from the perspective of a reasonable client in the circumstances imposes a responsibility of clarity on the lawyer that should preclude a determination that an agreement is ambiguous in most instances. Lawyers appreciate the importance of words and "are more able than most clients to detect and repair omissions in client-lawyer contracts."[17] A client's best interests, which its lawyer is obliged to pursue, do not include having a jury construe their agreements.

The judgment of the court of appeals is reversed, and the case is remanded to the trial court for further proceedings.

Nathan L. Hecht
Justice

Opinion delivered: August 26, 2011.

[17] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. h.

IN THE SUPREME COURT OF TEXAS

NO. 08-0833

ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC. AND ANGLO-DUTCH (TENGE) L.L.C., PETITIONERS,

v.

GREENBERG PEDEN, P.C. AND GERARD J. SWONKE, RESPONDENTS

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

Argued September 14, 2010

JUSTICE WAINWRIGHT, concurring in part and dissenting in part.

Scott Van Dyke, president of Anglo-Dutch Petroleum International, Inc., and his attorney Gerald Swonke signed an engagement letter, dated October 16, 2000, in which attorney Swonke agreed to represent Van Dyke's company, Anglo-Dutch, in litigation with Halliburton Energy Services, Inc. Swonke was "of counsel" at the law firm of Greenberg Peden P.C. Anglo-Dutch contends that under the terms of the letter, Swonke also bound Greenberg Peden to represent Anglo-Dutch in the Halliburton litigation. The letter contains Swonke's references to expenses he would "personally incur", fees that "I would be entitled to receive", the agreement for "me" to assist you in the so-called Halliburton litigation, but it is drafted on Greenberg Peden letterhead. Swonke contends this was an oversight. Swonke testified that for a couple of years prior to the Halliburton

litigation, he had individually represented Anglo-Dutch under his "of counsel" arrangement at Greenberg Peden. Notwithstanding this evidence, the Court disagrees with the trial court and concludes that the engagement letter is unambiguous and as a matter of law bound the Greenberg Peden firm to represent Anglo-Dutch. I therefore agree with JUSTICE LEHRMANN'S dissent that the engagement letter is ambiguous and with her other departures from the Court's opinion. I write to explain another basis for my disagreement with the Court's position.

The Court holds the two parties to an agreement that neither of them entered in October 2000, as their trial testimony indicates. Van Dyke testified that he knew at the time of the engagement letter that Greenberg Peden would not represent Anglo-Dutch in any new matters, such as the Halliburton litigation. Why? Van Dyke explained. Anglo-Dutch was over $200,000 behind in paying Greenberg Peden, and Greenberg Peden was not interested in further exposure on contingency fee cases. The exchange on this point during Van Dyke's testimony at trial is unequivocal, as Swonke told him in February 2000 that Greenberg Peden was not his law firm.

> Attorney: Mr. Van Dyke, my question was a more limited one, and you can say, "No, he didn't tell me that," if you want.
>
> I'm just asking: Did he [Swonke] not tell you from the beginning that Greenberg Peden wouldn't represent you in any lawsuit here, no matter whether it was contingency or hourly at all until you – because you hadn't paid off that debt.
>
> Van Dyke: Yes.

Furthermore, Van Dyke knew that no Greenberg lawyers would work on his files from that time forward. Harlan Naylor, Greenberg's managing partner, explained to the jury that the firm's lawyers were instructed not to work for Anglo-Dutch – "neither the shareholders nor the associates were

going to do any more work for Mr. Van Dyke on that case." This testimony from Van Dyke and Naylor is undisputed. Swonke explained to the jury that Greenberg had essentially terminated Van Dyke as a client.

> Greenberg Peden had told him in my presence they wouldn't do any more work for him. I had been doing work for him individually in my own capacity for – I don't know – two years, with Greenberg Peden not having involvement at all.

The uncontested testimony at trial establishes that Greenberg Peden's name partner (David Peden) told Van Dyke before he signed the engagement letter that the Greenberg Peden firm would not represent Anglo-Dutch in any new matter, whether contingency or hourly, because it was delinquent in paying the firm over $200,000 in legal fees. Swonke was present at that meeting. Nevertheless, Anglo-Dutch contends that the engagement letter signed after the meeting bound Greenberg Peden to represent it in the Halliburton litigation. This is quite a turnabout for Anglo-Dutch as its litigation position contradicts the knowledge of its president, who signed the engagement letter. Knowing that Greenberg Peden refused to represent Anglo-Dutch in the Halliburton litigation, Van Dyke now asserts that the engagement letter unambiguously did just that.

The jury heard all about the dispute from all four sides – Swonke, Van Dyke, Greenberg Peden and another law firm Anglo-Dutch engaged (McConn & Williams) – and found that the two signers of the engagement letter intended that Swonke, not Greenberg Peden, would represent Anglo-Dutch.

I agree with the Court that attorneys owe fiduciary duties to their clients in this context that include: exercising the utmost good faith and most scrupulous honesty toward clients; ensuring that engagement letters are clear to the clients; fully and fairly disclosing all important information to

clients concerning the transactions; and explaining material changes in the arrangement, such as moving from one law firm to another. Ambiguity in the fee agreement should be construed against the lawyer-drafter of the agreement. The Court and amici set these duties out in some detail.[1] I do not conclude, however, that application of these duties to this case means that an ambiguous contract should be designated clear and then enforced to a result that neither signer intended at the time he signed it. At base, our task here is to enforce the parties' agreement. The duties and presumptions of counsel in such cases should help determine what the contractual obligations are, not override the agreement they entered.

I therefore agree with the arguments in JUSTICE LEHRMANN'S dissent. However, because I agree that the judgment should remand the case to the trial court, I concur in the Court's judgment, while respectfully dissenting from its reasoning. Unlike the Court, I would remand for a new trial and instruct the jury to be guided by the lawyer's fiduciary duties in interpreting the ambiguous engagement letter.

Dale Wainwright
Justice

OPINION DELIVERED: August 26, 2011

[1] *See* Brief of Amicus Curiae Linda S. Eads, Associate Professor of Law, Dedman School of Law, Southern Methodist University, in Support of Petitioner at 21. *See* Brief of Amici Curiae Abrams Scott & Bickley, L.L.P., Arnold & Itkin LLP, Caddell & Chapman, Cornell, Smith & Mierl, LLP, Dawson, Sodd, Ellis & Hodge LLP, Law Office of James M. McCormack, and Quilling, Selander, Cummiskey & Lownds, P.C., in Support of Petitioner. The law firm *amici* state that they "are not suggesting that lawyers and law firms should always lose a fee dispute." *Id*. at 8.

IN THE SUPREME COURT OF TEXAS

NO. 08-0833

ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC. AND ANGLO-DUTCH (TENGE) L.L.C., PETITIONERS,

v.

GREENBERG PEDEN, P.C. AND GERARD J. SWONKE, RESPONDENTS

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

JUSTICE LEHRMANN, joined by JUSTICE MEDINA, and JUSTICE GREEN, dissenting

I agree that a court should review an attorney-client agreement from the perspective of a reasonable person in the client's circumstances when deciding whether it is subject to two or more reasonable interpretations. I disagree, however, with the Court's assumption that an agreement on firm letterhead unambiguously creates an agreement with the firm. The use of letterhead must be viewed in light of clear evidence that the client understood the firm had refused to represent him in the case due to large unpaid legal bills, the lawyer's testimony that his secretary mistakenly used firm stationery, and the fact that the agreement referred solely to the individual lawyer and contemplated a fee structure where only that lawyer's time would be compensated. I therefore am compelled to respectfully express my dissent. I would affirm the court of appeals' judgment

and hold that the trial court correctly determined the agreement was ambiguous and properly submitted the agreement's meaning to the jury.

I. BACKGROUND

Scott Van Dyke, the president of Anglo-Dutch, and Swonke, the attorney, had a long-standing relationship that began when Van Dyke worked at another company. Swonke was "of counsel" at the law firm of Greenberg Peden when the subject agreement was executed in 2000. One of the firm's founders testified at trial that Greenberg Peden understood Swonke sometimes contracted with clients the firm did not want to represent, and it was understood these were Swonke's "side deals". Greenberg Peden had the right of first refusal for all of Swonke's potential clients.

In 1997, when Anglo-Dutch committed to develop an oil field in Kazakhstan with two business partners, Halliburton and Ramco, Van Dyke contacted Swonke to prepare the necessary documents. It is undisputed that the parties understood that Greenberg Peden, not Swonke individually, took on the representation at that time. No formal fee agreement was signed. The joint project ended in early 2000 when Halliburton and Ramco allegedly breached the parties' confidentiality agreement and disclosed Anglo-Dutch's confidential data to third parties. Van Dyke consulted with Swonke, who advised him that Anglo-Dutch had viable claims against Halliburton and Ramco.

Around the same time, Anglo-Dutch ceased paying Greenberg Peden's bills and began accumulating a large account payable to the firm. Anglo-Dutch's unpaid legal bills prompted

Greenberg Peden to stop working for Anglo-Dutch in 1999. By early 2000, Anglo-Dutch owed Greenberg Peden more than $200,000. It is undisputed that Van Dyke asked if Greenberg Peden would represent Anglo-Dutch in the lawsuit against Ramco and Halliburton, but the firm refused to take on any more work for Anglo-Dutch because of Anglo-Dutch's unpaid bills and a history of difficulty in collecting fees from Anglo-Dutch.

Unable to retain Greenberg Peden, Anglo-Dutch, based on Swonke's recommendation, hired the law firm of McConn & Williams under a twenty percent contingency fee arrangement. As the Halliburton lawsuit progressed, Van Dyke asked Swonke to serve as an advisor to McConn & Williams because of his familiarity with the underlying contracts. After initially consulting for free, Swonke requested compensation as his involvement in the case became more substantial. McConn & Williams declined to pay Swonke because the firm's contingency fee interest was not large enough, so Van Dyke called Swonke directly and offered to pay him for the work. It is undisputed that Van Dyke and Swonke negotiated the terms of Swonke's representation and that Swonke finally agreed to accept compensation in the form of a fraction of the total recovery calculated based on the hours he worked, divided by the total hours billed by the McConn & Williams attorneys.

Swonke dictated the body of the one-page agreement and his secretary printed it on Greenberg Peden letterhead, with a Greenberg Peden signature block. Swonke signed his name under the Greenberg Peden signature block and sent the agreement to Van Dyke, who signed and returned it the next day. Swonke testified he did not notice the letterhead or the signature block

and did not think to correct them at any point because he and Van Dyke both knew the agreement was personal to him.

The day he signed the agreement, Van Dyke also drafted and sent Swonke a separate transmittal letter attaching a copy of the McConn & Williams contingency fee agreement. The letter said that the McConn & Williams document "provides the basis for the Agreement between Greenberg Peden P.C. and Anglo-Dutch." At trial, Swonke questioned Van Dyke's motives for sending the letter separately from the main agreement, and for sending it at all as Van Dyke had previously given him the McConn & Williams agreement. Swonke testified that he did not read the letter, and would not normally read a transmittal letter referring to a document he already had in his files.

Swonke worked on the Halliburton lawsuit for 277 hours while at Greenberg Peden. After Greenberg Peden dissolved in 2001, Swonke joined McConn & Williams as "of counsel". McConn & Williams and Swonke agreed that he would not share in the firm's fees from the Halliburton lawsuit, but did not relay that agreement to Anglo-Dutch. Swonke did inform Anglo-Dutch of his move to McConn & Williams, and told Anglo-Dutch he planned to take his client files with him unless Anglo-Dutch objected. Receiving no objection, Swonke worked 1,022 hours on the matter at McConn & Williams.

Anglo-Dutch won a $70.5 million verdict against Halliburton and the parties stipulated to $9.8 million in attorney's fees. The verdict was appealed and Halliburton ultimately settled the case for $51 million in 2004. A few days before Halliburton was going to wire the attorneys' fees

portion of the settlement to individuals and firms involved in the case, Swonke's name was removed from the wiring instructions at Van Dyke's request. Noting the change, Swonke e-mailed Van Dyke asking how he wanted to handle his compensation. Prior to discussing payment, Van Dyke requested that Greenberg Peden assign any interest under the Anglo-Dutch agreement to Swonke, purportedly to avoid any possible problems with multiple claims for attorney's fees. Swonke contacted Greenberg Peden, and the no-longer operating firm's representatives agreed to the assignment in exchange for a ten percent fee from all amounts collected by Swonke from Anglo-Dutch, an amount consistent with their original agreement that he would pay the firm a flat ten percent to cover overhead for matters handled by Swonke individually.

Soon after obtaining the assignment letter, Van Dyke informed Swonke that he'd consulted lawyers and determined that Anglo-Dutch's contract was with Greenberg Peden and not with Swonke individually. Accordingly, Van Dyke refused to include the hours billed after Swonke left Greenberg Peden in the contingency ratio, a position that would reduce Swonke's total compensation due by over a million dollars. Swonke asserted that the agreement was personal to him and that he should be paid for all of the work he performed for Anglo-Dutch. It is undisputed that had the trial court determined that the agreement was with Greenberg Peden, Anglo-Dutch would be able to calculate the compensation ratio based solely on the 277 hours Swonke billed while at Greenberg Peden. Anglo-Dutch argued that the 1,022 hours Swonke billed at McConn & Williams were covered by that firm's contingency percentage.

II. APPLICABLE STANDARDS

I agree with the standards the Court applies in determining whether this attorney-client agreement is ambiguous. Ambiguity is determined by examining the contract as a whole in light of the circumstances present when the contract was entered. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). When an agreement's language is ambiguous in light of the circumstances present when the parties entered into it, its meaning becomes an issue for the fact-finder. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003); *see Columbia Gas*, 940 S.W.2d at 589.

I also agree that there are limits. *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981). Parol evidence will not be received to create an ambiguity or to give a contract a meaning different from that imparted by its language. *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450–51 (Tex. 2008) (citations omitted). Courts may not consider the parties' interpretation or "admit extraneous evidence to determine the true meaning of the instrument" if the express language of the agreement may be interpreted in only one way. *Id.* at 450 (quoting *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)). Ambiguity likewise does not arise simply because the parties advance conflicting interpretations of the contract; rather, for an ambiguity to exist, both interpretations must be reasonable. *See Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 866 (Tex. 2000); *Nat'l Union Fire Ins.*, 907 S.W.2d at 520.

Further, as the Court observes and Anglo-Dutch and amici[1] contend, clarity is obviously critical, and courts should therefore view the agreement from the perspective of a reasonable client to determine if it is susceptible to more than one reasonable interpretation. Such a rule will protect clients from unscrupulous attorneys, reduce disputes, and create a predictable rule that is in the best interest of the legal system, individual clients, lawyers, and law firms.

And it is beyond dispute that attorney-client agreements are subject to heightened scrutiny by the courts because of the fiduciary nature of the attorney-client relationship. *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 560 (Tex. 2006). The attorney, unlike a commercial party to an agreement, bears a duty to ensure the client understands the terms of the representation because of the trust the client places in the attorney. *See Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex. 2001). To fulfill this duty, the lawyer must be clear.

Like the Court, I believe that the approach set out in the Restatement of the Law Governing Lawyers is workable. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18, cmt. h. Under this approach, such agreements should be viewed from the perspective of a reasonable client, taking into consideration the parties' relative bargaining power and other circumstances surrounding the agreement. *See id.* A reasonable client to whom this standard is

[1] Two amicus briefs were submitted in support of Anglo-Dutch: one by Linda Eads, Associate Professor of Law at the Dedman School of Law and another by the law firms of Abrams Scott & Bickley, L.L.P.; Arnold & Itkin LLP; Caddell & Chapman; Cornell, Smith & Mierl, LLP; Dawson, Sodd, Ellis & Hodge LLP; Law Office of James M. McCormack; and Quilling, Selander, Cummiskey & Lownds, P.C.

applied is "a reasonable person in the client's circumstances." *Id.* I do not agree, however, that any potential ambiguities should be resolved against the attorney.

III. ASSESSING AMBIGUITY IN ATTORNEY-CLIENT AGREEMENTS

The evaluation of whether an agreement is subject to multiple reasonable interpretations should be made from the perspective of a reasonable person in the client's circumstances. This does not mean, as Anglo-Dutch and the Court presume, that the individual client's interpretation prevails. Instead, the reasonableness of potential interpretations will be viewed from the reasonable client's perspective, taking into consideration the circumstances surrounding the agreement's formation, such as the parties' past dealings, their relative bargaining power, and the client's experience negotiating such agreements to determine whether the agreement was "truly negotiated". *See id.* If the court determines, as a matter of law, that the agreement is subject to more than one reasonable interpretation from a reasonable client's perspective, construction of the agreement becomes a fact issue for the judge or jury to resolve.

The Court claims not to construe the agreement against the attorney. *See Levine*, 40 S.W.3d at 94; *Lopez*, 22 S.W.3d at 860–61. However, in concluding that the circumstances surrounding the agreement do nothing to negate the letterhead on which the agreement was printed, the Court does just that. The Restatement emphasizes that in applying the reasonable client standard, courts should not ignore "the usual resources of contractual interpretation such as the language of the contract, the circumstances in which it was made, and the client's sophistication and experience in retaining and compensating lawyers or lack thereof."

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18, cmt. h. An agreement should be "construed in light of the circumstances in which it was made, the parties' past practice and contracts, and whether it was truly negotiated." *Id.*

Undoubtedly, Swonke's use of the Greenberg Peden letterhead in this case contributed to the agreement's ambiguity. But in times of increasing fluidity in the legal profession, the solution the Court implements—to construe agreements based on the letterhead regardless of the parties' understanding of their terms—could lead to unnecessarily harsh results: a lawyer who made a mistake in choosing stationery—or even used the only stationery available—would lose. *See* Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2191 (2010) (noting that the economic downturn marks a "transition for law firms less because of its immediate financial impact and more because it has highlighted and accelerated the trend toward the disaggregation of legal services that had begun before it"). While the entire Court would hold lawyers to a standard of reasonable clarity, perfection is not required. The Court's analysis of the agreement should focus on the terms as negotiated and agreed to, not on interpretations that the parties (and, at times, their counsel) have subsequently adopted in light of the changed circumstances. While giving due weight to a lawyer's fiduciary obligations, we should do so from a reasonable, not predatory, client's perspective.

1. Reasonableness of alternative interpretations

The Court holds that, even applying the Restatement's approach, a reasonable client would only interpret the agreement to be with Greenberg Peden. I disagree with that mechanical approach: application of the factors outlined in the Restatement leads me to conclude that the agreement is subject to multiple reasonable interpretations under the circumstances and thus ambiguous. The express terms of the Anglo-Dutch agreement cast doubt that it could only be understood to form a contract with Greenberg Peden from a reasonable client's perspective.

The Anglo-Dutch agreement invites more than one reasonable interpretation of the parties' intentions in spite of the fact that it was printed on Greenberg Peden letterhead and signed under a Greenberg Peden signature block. First, the body of the agreement did not reference Greenberg Peden while it referred to McConn & Williams by name five separate times. It defined the client as "you and/or the companies which you control (Anglo-Dutch)" but exclusively used personal pronouns throughout to refer to Swonke. The one-page document repeatedly used language such as "I agree to assist Anglo-Dutch and [McConn & Williams] for proportionately the same percentage (20%) of any benefit to McConn & Williams;" "the proportions under which my fees shall be calculated will be the ratio of the hours I have spent . . . relative to the hours [of McConn & Williams attorneys];" "if . . . I spent 90 hours of my time towards the lawsuit, . . . I would be entitled to receive;" "I shall be entitled to the benefit of any amendment;" "I will not be responsible for any expenses other than those I may personally incur;" and the like.

Second, the fee structure contemplated by Anglo-Dutch and Swonke, which based Swonke's compensation solely on the hours he individually billed, creates an ambiguity, especially when compared to other firm fee agreements. The applicable provision states that:

> the proportions under which my fees shall be calculated will be the ratio of the hours I have spent or will spend on this matter relative to the hours the attorneys at McConn & Williams have spent or will spend after the date the lawsuit was filed, rounded to the next whole percentage.

The four corners of the Anglo-Dutch agreement indicate that Anglo-Dutch and Swonke negotiated a contingency fee based solely on the hours Swonke (and no other Greenberg Peden attorneys or support staff) worked on the lawsuit, divided by the total hours billed by "the attorneys at McConn & Williams."[2] It is helpful to contrast this fee structure with the structure of the law firm agreement in *Sacks*, which likewise contained personal pronouns:

> My . . . rate for this particular matter will be $200.00 per hour. The other lawyers in my firm range from $150.00 to $200.00 per hour, and paralegals range from $50.00 to $100.00 per hour. You are responsible for all costs and expenses in the case as incurred. These expenses include, but are not limited to, copies; binding; fax transmissions; travel; lodging; parking; etc.

Sacks, 266 S.W.3d at 448–49.

While the Anglo-Dutch agreement stated Swonke would not be responsible for expenses, it did not anticipate compensation beyond one attorney's billable hours. *Compare Anglo-Dutch*, 267 S.W.3d at 460–61 *with Sacks*, 266 S.W.3d at 448–49; *In re Inslaw, Inc.*, 97 B.R. 685, 688 (D.D.C. 1989) (discussing an hourly law firm agreement stating that "[m]y partner . . . will be

[2] Anglo-Dutch's agreement with McConn & Williams provided for a flat 20 percent contingency fee, later reduced to 16 and 2/3 percent.

billed at $170 and all other attorney or paralegal time will be billed at this law firm's normal rate for that person"); *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 586 F. Supp. 2d 732, 767 and n.32 (S.D. Tex. 2008) (recognizing that law firm contingent fees take resources into account by holding that "in light of the complexity and difficulty of the litigation, the fee percentage would have to be sufficient to create adequate incentives for the firm to dedicate the substantial resources, possibly over a long period of time"). The agreement's compensation ratio and the use of personal pronouns throughout, in conjunction with its use of Greenberg Peden letterhead and the Greenberg Peden signature block, make it open to more than one reasonable interpretation. Accordingly, it must be read in light of surrounding circumstances. *See Columbia Gas*, 940 S.W.2d at 589; *Sun Oil*, 626 S.W.2d at 731.

2. Circumstances surrounding the agreement

It is undisputed that Van Dyke knew Greenberg Peden had refused to represent Anglo-Dutch in the Halliburton lawsuit due to the large amount of unpaid legal bills and the history of difficulty in collecting fees from Anglo-Dutch. Van Dyke admitted that he knew that Anglo-Dutch's account payable exceeded $200,000, and that Greenberg Peden therefore wanted to play no part in the lawsuit against Halliburton. Given this admission, it is difficult to see how a reasonable client in Anglo-Dutch's position could have believed that the agreement was with the firm, rather than with Swonke.

Moreover, it is undisputed that the contract in this case arose in the context of genuine negotiations between Swonke and the client, both of whom had previous experience negotiating

such agreements. Van Dyke testified that negotiating agreements was a significant portion of his job. He testified that Anglo-Dutch retained other counsel prior to switching to Greenberg Peden and had another attorney draft a demand letter to Halliburton prior to retaining McConn & Williams. Further, Van Dyke testified that he and Swonke had many discussions about contract drafting over the years, and Swonke had even given Van Dyke advice on best practices when drafting agreements.

Concerns that an attorney could exercise undue influence over an existing client are valid, but they are minimized here because this agreement was truly negotiated. The agreement was not suggested by Swonke to an uninformed and agreeable client—to the contrary, Van Dyke proposed it to ensure that he would continue to receive the benefit of Swonke's experience when McConn & Williams refused to compensate Swonke for his services. Although the Anglo-Dutch agreement is only one page, both Van Dyke and Swonke testified that they negotiated its terms. Significantly, there is undisputed evidence that Van Dyke, not Swonke, suggested the unusual compensation ratio that Swonke initially resisted, requesting a flat percentage fee instead.

Viewing the agreement from a reasonable client's perspective, I disagree that Anglo-Dutch's interpretation is the only reasonable one. Certainly, the use of personal pronouns in an engagement letter does not alone create an ambiguity as to whether the client hired a law firm or an individual lawyer. To be reasonable, an alternative interpretation must be one a client could reasonably understand from the agreement's language and the circumstances of the negotiation between the parties. Yet the negotiations between the parties demonstrate an understanding that

the law firm of Greenberg Peden was uninterested in future work for Anglo-Dutch, and Swonke negotiated the compensation for himself individually. The Court is persuaded by the letterhead on which the agreement was printed after its terms were already negotiated and accepted by both parties, and by the language of a Greenberg Peden assignment of interest letter, signed years after the agreement was reached. Neither one bears on the parties' understanding at the time they reached their agreement.

I would hold that the language of the agreement, as shown by the compensation ratio, the use of personal pronouns, the use of Greenberg Peden letterhead and the Greenberg Peden signature block, together with the circumstances surrounding the agreement's formation, made it open to multiple interpretations. The use of the letterhead could lead a reasonable client to believe the agreement was with the law firm. However, it was every bit as reasonable, given Greenberg Peden's repeated refusal to do more business with Anglo-Dutch, for the client to understand that it was a personal agreement with Swonke. Van Dyke's undisputed testimony that the firm declined all further representation of Anglo-Dutch highlights the ambiguity resulting from the circumstances surrounding the agreement's formation. His one-paragraph letter to Swonke, describing it as the agreement between "Anglo-Dutch and Greenberg Peden," showed only Anglo-Dutch's self-serving interpretation of the agreement, not whether it would unmistakably be understood that way by a reasonable client given the scope of the agreement. Moreover, because the letter is external to the contract's formation, it is not properly considered in determining whether the agreement is ambiguous.

Consideration of the language of the actual contract and the circumstances surrounding its formation lead me to conclude that the fee agreement was ambiguous as a matter of law. Accordingly, I would hold that the trial court properly submitted the agreement's construction to the jury. Because the Court effectively construes the agreement against the lawyer, I am compelled to respectfully express my dissent.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0890

THE HOUSTON EXPLORATION CO. AND
OFFSHORE SPECIALTY FABRICATORS, INC., PETITIONERS,

v.

WELLINGTON UNDERWRITING AGENCIES, LTD., ET AL.,
RESPONDENTS

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

Argued September 14, 2010

JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE GUZMAN joined, and in Parts I and III of which JUSTICE JOHNSON joined.

JUSTICE JOHNSON filed a concurring opinion.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, in which JUSTICE WILLETT and JUSTICE LEHRMANN joined.

The parties dispute whether an "all risk" property damage insurance policy provides indemnity for certain expenses incurred in connection with a covered loss. Coverage was negotiated in the London market, and as is customary there, the parties reached agreement by lining through provisions in a form policy. One such provision would have required reimbursement of the disputed expenses, and the question is whether the strike-through reflects the parties' intention that those

expenses would not be reimbursed. We agree with the court of appeals that the answer is yes.[1] Deletions from a draft agreement do not always indicate the parties' intent, but they do when, as here, they are part of the customary negotiation process.

I

In 2002, Offshore Specialty Fabricators, Inc. agreed to construct a drilling platform in the Gulf of Mexico for The Houston Exploration Company. Their contract required Offshore to obtain builder's risk insurance naming Houston as an additional insured. Offshore contacted a local broker, Greg Lary at Lary Insurance Services, Inc., who turned to Lloyd's of London for the insurance.

"Lloyd's began as a coffee house but has developed into one of the world's leading markets for insurance. This market, however, operates in accordance with age-old customs that are, to say the least, unusual in American business law."[2] Houston cites an opinion by Judge John Rainey as "[a] good description of the Lloyd's operation"[3] at the time the policy in this case issued:

> Lloyd's London ("Lloyd's") is a 300-year-old market in which individual and corporate underwriters, known as Names, underwrite insurance. Lloyd's itself is not an insurance company; it merely provides the physical premises and administrative staff and services to enable the actual underwriters to carry on their business. To increase efficiency and multiply resources, Names have joined together to form syndicates, of which there are now more than four hundred; a particular syndicate may have a few hundred or several thousand Names. Syndicates have no legal existence apart from the Names, and syndicates neither assume liability nor underwrite risks. Within each syndicate, an "active" underwriter is authorized to determine the conditions to which a risk will be subject, the percentage of risk to be assumed by the syndicate on behalf of the Names, and the percentage of risk each

[1] 267 S.W.3d 277 (Tex. App.–Houston [14th Dist.] 2008).

[2] *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 929 (2d Cir. 1998) (citing GODFREY HODGSON, LLOYD'S OF LONDON 49-75 (1984)).

[3] Brief on the Merits of Petitioner The Houston Exploration Company at 43.

> Name in the syndicate will assume. Thus, when the active underwriter accepts a percentage of the risk, he binds every Name in the syndicate. Each Name assumes unlimited liability for his share of the syndicate's losses, but he is liable for no other portion assumed by any other Name.
>
> Only approved brokers are permitted to place risks with Lloyd's underwriters. Typically, a broker will prepare the "slip," a summary of the details of the risk the broker is seeking to insure (or reinsure). The broker and the active underwriter proceed to negotiate the terms and premium, indicating as much on the slip itself. The underwriter who structures the transaction with the broker is known as the "lead" underwriter; the lead underwriter's syndicate is known as the "market lead" or "leader of the market" for that particular risk. When the underwriter signs (or "scratches") the slip, a binding contract between his syndicate and the insured is formed. Having obtained the signature of the lead underwriter, the broker retains the slip and approaches other syndicates or insurance companies to secure coverage for the remaining risk. Once the broker has succeeded in procuring full coverage, he retains the slip and provides subscribing underwriters with copies of the terms and conditions of the coverage. If a claim under the insurance (or reinsurance) agreement is not outstanding, an underwriter may agree to waive issuance of a policy; the slip is then signed "on risk." Otherwise, the broker's policy department prepares the policy and forwards it to the Lloyd's Policy Signing Office ("LPSO"). The LPSO checks the policy against the slip to ensure that the policy contains all the terms and conditions of the slip. If no inconsistencies are discovered, the policy issues, often long after the initial signing of the slip.[4]

As required by Lloyd's, Lary requested an approved London broker, Tysers International Insurance & Reinsurance Brokers, to obtain insurance for Offshore and Houston ("the Assureds"). Tysers negotiated with respondent Wellington Underwriting Agencies Limited as lead for a group of underwriters ("the Underwriters").[5] Tysers and Wellington worked from a 33-page "WELCAR

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[4] *Houston Cas. Co. v. Certain Underwriters at Lloyd's London*, 51 F. Supp. 2d 789, 791-792 (S.D. Tex. 1999), *aff'd*, 252 F.3d 1357 (5th Cir. 2001) (footnote omitted); *cf. What We Do*, LLOYD'S.COM, http:// www. lloyds. com/ Lloyds/ Investor-Relations/ Lloyds-overview/What-we-do (last visited Aug.23, 2011).

[5] The other underwriters, also respondents, were: Syndicate 2020; Anton Private Capital Limited; CBS Private Capital Limited; Argenta Private Capital Limited; Syndicate 3030; Amlin Underwriting Ltd.; Syndicate 2001; Navigators Underwriting Agency Ltd.; Syndicate 1221; Marlborough Underwriting Agency Ltd.; Syndicate 1861; Managing Agency Partners Ltd.; Syndicate 2791; Hardy (Underwriting Agencies) Ltd.; Syndicate 382; Beazley Furlonge Ltd.; Syndicate 623; Houston Casualty Company; Navigators Insurance Company; AXA Corporate Solutions Reassurance-Paris; AXA

2001 Offshore Construction Project Policy" form, lining through several provisions. The form contained two parts labeled "Section I - Physical Damage" and "Section II - Liability". Tysers and Wellington lined through all seven pages of Section II, which provided liability insurance. "Subject to the [policy's] terms, conditions and exclusions", Section I "insure[d] against all risks of physical loss of and/or physical damage to [covered] property" — that is, property involved in any project undertaken by Offshore and declared under the policy.[6] Offshore's Houston project was part of the declaration, and others could be added as they were undertaken.

The policy terms provided that the Underwriters would indemnify the Assureds for "costs necessarily incurred and duly justified in repair or replacement" of lost or damaged property (¶ 1a). The cost of hiring vessels, equipment, and labor "used in or about the repair . . . of losses covered by Section I" was also recoverable, as was a reasonable charge for Offshore's "utilis[ing]" its own equipment (¶ 1d). Other provisions required payment for loss due to governmental action to prevent pollution (¶ 6); certain defective parts (¶ 7); certain salvage charges (¶ 8); and wreckage removal

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Corporate Solutions IUA; AXA Corporate Solutions Insurance Company; AXA Corporate Solutions Reinsurance; AXA Corporate Solutions Lloyd's Insurance Company of Texas; Commonwealth Insurance Company; International Insurance Company of Hannover Limited; and American Offshore International Syndicate.

[6] A section captioned "Covered Property" provided as follows:

"This insurance covers works executed anywhere in the world in the performance of all contracts relating to the Project including (provided they are included in the contract values declared to Underwriters and insured herein) materials, components, parts, machinery, fixtures, equipment and any other property destined to become a part of the completed project, or used up or consumed in the completion of the project. This insurance shall also cover (provided they are declared to and agreed by Underwriters) all temporary works, plant, equipment, machinery, materials, outfits and all property associated therewith, whether such items are intended to form a permanent part of the works or not, including site preparatory work and subsequent operational risks.

"It is understood and agreed that any insured equipment and/or property that is not for incorporation into the contract works shall be covered whilst it is being utilised in the Project and whilst in transit from the Project site(s) until the earlier of the date of arrival at its final destination or the 30th day after its removal from the Project site(s)."

(¶ 11). But five provisions calling for reimbursement of other expenses associated with covered losses were struck through:

- ¶ 10, "Additional Work", providing payment for additional work needed to reposition a structure;[7]
- ¶ 12, "Tests, Leak and/or Damage Search Costs", providing payment for tests required to be repeated after a covered occurrence;[8]
- ¶ 13, "Stand-By Charges", providing payment for the cost of keeping equipment engaged in repairing a covered occurrence available through delays for bad weather;[9]
- ¶ 16, "Terrorist 'Buy Back' Clause", providing payment of some losses due to terrorism;[10] and

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[7] "In the event that the structure or insured property is set down or wrongly positioned, which is the direct result of a peril insured against, Underwriters shall indemnify the Assureds for the cost of additional work that is required in respect of positioning or repositioning, sinking, submerging and stabilising the property insured herein insofar as such cost does not fall within the cover afforded by the sue and labour clause. However Underwriters' liability under this clause shall not exceed the percentage amount that would be recoverable under the sue and labour clause and then only to the extent that the Policy Limit is not exhausted by a claim under the sue and labour clause."

[8] "If it becomes necessary to repeat any test(s) and/or trial(s) or to carry out subsequent test(s) and/or trial(s) as a result of a physical loss or physical damage to the insured property arising from an Occurrence covered under Section I, Underwriters will bear the cost of any such repeated and/or subsequent test(s) and/or trial(s) subject to a sub-limit of (AMOUNT) (100%) any one Occurrence, but never to exceed original expenditure as identified in the latest agreed Schedule B."

[9] "Subject to a sub-limit of US$ (AMOUNT) any one Occurrence aggregated at US$ (AMOUNT) over the Policy Period, Underwriters shall indemnify the Assureds for the cost of stand-by time on vessels and/or craft and/or equipment actively engaged in the course of repair following an Occurrence covered under Section I, where the Assureds are prevented from working in, around or about the damaged property by bad weather, including named hurricanes."

[10] "Subject to the terms and conditions to which reference is made below, Underwriters shall indemnify the Assureds under this clause for physical loss and/or physical damage that would be recoverable under Section 1 of the Policy but for the existence of the following clause in Section I, Exclusion 2:

"'Notwithstanding anything to the contrary contained in this section, there shall be no liability whatsoever for any loss caused by, or resulting from, or incurred as a result of:

"'a. (i) the detonation of an explosive and/or (ii) any weapon of war[;] and is caused by any person acting maliciously or from a political motive.

"'b. Any act for political or terrorist purposes of any persons, and whether or not agents of a sovereign power, and whether the physical loss, damage or expense resulting therefrom is accidental or intentional'."

- ¶ 17, "Forwarding Charges", providing payment for costs due to interruptions in transporting property as part of a covered occurrence.[11]

Following these terms were almost two pages of exclusions. As altered,[12] the form became the policy to which Tysers and the Underwriters agreed, and Tysers notified Lary that coverage had been bound.[13]

A few weeks later, the drilling platform Offshore was constructing for Houston became unstable, requiring immediate repairs. But work was delayed by severe storms in the Gulf, during which Offshore kept repair vessels standing by so that they could resume repairs as soon as the weather improved. The Assureds submitted a claim for $3,256,174, which included about $1 million for weather stand-by charges. The Underwriters paid $2,034,961, acknowledging that the platform damage was a covered occurrence, but refused to pay for the weather stand-by charges. Paragraph 13, which was struck through in the policy, would have required indemnity for those charges.

The Assureds sued the Underwriters on the policy, and the Underwriters counterclaimed, alleging that the Assureds had submitted a false claim. The trial court granted partial summary

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[11] "In respect of transit(s) insured hereunder, if as a result of an Occurrence covered by the terms of Section I, the insured transit is terminated at a port or place other than that to which the property insured is covered under this insurance, Underwriters will reimburse the Assured for any extra charges properly and reasonably incurred in unloading, storing and forwarding the property insured to the destination to which it is insured hereunder.

"Underwriters will bear the cost of any such extra charges subject to a sub-limit of US$ (AMOUNT) (100%) any one Occurrence."

[12] Tysers and the Underwriters also lined through a paragraph of the general provisions entitled "Escalation Clause", which called for insured values to be adjusted above or below declared values to reflect final completed values, and other provisions deemed unnecessary because they related to the construction period.

[13] The Assureds insist that they knew nothing of the actual terms of the policy to which Tysers and the Underwriters had agreed until after this litigation commenced. Those factual disputes and others before the trial court do not prevent our resolution of the legal questions presented.

judgment for the Assureds, construing the policy to require payment of the weather stand-by charges. In its order, the trial court gave this explanation of its ruling

> The Court, having disregarded the stricken policy language as parol evidence, found the Policy to be unambiguous in favor of coverage. The Policy is only ambiguous if the stricken language is read into the Policy, and then treated as an exclusion. The stricken language is parol evidence that *creates* an ambiguity, necessitating further parol evidence. Whereas parol evidence may be used to interpret an ambiguous contract, it cannot be used to create an ambiguity. By ignoring the stricken language and treating it as never having been in the policy (as is the case when only looking at the four corners of the Policy), the contract is unambiguous.

(Emphasis in original.) Later, the trial court signed an agreed order for an interlocutory appeal on two questions:

> (1) Whether the Welcar 2001 Offshore Construction Project policy of insurance at issue herein provided coverage for the weather standby charges incurred by Houston Exploration which are the subject of suit herein;
>
> (2) If coverage exists for weather standby [charges], whether Underwriters' counterclaims for fraud and breach of contract are without merit.

The trial court found these were "controlling questions of law as to which there is substantial ground for difference of opinion", and that "an immediate interlocutory appeal . . . will materially advance the ultimate termination of this litigation".[14]

[14] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d) ("A district court, county court at law, or county court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if: (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order."). Section 51.014(d) has been amended, effective September 1, 2011. Act of May 30, 2011, 82nd Leg., R.S., ch. 203, § 3.01, 2011 Tex. Gen. Laws ___, ___ (amendments to TEX CIV. PRAC. & REM. CODE § 51.014(d)); *id.* § 6.01 (effective only in civil actions filed on or after effective date); *id.* § 6.02 (effective date).

The court of appeals answered the first question no, thereby mooting the second question.[15] The court began by noting that Section I's broad provision of insurance against "all risks" is expressly "subject[] . . . to 'the [policy's] terms'", which require reimbursement of only certain repair costs.[16] Those include "costs 'necessarily incurred . . . in repair'" of damaged property.[17] But according to the evidence, weather stand-by charges are justified only in limited circumstances, when repairs are required to be made immediately, and thus, the court reasoned, are not "necessarily incurred" in making repairs.[18] Nor, the court continued, are charges for equipment and laborers being "'used in or about the repair'" of losses, as required by another policy term, while standing by, doing nothing, waiting for the weather to improve.[19] The court further reasoned that the inclusion of paragraph 13 among the terms in the form policy, specifically requiring reimbursement of weather stand-by charges, indicates that such charges would not be reimbursable under other form policy provisions.[20] Relying on a decision of this Court, the court of appeals held that "deletions remaining within an insurance policy can be considered in construing an unambiguous insurance

[15] 267 S.W.3d 277, 288-289 (Tex. App.–Houston [14th Dist.] 2008).

[16] *Id*. at 284 (quoting the policy).

[17] *Id*. at 285 (quoting the policy).

[18] *Id.*

[19] *Id*. at 285-286 (quoting the policy).

[20] *Id*. at 288.

policy."[21] By striking out paragraph 13, the court concluded, the parties must have intended that weather stand-by charges not be reimbursable.[22]

We initially denied the Assureds' petitions for review[23] but granted them on rehearing.[24]

II

A written contract must be construed to give effect to the parties' intent expressed in the text as understood in light of the facts and circumstances surrounding the contract's execution, subject to the parol evidence rule.[25] The parol evidence rule applies when parties have a valid, integrated written agreement, and precludes enforcement of prior or contemporaneous agreements.[26] The rule does not prohibit consideration of surrounding circumstances that inform, rather than vary from or

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[21] *Id*. at 287 (citing *Gibson v. Turner*, 294 S.W.2d 781 (Tex. 1956), and *Westchester Fire Ins. Co. v. Stewart & Stevenson Servs., Inc.*, 31 S.W.3d 654 (Tex. App.–Houston [1st Dist.] 2000, pet. denied)).

[22] *Id*. at 288.

[23] 53 Tex. Sup. Ct. J. 15 (Oct. 23, 2009).

[24] 53 Tex. Sup. Ct. J. 562 (Apr. 9, 2010).

[25] *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981) ("'It is the general rule of the law of contracts that where an unambiguous writing has been entered into between the parties, the courts will give effect to the intention of the parties as expressed or as is apparent in the writing. In the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls. . . . Where a question relating to the construction of a contract is presented, as here, we are to take the wording of the instrument, considering the same in the light of the surrounding circumstances, and apply the pertinent rules of construction thereto and thus settle the meaning of the contract.' . . . If, in the light of surrounding circumstances, the language of the contract appears to be capable of only a single meaning, the court can then confine itself to the writing. Consideration of the facts and circumstances surrounding the execution of a contract, however, is simply an aid in the construction of the contract's language. There are limits. For example, when interpreting an integrated writing, the parol evidence rule circumscribes the use of extrinsic evidence." (quoting *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518-519 (Tex. 1968)) (emphasis removed)).

[26] *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 32 (Tex. 1958) ("When parties have concluded a valid integrated agreement with respect to a particular subject matter, the rule precludes the enforcement of inconsistent prior or contemporaneous agreements."); *see generally* RESTATEMENT (SECOND) OF CONTRACTS (1981) § 213 ("(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them. (2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.").

contradict, the contract text. Those circumstances include, according to Professor Williston's treatise, "the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give a context to the transaction between the parties."[27]

As we have said, "[n]egotiations of the parties may have some relevance in ascertaining the dominant purpose and intent of the parties embodied in the contract interpreted as a whole".[28] The manner in which the insurance policy in this case was negotiated in the London market is crucial to understanding its terms. The parties did not create the policy text; rather, they began with a form policy that covered "all risks" of property damage, subject to a laundry list of terms that provided for reimbursement of different kinds of costs that might be incurred in connection with a covered loss. They did not edit the policy language, but they did strike through several provisions requiring payment of particular costs, including the cost of certain additional work and testing, certain transportation costs, losses due to terrorism, and weather stand-by charges. The remaining provisions required payment of other costs. The parties followed the customary process for negotiating an insurance policy in the London market.

The Assureds argue that by deleting requirements that specific kinds of costs be reimbursed, the parties did not intend that the costs *not* be reimbursed. Rather, they contend, the deletions are completely irrelevant, and the policy must be construed as if the struck-through provisions had not been included in the form in the first place. This not only ignores but distorts the negotiation

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[27] 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32.7 (4th ed. 1999).

[28] *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777, 781 (Tex. 1977); *see generally* RESTATEMENT (SECOND) OF CONTRACTS § 214 ("negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . (c) the meaning of the writing, whether or not integrated").

process. The parties did not try to write a policy from scratch. They took an existing form, deleted some payment requirements and kept others. The purpose of the process was to decide both what costs would be paid by the policy and what costs would not be paid. To see the deletions as irrelevant blinks reality.

We have twice held that deletions in a printed form agreement are indicative of the parties' intent. In *Gibson v. Turner*, lessors leased all the minerals in 922 acres, even though they owned only an undivided 9/40ths.[29] The lessee knew this because he was already lessee of the other 31/40ths.[30] The printed form lease in common use called for a 1/8th royalty on production "from said land".[31] Following the royalty clause was a proportionate reduction clause.[32] This standard provision in mineral leases provided that if the lessor owned less than all of the mineral interest in the property described, the royalty would be reduced proportionately.[33] The clause had been typed over with x's.[34] We held that the lease entitled the lessors to a 1/8th royalty on total production from the 922 acres, not 9/40ths of 1/8th.[35] We expressly rejected the lessee's contention "that the fact that the proportionate reduction clause was stricken from the lease cannot be considered in construing

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[29] 294 S.W.2d 781, 782 (Tex. 1956).

[30] *Id.* at 782-783.

[31] *Id*. at 783.

[32] *Id*. at 782.

[33] *See McMahon v. Christmann*, 303 S.W.2d 341, 343 (Tex. 1957).

[34] *Gibson*, 294 S.W.2d at 782.

[35] *Id*. at 785.

the meaning of the royalty reservation".[36] The deletion showed, not merely that the parties had not reached agreement on the subject, but that "the parties to the lease at the time of its execution did not limit the royalty provision to 1/8th of 9/40ths of the production — the interest owned by the lessors in the minerals".[37] This, we said, was consistent with provisions of the lease calling for the lessors to be paid only 9/40ths of the bonus and delay rental.[38] When the parties intended the lessors' entitlements to be based on their partial ownership, they expressed it clearly.[39]

In *Houston Pipe Line Co. v. Dwyer*, landowners claimed that a natural gas pipeline easement had terminated when the defendant removed the existing pipeline and replaced it with a larger one to meet increased demand.[40] The printed form easement granted "a right of way to lay, maintain, operate, repair and remove a Pipe Line for the transportation of gas", but the parties lined through the words, "and remove".[41] They added a provision that authorized removal of the pipeline on termination of the easement.[42] And they lined through a paragraph granting the right to construct additional pipelines.[43] The landowners contended, and we agreed, that "[t]he deletions made by the parties . . . may be considered . . . in order to arrive at the true meaning and intention of the

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] 374 S.W.2d 662, 663 (Tex. 1964).

[41] *Id.* (emphasis removed).

[42] *Id.*

[43] *Id.*

parties."[44] They argued that by deleting "and remove" while adding authorization for removal at termination, the parties intended to prohibit any removal of the pipeline except at termination.[45] The defendant countered that the deletion could not be construed to prohibit the removal and replacement of the original pipe when the pipe's condition required replacement.[46] We held that the right to "operate" and "maintain" a pipeline was broad enough to authorize its replacement in the existing location with pipeline of the same size, but not broad enough to authorize replacement "with a line of substantially greater size."[47]

Gibson and *Dwyer* establish that deletions in a printed form agreement must be considered in construing the other provisions.[48] The import of a deletion may be clear, as it was in *Gibson*, or less so, as in *Dwyer*, but in neither case can it be ignored. The Assureds contend that the parties' intent in deleting paragraph 13 requiring reimbursement of weather stand-by charges is unclear. It may have been, they argue, because the provision was surplusage, redundant of other, more general provisions, like the "all risks" provision, the "costs necessarily incurred" provision in paragraph 1a, and the "used in or about" provision in paragraph 1d. This argument ignores the structure of the

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[44] *Id*. at 664.

[45] *Id*.

[46] *Id*.

[47] *Id*. at 664-666.

[48] *See generally* 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32.13 (4th ed. 1999) ("The rule that added or modified provisions control over printed provisions plainly applies to instances of interlineations or to the striking of a printed portion and the addition of another term. Indeed, deletions made without concomitant additions or substitutions may be considered in order to ascertain the parties' intent, for the deletion alone, even without replacement, clearly manifests an unwillingness to be bound according to the deleted terms, although it may not express to what terms a party would be willing to be bound." (footnote omitted)).

form policy, which was to provide coverage for "all risks" subject to specific terms, followed by a list of terms addressed to specific kinds of costs. There is no reason to think that paragraph 13 was any more surplusage than the other four paragraphs that were struck through, so that provision after provision was redundant, or any less surplusage than the paragraphs that remained, so that only the five struck were unnecessary. The Assureds argue that the parties may have deleted paragraph 13 so that weather stand-by charges would be fully reimbursable, rather than capped as permitted by the provision. But the way to delete the cap was to strike the introductory phrase, "[s]ubject to a sub-limit of US$ (AMOUNT)", not to strike the remainder of the paragraph requiring payment.

The Assureds argue that deletions in a printed form should be treated no differently than deletions in a draft, all evidence of which is omitted from the final agreement. But the law has long recognized that changes in a printed form must be accorded special weight in construing the instrument. The Uniform Commercial Code, for example, provides that handwritten and typewritten terms prevail over contradictory printed terms.[49] Professor Williston's treatise states that this is the rule generally.[50] It may be that deletions in drafts indicate the parties' intent in the final agreement, but we need not decide that issue here.

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[49] TEX. BUS. & COM. CODE § 3.114 ("If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers.").

[50] 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32.13 ("Even though the parties will often begin with a preprinted or standard form contract, they will sometimes make additions to or changes in their printed contract, adopting it to their particular transaction. Typically, such changes or additions will be handwritten but they may also be typed or stamped. In accord with the general rule that all parts of a contract are to be given effect, the courts must seek to reconcile inconsistencies between the changed or added terms and the printed matter. Where, however, the printed contract provisions irreconcilably conflict with the provisions added by the parties, the added provisions will contro1." (footnote omitted)).

We conclude that the effect of the deletion of paragraph 13 was to remove weather stand-by charges from the costs for which the policy provided indemnity.

III

The Assureds contend that indemnification for weather stand-by charges is required by policy provisions other than paragraph 13, and that if the deletion of that paragraph is construed as an exclusion, then its effect must be "strictly construed against the insurer and in favor of the insured."[51] We agree that strict construction is required, but the effect of the exclusion is the same.

The Assureds argue that payment of weather stand-by charges is required by the policy's general provision that "insures against all risks of physical loss of and/or physical damage to [covered] property". But that provision is expressly "[s]ubject to the terms" that follow in the policy, one of which would have been paragraph 13. Treating its deletion as an exclusion makes it an express exception to the general "all risks" insurance provision.

The Assureds argue that weather stand-by charges are "costs necessarily incurred and duly justified in repair or replacement" of lost or damaged property, which must be paid under paragraph 1a. But weather stand-by charges are not necessarily incurred in repairing property damage; they are optional. The Assureds could have released vessels and labor until the storms that delayed repairs passed. Their retention may have been prudent and cost-effective, as the Assureds argue, but the charges incurred were no more necessary than those for repositioning a structure, repeating tests, losses from terrorism, and transportation interruptions, all covered by other paragraphs in the same "Terms and Conditions" section that were also deleted.

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[51] *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991).

The Assureds argue that weather stand-by charges are part of the costs of equipment and labor "used" or "utilise[d]" in repairing covered property under paragraph 1d, but the opposite is true: the charges are for equipment and labor that are standing by, awaiting use when the weather clears. If paragraph 1d covered weather stand-by charges, paragraph 13 would be surplusage in a policy in which it was not struck through, as in this policy.

Finally, the Assureds argue that because the policy provided a deductible for weather stand-by charges, the charges must have been payable under the policy. But the deductible provision was another part of the printed form. Having struck paragraph 13, the parties might well have struck the deductible provision, but failing to do so simply left it inoperative.

* * *

For these reasons, we conclude that the judgment of the court of appeals should be

Affirmed.

Nathan L. Hecht
Justice

Opinion delivered: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0890

THE HOUSTON EXPLORATION CO. AND
OFFSHORE SPECIALTY FABRICATORS, INC., PETITIONERS,

v.

WELLINGTON UNDERWRITING AGENCIES, LTD., ET AL.,
RESPONDENTS

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

CHIEF JUSTICE JEFFERSON, joined by JUSTICE WILLETT and JUSTICE LEHRMANN, dissenting.

The Court holds that language manifestly stricken from a contract, and thereby made inoperative by the parties, nonetheless determines the contract's meaning. The Court believes that industry custom controls and that our precedent demands this outcome. But there is no evidence of such a custom, and old precedent, to the extent that it employs inoperative language to interpret a contract, is overwhelmed by modern views of parol evidence. I respectfully dissent.

I. Deleted Language

Based on what it believes to be the custom of the Lloyd's market,[1] the Court engages in a speculative analysis of what the parties to this insurance contract intended when they deleted certain

[1] *See* ___ S.W.3d at ___ ("Coverage was negotiated in the London market, and as is customary there, the parties reached agreement by lining through provisions in a form policy."). The Court cites no authorities confirming the existence of such a custom. Elsewhere, the Court states a broader rule: that "deletions in a printed form agreement *must* be considered in construing the other provisions." *Id.* at ___ (emphasis added).

contractual language. In doing so, the Court enters a morass of indeterminacy, which could easily be avoided by focusing on the contract language alone. To justify looking to the contract's deleted language, the Court relies on two cases that are, in my opinion, ill-reasoned, and should be disapproved to the extent that they consider deleted text to interpret a facially unambiguous contract.

The content of a deleted provision, like the negotiations preceding the contract's execution, is extrinsic and cannot be considered in interpreting the contract. In *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981), we made clear that while a court may consider the circumstances surrounding a contract's execution, it could do so only as an aid to the interpretation of the contract's language. Neither surrounding circumstances nor extrinsic evidence may be consulted if they introduce ambiguity, as consideration of paragraph 13 does here. *Sun Oil Co.*, 626 S.W.2d at 732 ("[P]arol evidence is not admissible to render a contract ambiguous . . . ." (quoting *Lewis v. E. Tex. Fin. Co.*, 146 S.W.2d 977, 980 (Tex. 1941))). Extrinsic evidence, moreover, may be considered only when the contract's meaning cannot be determined from the text. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex. 1995) (holding that extrinsic evidence may not be introduced where the contract is unambiguous); *Sun Oil Co.*, 626 S.W.2d at 732 (same). The circumstances that a court may consider are limited to the facts constituting the context of the contract's execution, not extrinsic evidence of the negotiations among the parties. Professor Williston explains that the rule permitting consideration of surrounding circumstances should not be read to eviscerate the parol evidence rule by allowing extrinsic evidence; rather, surrounding circumstance "refers to the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give a context to the transaction between

the parties"—factors such as the parties' experience, sophistication, and age.[2] 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32.7 (4th ed. 1999). To consider deleted language or other previous drafts or negotiations would destroy the parol evidence rule without easing interpretation. *See id.* § 33.42 (noting that "the law distinguishes [facts regarding prior negotiations] from other facts surrounding the transactions" and that "evidence of [facts regarding prior negotiations] is inadmissible"). Indeed, Texas law prohibits as extrinsic evidence the introduction of prior policies and negotiations, as well as legal memoranda, for the purpose of aiding the interpretation of an unambiguous contract. *See, e.g.*, *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006) (prior policies); *Nat'l Union Fire Ins. Co.*, 907 S.W.2d at 521 (prior dealings; prior negotiations); *Sun Oil Co.*, 626 S.W.2d at 732 (legal memoranda); *cf. Sharp v. State Farm Fire & Cas. Ins. Co.*, 115 F.3d 1258, 1262 (5th Cir. 1997) (interpreting Texas law and prohibiting prior policies).

The evidence that Wellington wishes to admit does not provide context for the negotiation and execution of the contract in a way that elaborates on the meaning of the contract's language; rather, Wellington seeks to use language the parties rejected to tell us directly what the contract means. *Cf. Fiess*, 202 S.W.3d at 745 (noting that we construe contracts according to what they say, "not what . . . insurers thought [they] said"). Paragraph 13 is not evidence of a surrounding

[2] We have tended to permit evidence only of such contextual facts under the rubric of "surrounding circumstances." *See, e.g.*, *Progressive Cnty. Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 807–08 (Tex. 2009) (considering the *existence* of two contracts—not their content—as part of the "surrounding circumstances"); *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741–42 (Tex. 1998) (regulatory climate surrounding promulgation of a form policy); *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 457–58 (Tex. 1997) (the fact that the insurance was provided to a sole shareholder corporation); *Sun Oil Co.*, 626 S.W.2d at 732 (bargaining position, sophistication, and relative value of the minerals at the time of execution).

circumstance; it is parol evidence, and the Court gives no reason, beyond two old cases that conflict with the spirit of our recent precedent, for why it should be considered here.

When contracting parties strike through proposed language, the stricken language is inoperative. Though the deleted text is legible, we must not summon dead words for live contracts. *See* 11 LORD, WILLISTON ON CONTRACTS § 32:13 (noting that deletions "manifest[] an unwillingness to be bound according to the deleted terms"). Deleted language is extrinsic to the contract, valid only where the law otherwise permits its consideration. Most other courts considering this issue have reached this conclusion. *See, e.g.*, *Gateway Frontier Props., Inc. v. Selner, Glaser, Komen, Berger & Galganski, P.C.*, 974 S.W.2d 566, 570 (Mo. Ct. App. 1998) (noting that the majority of "jurisdictions considering the issue have held that stricken language is extrinsic and may not be resorted to in construing an integrated, unambiguous contract"). In one of the earliest opinions to address the effect of deleted language on contract interpretation, the Supreme Court of South Carolina wrote:

> [W]e think the notes must be read as if the words erased had never been inserted, and when so read the contract falls within the general rule as to mortgages. Those words were not at all necessary to create a liability on the part of the defendant . . . , and if he had desired to exempt himself from such liability he should have inserted in the contracts words of exemption, as contracts must be construed by the words which they contain, and not with reference to words omitted or erased.

Straub v. Screven, 19 S.C. 445, 449–50 (1883).[3]

[3] *See also, e.g.*, *Hughes v. Samedan Oil Corp.*, 166 F.2d 871, 873–74 (10th Cir. 1948) (noting that a court may only look to a deleted provision where the contract is ambiguous); *St. Lawrence Explosives Corp. v. Worthy Bros. Pipeline Corp.*, 916 F. Supp. 187, 190–91 (N.D.N.Y. 1996) (same), *aff'd*, 111 F.3d 124 (2d Cir. 1997) (unpublished table decision); *Remillard Brick Co. v. Remillard-Dandini Co.*, 125 P.2d 548, 552 (Cal. Dist. Ct. App. 1942) (refusing to look at an excised provision because the contract, considered without reference to that provision, was unambiguous); *Kennon v. Shepard*, 127 N.E. 426, 427 (Mass. 1920) ("[W]ords eliminated from the contract before its execution cannot be restored; and they cannot be used in its construction."); *Gateway Frontier Props., Inc.*, 974 S.W.2d at 570 ("The

The opposite rule creates havoc. Imagine that an insurance company provided insurance through a form policy with the various types of coverage negotiable before execution. Two parties contract for identical coverage with this insurer, but one is provided a clean copy, containing only the language to which that party agreed. The other, meanwhile, receives a policy with the same operative language but with other language—coverage not contracted for—crossed out. Under the regime proposed by Wellington, were both parties to sue on the contract, the interpretations might come out differently, even though each had negotiated the same coverage, because the court in one case could look to the deleted language while the other could not. Such a rule would invite confusion rather than mitigate it.[4]

Meaning derived from stricken language can never be more than a mere inference—a reading of intent into an action without clear meaning—and thus the Court substitutes guesswork for operative language. The Court believes the words were deleted because the parties rejected their substance. I disagree, as explained below. But even if the Court were right in this case, the intent behind deletions will not always—or even usually—be so clear. Parties delete language because of "an unwillingness to be bound according to the deleted terms." 11 LORD, WILLISTON ON CONTRACTS § 32.13. Why they were unwilling to be bound by those terms—or even whether the

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rationale underlying the rule is that the writing excised from the agreement . . . is not part of the agreement between the parties.").

[4] Similarly, the Court's rule would give significance to seemingly insignificant factors, such as the thickness of the line striking a provision: Would deleted language be considered where struck with a thin, pen line but not where struck emphatically with marker that rendered the provision illegible? If the same rule would apply to both situations, how would parties prove what the now-illegible text said?

parties wished not to be bound by them for the same reason[5]—is not apparent. *See id.* (noting that deletions "may not express to what terms a party would be willing to be bound"). Deletions may serve some purpose, but we should reject the notion that that purpose is easily ascertainable simply from the contract's face and the fact of deletion. Courts cannot hope to do this consistently and successfully, and they should not try.

II. The Contract's Language

The contract must be interpreted without reference to the deleted paragraph 13, and coverage for standby charges is otherwise established by the contract's language.

When the deletion is honored as a banishment, there is only one reference to standby charges: a clause stating a deductible for standby charges. Surplusage being strongly disfavored in the interpretation of contracts, this alone is strong evidence of coverage. If standby charges were not covered, what would be the rationale for including the deductible? It is "our duty . . . to give effect to all contract provisions, and render none meaningless." *King v. Dall. Fire Ins. Co.*, 85 S.W.3d 185, 193 (Tex. 2002). Yet the Court dismisses the deductible language and holds it "inoperative."[6] ___ S.W.3d at ___. Holding that standby charges are indeed covered would,

[5] And in this case, it is clear that there was no agreement at all.

[6] Although the Court is nonchalant about calling actual provisions surplusage, the Court is deeply concerned about *hypothetical* surplusage. The Court writes that the contract cannot be read to cover standby charges—because of the (non?)existence of paragraph 13: "If paragraph 1d covered weather standby charges, paragraph 13 would be surplusage in a policy in which it was not struck through." ____ S.W.3d at ___. This amounts to the conceptually difficult argument that something cannot be covered because if language not actually in the contract *were* in the contract, that language not in the contract would be surplusage. But paragraph 13 *is not* in the contract, and so the Court rejects the only reading that gives meaning to each of the contract's clauses based on its hypothetical interpretation of a contract that is not before this Court and, indeed, may not exist. And, moreover, this is all based on a belief, implicit in the Court's reasoning, that the form contract from which the Underwriters were working could not have contained surplusage as it was written—but perhaps it did, and perhaps that's why the "surplusage" was removed?

Or perhaps paragraph 13's deletion removed a sublimit, as the brokers argued to the Underwriters. To this the

consistent with our precedent and in contrast with the Court's construction, give meaning to each of the contract's provisions, rendering none meaningless.

Coverage becomes more clear when the deductible provision is considered alongside the contract's other provisions. Paragraph 1.a. of the Basis of Recovery section promises indemnification for "installation and all other costs necessarily incurred and duly justified in repair or replacement." Paragraph 1.d. of the Basis of Recovery section provides that in the event of a loss caused by a covered occurrence, with respect to

> repairs . . . carried out by vessels . . . which the Assured have on charter, . . . the cost or the proportion thereof shall be based on the pre-agreed hire or contract rates for such employment when used in or about the repair . . . and shall be so recoverable as a claim hereon. In the event that the Assured utilises its own vessels . . . for any repair, . . . a reasonable charge in respect of such work shall be recoverable as a claim hereon.

These clauses provide coverage for weather standby charges. Paragraph 1.a. does not, by its terms, restrict coverage to actual repair costs. Rather, the provision covers all costs that are "necessarily incurred and duly justified" in the course of repairs, even if those costs are not for actual repairs. Here, Houston and Offshore incurred the weather standby costs in the course of the repairs. Though the immediate cause of the charges was the weather, it is apparent that they were in fact incurred as a result of the covered occurrence—the vessels put on standby were hired to perform covered repairs, but the weather intervened. These vessels, while on standby, continued

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Court again says no, writing that "*the* way to delete the [sublimit] was to strike the introductory phrase" rather than the whole paragraph. ___ S.W.3d at ___ (emphasis added). *The* way: in the Court's opinion, there could be no *other* way to remove a sublimit.

to be hired for the purposes of repair. Absent clearer exclusionary language in the contract, the standby charges are necessarily incurred and duly justified.

Paragraph 1.d. supports this conclusion. It has two relevant clauses. The first deals with hired vessels "used in or about the repair." Wellington narrowly defines the term "about" and argues that this provision restricts indemnification to costs associated with the use of the vessels while they are actually engaged in repairs or are physically near the repair site. This misinterprets the contract's use of the term "about." The *Oxford English Dictionary* makes clear that, when used as a preposition, "about" may express proximity, but it may also express "relation or connection." OXFORD ENG. DICTIONARY (online ed. 2011), http://www.oed.com (all Internet material as visited August 23, 2011, and copy available in Clerk of Court's case file). This reading makes sense: it is more reasonable for Wellington to indemnify the Assureds for hiring costs incurred "in or in connection with" a repair than for costs incurred "in or near" a repair.

The second clause of paragraph 1.d. indemnifies the Assureds for hire costs related to boats owned by the Assured and "utilise[d] . . . for" repairs. Because most of the standby charges at issue are related to vessels owned by Offshore, this provision is especially relevant. As with the previous clause, the contract's language here does not limit indemnification to the vessel's expenses while actually engaged in repairs. Crucially, the preposition changes from the previous sentence. There, the parties wrote "used in"—implying actual repairs costs—while here it is "utilized for." Like "about," the use of "for" broadens the coverage, indicating that indemnification should include costs incurred with regard to those vessels while they are generally engaged in repair-related activities, even if they are not actively making repairs. Here, Offshore's vessels were being "utilise[d] . . . for"

repairs to the platform when the storms forced them to quit. While the storms passed, Offshore and Houston kept those vessels on standby, ensuring their continued availability when repairs could recommence. As such, even as they waited out the storms, the vessels continued to be used for the repairs. Indeed, waiting on standby *was* their use, meant to ensure that repairs continued with haste.

Thus, standby charges are covered under the contract.

III. Conclusion

The Lloyd's process is odd and opaque. Even after extensive discovery, it remains unclear how the insurance contract came into being or to what extent its language was accepted by the parties. Taking into account language that was *removed from* a contract, and trying to read the record of the negotiations, only confuses things. Here, there is a deletion and a failure to delete; there are changed stories; there are conflicting explanations. This is not clear evidence of noncoverage because it is clear evidence of *nothing*. Considering this extraneous information inhibits rather than enhances clarity, and it makes our interpretive task more difficult. The Court should not have gone down this road in *Gibson* or *Dwyer*, and the Court should not compound its mistake today.

We interpret language, not its absence. The expressive content of an act of deletion will frequently be indeterminate; here, it could have been intended to remove coverage, remove redundancy, or remove a sublimit. Deleted language is therefore best regarded as extrinsic evidence, inadmissible for the purposes of varying or contradicting the language of an unambiguous contract. Accordingly, I respectfully dissent.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0890

THE HOUSTON EXPLORATION CO. AND
OFFSHORE SPECIALTY FABRICATORS, INC., PETITIONERS,

v.

WELLINGTON UNDERWRITING AGENCIES, LTD. ET AL., RESPONDENTS

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

JUSTICE JOHNSON, concurring.

I join parts I and III of the Court's opinion and its judgment. I write to explain my view of why the stricken language of paragraph 13 can and should be considered for context.

First, the stricken language of paragraph 13 need not be considered in determining the policy's coverage. As explained in part III of the Court's opinion and by the court of appeals, 267 S.W.3d 277, 283-87, the policy is unambiguous regardless of the presence of the stricken language. The policy provides coverage for repairs and vessels engaged in "or about" repairs; it does not provide coverage for vessels on standby for an extended period of time and not actively preparing for, supporting, or engaged in repairs.

Next, this was not a one-size-fits-all insurance agreement. The insurance contract was negotiated based on Offshore's particular risks. The striking of paragraph 13 and other language

from the form policy is an objective reflection of the setting surrounding the creation of the policy; it assists in giving context to how the policy terms were reached through negotiations. *See* ___ S.W.3d ___ at ___ (Jefferson, C.J., dissenting) (citing 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32.7 (4th ed. 1999)). The strikings show that the parties negotiating the contract were experienced with the type of coverage being negotiated and that "standby charges" was a term of art reflecting a particular, recognized category of risk. Moreover, the presence of the clause providing a deductible for standby charges does not indicate that the policy covers standby charges as the dissent posits. To the contrary, it indicates the opposite: standby charges were a separate, recognized category of expense. The insuring portions of the policy did not provide coverage for such charges even though the deductible clause was not stricken.

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Phil Johnson
Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0989

ITALIAN COWBOY PARTNERS, LTD.,
FRANCESCO SECCHI AND JANE SECCHI, PETITIONERS,

V.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA AND
FOUR PARTNERS, LLC D/B/A PRIZM PARTNERS AND
D/B/A UNITED COMMERCIAL PROPERTY SERVICES, RESPONDENTS

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

Argued April 14, 2010

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

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

We recognized decades ago that agreeing to a merger clause does not waive the right to sue for fraud should a party later discover that the representations it relied upon before signing the contract were fraudulent. *See Dallas Farm Mach. Co. v. Reaves*, 307 S.W.2d 233, 239 (Tex. 1957) (quoting *Bates v. Southgate*, 31 N.E.2d 551, 558 (Mass. 1941)). The principal issue in this case is whether disclaimer-of-representations language within a lease contract amounts to a standard merger

clause, or also disclaims reliance on representations, thus negating an element of the petitioner's claim for fraudulent inducement of that contract. We conclude that the contract language in this case does not disclaim reliance or bar a claim based on fraudulent inducement. Accordingly, we reverse the take-nothing judgment of the court of appeals and remand the case to that court for further proceedings consistent with this opinion. We render judgment in favor of the lessee on its claim for rescission premised on breach of the implied warranty of suitability.

I. Facts

This dispute arose when Jane and Francesco Secchi, owners and operators of a restaurant, Italian Cowboy, terminated the restaurant's lease because of a persistent sewer gas odor.[1] In a suit against the landlord, Prudential Insurance Company of America, and the property manager, Prizm Partners,[2] the Secchis sought to rescind the lease and recover damages for fraud and breach of the implied warranty of suitability. The landlord maintains that rescission is not warranted and seeks to recover for breach of contract.

The Secchis successfully owned and operated restaurants for more than twenty years. The Secchis identified Keystone Park, a Dallas shopping center owned by Prudential and managed by Prizm, as a possible site for a new restaurant, Italian Cowboy. Keystone Park housed three successful restaurants and had a vacant restaurant building available for lease. The Secchis began

[1] The lease was executed by Italian Cowboy Partners, Ltd., but the Secchis also signed a personal guaranty. In their individual capacities, the Secchis later filed suit to rescind the guaranty. We include the Secchis' individual claims in our references to the claims filed by Italian Cowboy Partners, Ltd., as the claims and the facts giving rise to them are, in relevant respects, the same.

[2] We refer to the respondents collectively as Prudential. Prudential does not dispute that Prizm or Prizm's property manager, Fran Powell, acted as its agent during the lease negotiations and in managing the property under the Italian Cowboy lease.

negotiating a potential lease of the vacant restaurant building with Prizm's property management director, Fran Powell.

During the lease negotiations, Powell told the Secchis that the building was practically new and had no problems. In particular, Francesco Secchi testified that Powell told him "the building was in perfect condition, never a problem whatsoever." According to Secchi, Powell also said, "[T]his is my baby and I was here from the first day when they put the first brick until the last one. The size—it's in perfect condition. There is no problem whatsoever. . . . [It is] a perfect building." Similarly, Jane Secchi testified that Powell told her that "this was a very new building and she had been present at the very beginning of this building and watched it all the way through," that "[i]t was somewhat of her baby," and that "there had been nothing wrong with the place at all."

The lease with Italian Cowboy contained the following relevant provisions:

> **14.18 Representations.** Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.
>
> **14.21 Entire Agreement.** This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party. . . .

The Secchis began remodeling the property after signing the lease. During this time, the Secchis first heard that a severe odor had plagued Hudson's Grill, the previous tenant. Francesco Secchi testified that a nearby cinema manager had asked Ron Perry, Italian Cowboy's general contractor, if he knew of the problematic odor existing in the previous restaurant. Secchi stated that a few days later, "[a] guy with a motorcycle" stopped by the restaurant and said to "be very

careful. . . . [There] used to be a place called Hudson's here and they used to serve excellent hamburgers, but there was a very, very bad odor."

Upon hearing these statements, Francesco Secchi contacted Powell and specifically asked whether Hudson's Grill had experienced an odor problem. According to Secchi, Powell answered that she had been working with the building "all the time," and that "[n]ever before" had there been a problem—this was the "first time" she heard something was wrong.

The sewer system subsequently backed up during the remodeling, and Francesco Secchi again contacted Powell. Secchi complained to Powell that there was an odor coming from several parts of the building. According to Secchi, Powell replied that she did not "know anything" about these issues. As renovations proceeded, the odor subsided.

However, a persistent odor—distinct from the earlier odor—materialized a few months later, a week before the planned "soft opening" of the Italian Cowboy restaurant. A cleanup crew removed a layer of hardened grease that had been blocking the inlet pipe to the grease trap, and a constant foul sewer gas odor became evident immediately. Francesco Secchi then contacted Powell again because "the odor started to come inside . . . the restaurant" from the grease trap, which was located outside the restaurant building. Secchi told Powell they had a big problem, and he testified that on that day, Powell acknowledged that she smelled the odor, though she never admitted the same problem had occurred with Hudson's Grill.

Attempts to remedy the persistent sewer gas odor began immediately and continued for months. Perry and Powell inspected the plumbing and seals for leaks. Powell contacted Prizm's plumbers, Twin Cities, who replaced toilet rings in a restroom, and Powell authorized Perry to take out a wall, which Perry did. Perry then capped off a sink arm in the kitchen, Twin Cities installed

new roof vents, and Powell and Perry examined parts along the bathroom wall corridor. The Secchis hired a trusted repair man, who "put [in] some extra pipes [to extend the sewer vents] to maybe get the odor out." Powell also had camera tests of the plumbing lines conducted. Twin Cities attempted to correct the outflow lines running between the grease trap and the city's sewer system. The Secchis hired Lawton Mechanical Contractors, who continued efforts to remedy the odor by focusing on the grease trap, including its seals and covers. All of these attempts were unsuccessful.

In hopes that the foul odor would soon be remedied, the Secchis opened Italian Cowboy. The odor persisted, however, and the restaurant was unable to draw customers. At one point, the City of Dallas briefly shut down the restaurant following a customer's complaint to the health department. Secchi again complained about the odor to Powell, stating that "this is a very big problem. . . . You cannot operate a restaurant with an odor like that."

Secchi contacted Powell again later and told her that "the odor was so terrible" that Italian Cowboy "couldn't carry on." Powell then arranged for a smoke test to help identify the odor's source. After the test, Secchi asked Powell if those conducting the test had found anything and "[s]he said no." Yet, Secchi testified that one of the men who conducted the test said, "I found three [smoke] bombs, but those, they're old bombs. They're not our bombs. Those had been put some time ago."

Throughout this time, Powell continually denied knowledge of previous odor problems. However, the Secchis soon learned from a former manager of Hudson's Grill, Darla Wahl, and her husband, who had also worked at the restaurant, that the sewer gas odor was not only present during Hudson's tenancy and that attempts to remedy it at the time were also unsuccessful, but that Powell was aware of the odor at that time and had visited Hudson's Grill numerous times while the odor was

present. Wahl testified that on the day of her and her husband's visit to Italian Cowboy as patrons, she "came back from the restroom and told [her husband] the smell is still there in the bathrooms," and she confirmed the smell was noticeable "outside the restroom area" as well. Wahl mentioned the odor to one of the servers, at which point "Jane [Secchi] came over to the bar area and introduced herself" to the Wahls. Wahl then told Secchi that "the smell was there while I was at the restaurant when it was Hudson's Grill" and that Powell had been "present in the restaurant when the smell was there." Wahl confirmed she spoke with Secchi regarding "how long the smell had been there," "whether customers had complained about it," "how often customers complained about it," and the things that were done "to try to alleviate the smell."

Upon receiving this information from the Wahls, the Secchis immediately ceased paying rent and closed the restaurant. Italian Cowboy then sued Prudential and Prizm, asserting claims for fraud, including both a theory of fraud in the inducement of the lease, as well as fraud based on later misrepresentations. Italian Cowboy further asserted claims for negligent misrepresentation, breach of the implied warranty of suitability, and constructive eviction, and also sought rescission of the lease.

At trial, Matt Quinn, who had been regional manager of Hudson's Grill, directly refuted Powell's representations, testifying that he recalled incidents of sewer gas odor in Hudson's Grill and that Powell "knew of the smell," that "she talked to myself about it and other people about it as well," and that she described it as "almost unbearable" and "ungodly." When late on a rent payment, Quinn said, "I told her we had a problem with an odor coming from the bathroom and that's what was causing a lot of problems as far as business. . . . Obviously no business, no sales, no sales can't pay the rent." Also, after the initiation of the dispute, Powell contacted Quinn in reference to the

odor, and he informed her that they "never did get it . . . taken care of." Quinn also testified that Prizm's president, Scott Weaver, had experienced the odor while visiting Hudson's Grill, and knew that Hudson's Grill had been unsuccessful in attempting to remedy it. Darla Wahl affirmed at trial what she had told the Secchis just before Italian Cowboy closed. Powell, on the other hand, continued to deny any knowledge of, or experience with, the odor during the Hudson's Grill tenancy.

The trial court found for Italian Cowboy on all claims. The trial court entered findings of fact, including:

- "Through her on-site visits to Hudson's Grill, Powell learned of the sewer gas smell in Hudson's Grill, of measures taken to remedy the odor, and that such measures were unsuccessful." Specifically, Powell was at Hudson's Grill "while the smell was present [and] personally characterized it as 'horrid' and 'ungodly'; a smell that would make one 'gag.'"

- During negotiations, Powell described the building as "her baby" and "purported to have, and did have, knowledge superior to the Secchis of what had transpired in and about the Premises when it served as the Hudson's Grill and what would transpire in the future concerning the Premises and Keystone Park."

- Powell's statements—"[t]he Secchis were lucky to be able to lease the [building] because the building . . . was practically new and was problem-free; [n]o problems had been experienced with the [building] by the prior tenant; [t]he building . . . was a perfect restaurant site"—were statements of fact, known to be false when made, and were relied upon by the Secchis in signing the lease and guaranty.

- "Powell's conduct and attempted cover-up when the Hudson's Grill sewer gas smell recurred in the Italian Cowboy restaurant evidenced consciousness of guilt of her pre-lease and pre-guaranty misrepresentations to the Secchis."

Italian Cowboy elected to rescind the lease, and to recover damages for rescission.[3] The trial court awarded $600,070.40 in actual damages, plus prejudgment interest and attorney's fees. The trial court awarded $50,000 as exemplary damages. The trial court also ordered that Prudential take

[3] As discussed below in Part IV, testimony from the subsequent restaurant tenant indicated that the persistent odor disappeared after that tenant severed wastewater piping to the grease trap, moved the kitchen to a new area of the building, raised vent stacks, and re-routed pipes on the roof.

nothing on its counterclaim for breach of contract. The court of appeals, however, reversed as to each of Italian Cowboy's claims and rendered a take-nothing judgment, while rendering judgment in favor of Prudential on its counterclaim for breach of contract. 270 S.W.3d at 208. We granted Italian Cowboy's petition for review. 53 Tex. Sup. Ct. J. 389 (Mar. 15, 2010).

II. Disclaimer of Reliance and Fraudulent Inducement

We turn first to whether the lease contract effectively disclaims reliance on representations made by Prudential, negating an element of Italian Cowboy's fraud claim. We conclude that it does not. First, a plain reading of the contract language at issue indicates that the parties' intent was merely to include the substance of a standard merger clause, which does not disclaim reliance. Moreover, even if the parties had intended to disclaim reliance, the contract provisions do not do so by clear and unequivocal language. For these reasons, we hold as a matter of law that the language contained in the lease agreement at issue does not negate the reliance element of Italian Cowboy's fraud claim.

A contract is subject to avoidance on the ground of fraudulent inducement. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990); RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. c (1981) ("What appears to be a complete and binding integrated agreement . . . may be voidable for fraud . . . ."). For more than fifty years, it has been "the rule that a written contract [even] containing a merger clause can [nevertheless] be avoided for antecedent fraud or fraud in its inducement and that the parol evidence rule does not stand in the way of proof of such fraud." *Dallas Farm Mach. Co. v. Reaves*, 307 S.W.2d 233, 239 (Tex. 1957) (citing *Bates v. Southgate*, 31 N.E.2d 551, 558 (Mass. 1941)); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. c (1981) ("Such invalidating causes [including fraud] need not and commonly do not appear on the face of the

writing. They are not affected even by a 'merger' clause."). In *Reaves*, we quoted approvingly the "sound public policy" supporting the rule on merger clauses:

> The same public policy that in general sanctions the avoidance of a promise obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices. In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law.

307 S.W.2d at 239 (quoting *Bates*, 31 N.E.2d at 558).

Decades later, we recognized an exception to this rule in *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997), and held that when sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such a disclaimer may be binding, conclusively negating the element of reliance in a suit for fraudulent inducement.[4] *Id.* at 179. In other words, fraudulent inducement is almost always grounds to set aside a contract despite a merger clause, but in certain circumstances, it may be possible for a contract's terms to preclude a claim for fraudulent inducement by a clear and specific disclaimer-of-reliance clause. *See id*. We stated that we had a clear desire to protect parties from unintentionally waiving a claim for fraud, but also identified "a competing concern—the ability of parties to fully and finally resolve

[4] We also held in *Schlumberger* that parties can execute "a release that clearly expresses the parties' intent to waive fraudulent inducement claims." 959 S.W.2d at 181. Here, however, Prudential does not argue this lease expressly disclaims a fraudulent inducement claim, and instead suggests that a disclaimer of representations amounts to a disclaimer of reliance upon such representations.

disputes between them." *Id.* We held that "[p]arties should be able to bargain for and execute a release[5] barring all further dispute," and to that end, "parties may disclaim reliance on representations[, a]nd such a disclaimer, where the parties' intent is clear and specific, should be effective to negate a fraudulent inducement claim." *Id.*; *see also* 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."). Schlumberger and the Swansons had long been embroiled in a dispute over the feasibility of a mining project, and were "attempting to put an end to their deal." *Schlumberger*, 959 S.W.2d at 180. Given the circumstances surrounding the settlement agreement's formation, we determined that the disclaimer-of-reliance clause had the "requisite clear and unequivocal expression of intent necessary to disclaim reliance . . . on specific representations by Schlumberger," and thus the clause effectively precluded a claim for fraudulent inducement. *Id.* at 179–80.

More recently, in *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008), we applied our *Schlumberger* analysis to a settlement agreement that was intended to resolve both future and past claims. *Id.* at 58 ("Our analysis in *Schlumberger* rested on the paramount principle that Texas courts should uphold contracts negotiated at arm's length by knowledgeable and sophisticated business players represented by highly competent and able legal counsel, a principle that applies with equal force to contracts that reserve future claims as to contracts that settle all claims." (internal quotations omitted)). In *Forest Oil*, we held that "a freely negotiated agreement to settle present disputes and arbitrate future ones" was enforceable. *Id.* We acknowledged that "[a]n all-embracing disclaimer

[5] "Texas law favors and encourages voluntary settlements and orderly dispute resolution. However, a release is a contract, and like any other contract, is subject to avoidance on grounds such as fraud or mistake." *Schlumberger*, 959 S.W.2d at 178.

of any and all representations, as here, shows the parties' clear intent." *Id.* We also reemphasized the strong policy favoring settlement agreements. *Id.* at 60. ("Refusing to honor a settlement agreement—an agreement highly favored by the law—under these facts would invite unfortunate consequences for the everyday business transactions and the efficient settlement of disputes."(footnote omitted)). Despite applying *Schlumberger*'s analysis to a more inclusive settlement agreement, we were careful to clarify that:

> Today's holding should not be construed to mean that mere disclaimer standing alone will forgive intentional lies regardless of context. We decline to adopt a *per se* rule that a disclaimer automatically precludes a fraudulent-inducement claim, but we hold today, as in *Schlumberger*, that "on this record," the disclaimer of reliance refutes the required element of reliance.

Id. at 61.

Here, the parties dispute whether a disclaimer of reliance exists, or whether the lease provisions simply amount to a merger clause, which would not disclaim reliance. The question of whether an adequate disclaimer of reliance exists is a matter of law. *See Schlumberger*, 959 S.W.2d at 181. Our analysis of the parties' intent in this case begins with the typical rules of contract construction.

In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). In identifying such intent, "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.* We begin this analysis with the contract's express language. *Progressive County Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 807 (Tex. 2009) (per curiam); *see also Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) ("If the written instrument is so worded that it can be given a certain or definite

legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."). "[I]f the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent." *J.M. Davidson*, 128 S.W.3d at 229. "Only where a contract is ambiguous may a court consider the parties' interpretation and admit extraneous evidence to determine the true meaning of the instrument." *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450–51 (Tex. 2008) (per curiam) (internal quotation omitted).

Prudential focuses our attention on section 14.18 of the lease contract ("Representations"), suggesting that Italian Cowboy's fraud claim is barred by its agreement that Prudential did not make any representations outside the agreement, i.e., that Italian Cowboy impliedly agreed not to rely on any external representations by agreeing that no external representations were made. Standard merger clauses, however, often contain language indicating that no representations were made other than those contained in the contract, without speaking to reliance at all. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. e (1981) (discussing merger clauses and observing that "[w]ritten agreements often contain clauses stating that there are no representations, promises or agreements between the parties except those found in the writing. Such a clause . . . is likely to conclude the issue whether the agreement is completely integrated.").[6] Such language achieves the

[6] *See also* 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 28.21 (rev. ed. 2002) (describing merger clauses as "stating that the writing contains the entire contract and that no representations other than those contained in the writing have been made"); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33.21 (4th ed. 1999) ("Recitations to the effect that a written contract is integrated, that all conditions, promises, or representations are contained in the writing . . . are commonly known as merger or integration clauses."); *see also*, *e.g.*, *Tellepsen Builders, L.P. v. Kendall/Heaton Assocs., Inc.*, 325 S.W.3d 692, 699 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) ("The subcontracts at issue included merger clauses, stating that each subcontract represented the entire agreement and superseded all prior negotiations, representations and agreements, either written or oral."); *Va. Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 406 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (quoting a merger clause stating that "any prior contracts, understandings and representations, whether oral or written, relating to such transaction are merged into and superseded by this Contract").

purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negating the apparent authority of an agent to later modify the contract's terms. *See* RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. e (1981) (observing that a merger clause "may negate the apparent authority of an agent to vary orally the written terms"); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33.21 (4th ed. 1999) (stating that the existence of a merger clause showing the parties' intent to fully integrate their contract requires application of the parol evidence rule, which renders prior agreements covering the same subject matter unenforceable).

We conclude that the only reasonable interpretation of the contract language at issue here is that the parties to this lease intended nothing more than the provisions of a standard merger clause, and did not intend to include a disclaimer of reliance on representations. Therefore, we need not consider any extraneous evidence of the parties' intent to ascertain the true meaning of the instrument. *See Sacks*, 266 S.W.3d at 450–51.

Pure merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, have never had the effect of precluding claims for fraudulent inducement. *See, e.g.*, *Reaves*, 307 S.W.2d at 239; *Edward Thompson Co. v. Sawyers*, 234 S.W. 873, 873–75 (Tex. 1921) (holding that a buyer of legal encyclopedias could sue the seller for fraudulent inducement based on oral representations despite a contract clause stating that no representations or guaranties had been made that were not expressed in the contract); RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. c. (1981); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33.21 (4th ed. 1999) ("The better view is . . . to ask whether a fraudulent misrepresentation (as opposed to, say, a warranty) has been made and whether the party

asserting the fraud would have entered the agreement had he or she known the representation was false; if not, the contract should be voidable to the same extent as if there were no merger clause and, indeed, as if there were no writing . . . ."); *see also Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644 (7th Cir. 2002) (Posner, J.) ("[A]ll an integration clause does is limit the evidence available to the parties should a dispute arise over the meaning of the contract. It has nothing to do with whether the contract was induced . . . by fraud.").

The language of the contract at issue here differs significantly from the provisions at issue in *Schlumberger* and *Forest Oil*, where we determined there was an intent to disclaim reliance. In *Schlumberger*, the contract provided, "[N]one of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment . . . ." 959 S.W.2d at 180 (emphasis omitted). Similarly, in *Forest Oil*, the contract stated that "in executing the releases contained in this Agreement, [the parties are not] relying upon any statement or representation of any agent of the parties being released hereby. [We are] relying on [our] own judgment . . . ."). 268 S.W.3d at 54 n.4. In each case, the intent to disclaim reliance on others' representations—that is, to rely only on one's own judgment—was evident from the language of the contract itself. No such intent is evident in Italian Cowboy's lease contract, which provided only that "neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein," and that "this lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof." There is a significant difference between a party disclaiming its *reliance* on certain representations, and therefore potentially relinquishing the right to pursue any claim for which reliance is an element, and disclaiming the *fact* that no other

representations were made. In addition to differences in the contract's language, the facts surrounding this lease agreement differ significantly from those in *Schlumberger* and *Forest Oil*, where we could more easily determine that the parties intended once and for all to resolve specific disputes. *See Forest Oil*, 268 S.W.3d at 60 (concerning a release containing an arbitration requirement for future disputes); *Schlumberger*, 959 S.W.2d at 179–80 (concerning a once-and-for-all settlement agreement over a seafloor mining operation by which parties attempted to put an end to their dispute). A lease agreement, as here, which is the initiation of a business relationship, should be all the more clear and unequivocal in effectively disclaiming reliance and precluding a claim for fraudulent inducement, lest we "forgive intentional lies regardless of context." *Forest Oil*, 268 S.W.3d at 61.

Here, the only plain reading of the contract language in sections 14.18 and 14.21 is that the parties intended to include a well-recognized merger clause. Nothing in that language suggests that the parties intended to disclaim reliance. Prudential and the dissent would have us hold that parties no longer have to disclose known defects if they include a general merger clause in the lease agreement. This is outside a well-settled body of law on the proper legal effect of merger clauses and represents unsound policy.[7] *See* 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 28.21 (rev. ed. 2002) ("Despite the existence of a merger clause, parol evidence is admissible for purposes of demonstrating that the agreement is void or voidable or for proving an action for deceit. *Fraus omnia corrumpit*: fraud vitiates everything it touches." (footnote omitted)); *see also Morris v. House*,

[7] We realize we may have suggested otherwise in certain language in *Schlumberger*. *See* 959 S.W.2d at 181 ("We emphasize that a disclaimer of reliance *or merger clause* will not always bar a fraudulent inducement claim." (emphasis added)). Today, we expressly hold that a merger clause—as distinct from a specific disclaimer-of-reliance clause—may not, by itself, bar an action to set aside a contract based on fraudulent inducement.

32 Tex. 492, 495 (1870) ("[I]t is properly said that fraud vitiates whatever it touches."); *cf. Reaves*, 307 S.W.2d at 239 (discussing the "sound public policy" behind allowing parties an action for fraud despite a contract's efforts to eliminate its availability).

We have repeatedly held that to disclaim reliance, parties must use clear and unequivocal language. *See Forest Oil,* 268 S.W.3d at 62; *Schlumberger*, 959 S.W.2d at 179–80. This elevated requirement of precise language helps ensure that parties to a contract—even sophisticated parties represented by able attorneys—understand that the contract's terms disclaim reliance, such that the contract may be binding even if it was induced by fraud. Here, the contract language was not clear or unequivocal about disclaiming reliance. For instance, the term "rely" does not appear in any form, either in terms of relying on the other party's representations, or in relying solely on one's own judgment. This provision stands in stark contrast to provisions we have previously held were clear and unequivocal:

Schlumberger	*Forest Oil*	*Italian Cowboy*
[E]ach of us . . . expressly warrants and represents . . . that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that none of us is *relying* upon any statement or representation of any agent of the parties being released hereby. Each of us is *relying* on his or her own judgment	[We] expressly represent and warrant . . . that no promise or agreement which is not herein expressed has been made to them in executing the releases contained in this Agreement, and that they are not *relying* upon any statement or representation of any of the parties being released hereby. [We] are *relying* upon [our] own judgment	Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises . . . except as expressly set forth herein.

Forest Oil, 268 S.W.3d at 54 (emphasis added); *Schlumberger*, 959 S.W.2d at 180 (emphasis added).

We decline to extend our holdings in *Schlumberger* and *Forest Oil*—each of which included clear and unequivocal language expressly disclaiming reliance on representations, and representing reliance on one's own judgment—to the generic merger language contained in the contract at issue in this case. As a matter of law, the lease agreement at issue does not disclaim reliance, and thus does not defeat Italian Cowboy's claim for fraudulent inducement.[8]

III. Fraud and Negligent Misrepresentation

Because the court of appeals concluded that a binding disclaimer of reliance existed, it did not reach the merits of Italian Cowboy's fraud claims. However, Prudential asserts alternate bases for why Italian Cowboy's fraud claims fail as a matter of law. 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.

Aquaplex, Inc. v. Rancho la Valencia, Inc., 297 S.W.3d 768, 774 (Tex. 2009) (per curiam). We review legal questions that rest on a factual basis de novo, while affording deference to the trial court's findings of fact. *See Reliance Nat'l Indem. Co. v. Advance'd Temps., Inc.*, 227 S.W.3d 46,

[8] Were this a clear and unequivocal disclaimer-of-reliance clause, our analysis would then proceed to "the circumstances surrounding [the contract's] formation," in order to determine whether such a provision is binding on the parties involved. *Schlumberger*, 959 S.W.2d at 179. This would include an analysis of whether "the terms of the contract were negotiated, rather than boilerplate;" during negotiations "the parties specifically discussed the issue which [became] the topic of the subsequent dispute;" "the complaining party was represented by counsel;" "the parties dealt with each other in an arm's length transaction;" and "the parties were knowledgeable in business matters." *Forest Oil*, 268 S.W.3d at 60 (discussing the most important factors from *Schlumberger* to consider in enforcing a disclaimer-of-reliance clause). We also observed that if the situation, like that in *Schlumberger*, indicates a "once and for all" settlement of claims, this "may constitute an additional factor urging rejection of fraud-based claims." *Id.* at 58 (emphasis omitted).

50 (Tex. 2007) ("Appellate courts review legal determinations de novo, whereas factual determinations receive more deferential review based on the sufficiency of the evidence.").

Prudential maintains that Italian Cowboy's fraud claims fail as a matter of law because either Powell's representations were statements of opinion (undercutting the first element), or were not known to be false (undercutting the third element). We disagree. We conclude that her statements were actionable material misrepresentations as a matter of law, and that legally sufficient evidence established that those misrepresentations were known to be false when made.

The trial court listed in its findings of fact three actionable representations made during the lease negotiations:

> a. The Secchis were lucky to be able to lease the Premises because the building on the Premises was practically new and was problem-free;
>
> b. No problems had been experienced with the Premises by the prior tenant; [and]
>
> c. The building on the Premises was a perfect restaurant site and that the Secchis could get into the building as a restaurant site for next to nothing.

"Material means a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question." *Smith v. KNC Optical, Inc.*, 296 S.W.3d 807, 812 (Tex. App.—Dallas 2009, no pet.). Pure expressions of opinion are not representations of material fact, and thus cannot provide a basis for a fraud claim. *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 163 (Tex. 1995). "Whether a statement is an actionable statement of 'fact' or merely one of 'opinion' often depends on the circumstances in which a statement is made." *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995). Special or one-sided knowledge may help lead to the conclusion that a statement is one

of fact, not opinion. *See id.* (including "the comparative levels of the speaker's and the hearer's knowledge" as among the relevant circumstances upon which the classification of a statement as fact or opinion depends). Moreover, even if an expression is an opinion, "[t]here are exceptions to this general rule that an expression of an opinion cannot support an action for fraud." *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983). One such exception is that "when an opinion is based on past or present facts . . . . special knowledge establishes a basis for fraud." *Id.* Thus, most simply, "[s]uperior knowledge by one party may also provide the occasion for fraud."[9] *Faircloth*, 898 S.W.2d at 277; *see also Matis v. Golden*, 228 S.W.3d 301, 307 (Tex. App.—Waco 2007, no pet.) ("When a speaker purports to have special knowledge of the facts, or does have superior knowledge of the facts—for example, when the facts underlying the opinion are not equally available to both parties—a party may maintain a fraud action." (quoting *Paull v. Capital Res. Mgmt., Inc.*, 987 S.W.2d 214, 219 (Tex. App.—Austin 1999, pet. denied))); *Padgett v. Bert Ogden Motor's, Inc.*, 869 S.W.2d 532, 535–36 (Tex. App.—Corpus Christi 1993, writ denied) (concluding statements were actionable representations of fact where body shop employees had "specifically inspected and determined how best to repair [a purchaser's] car" and subsequently represented that the car was "completely repaired" and "completely fixed," even though they only partially repaired the car's frame).

Initially, it defies common sense and any plausible meaning of the word "problem" to infer from the first two representations that in Prudential's "opinion," the sewer gas odor was not a

[9] However one analyzes it, the ultimate question is whether the statement is actionable as fraud. The result may be the same where, as here, special or one-sided knowledge helps one categorize a statement as fact rather than opinion, or instead triggers the exception that even a pure opinion is actionable because of special knowledge.

problem for Hudson's Grill. A foul odor is obviously problematic to a restaurant.[10] Testimony indicated that Powell herself personally experienced the odor and described it as "almost unbearable" and "ungodly." According to its regional manager, Hudson's Grill had even indicated to Powell that it was late in making rent payments because of the odor. In light of the circumstances, we conclude that the statements concealing the odor "problem" are more properly statements of fact, not pure expressions of opinion. *Cf. GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 889–90 (Tex. App.—Austin 2008, no pet.) (determining vehicle seller's statements that he had "no problems [whatsoever]" to be a factual representation where "an inspection revealed structurally unsafe engine frames, corrosion, and serious engine problems"); *Padgett*, 869 S.W.2d at 535–36. Similarly, because of the attempts to remedy the odor by Hudson's Grill, known by Powell, combined with testimony that the odor was not remedied before Hudson's Grill closed, Powell's statement that the restaurant site was "perfect" is better characterized as a false statement of fact. *Cf. GJP, Inc.*, 251 S.W.3d at 889–90 (determining statements that the vehicle was "in fine running order" and that it had "strong mechanicals" to be factual representations).

Even assuming, however, that Powell's statements are properly considered pure expressions of opinion, Prudential's one-sided knowledge of past facts makes these particular representations actionable under the circumstances. *See Faircloth*, 898 S.W.2d at 277; *Trenholm*, 646 S.W.2d at 930. Powell emphasized to Italian Cowboy that she had been working with the restaurant site since its inception, implying that she had personal knowledge of its entire history from her experience—i.e., if there had been something worth mentioning, she would have known about it and

[10] As the trial court wrote in its findings of fact, "[a]s a matter of lay testimony and common sense, recurring unresolved sewer gas odors in a restaurant are a material fact to someone leasing for restaurant use."

mentioned it. Powell's honest representations about her superior knowledge of the site—such as stating that she "was here from the first day when they put the first brick until the last one"—were so intertwined with her other statements that they are actionable. *See Trenholm*, 646 S.W.2d at 931 ("These are direct representations of present facts which are so intertwined with his future prediction that the whole statement amounts to a representation of facts."); *Matis*, 228 S.W.3d at 307. The persistent odor problem did not appear until a layer of solidified grease was removed from the grease trap, meaning that a reasonable inspection of the premises by Italian Cowboy would not have revealed the problem. Thus, Italian Cowboy did not have access to the same information as Powell.

While it is true that Italian Cowboy could have interviewed the former tenant to inquire about prior problems with the property, we are unwilling to require prospective commercial tenants to undertake this burden simply to ensure that they can later bring claims arising from their reliance on representations about the property made by a lessor with superior, personal knowledge. Rather, commercial tenants are entitled to rely on the fact that a landlord will not actively conceal material information. Firsthand knowledge—like Powell's—concerning material information—like an odor problem in a restaurant site—is exactly the sort of scenario that demonstrates the sound policy behind the exception allowing an opinion to be actionable under certain circumstances where material information was withheld.

Prudential also suggests that because the odor played no role in Hudson's Grill's decision to close, Powell had no knowledge of her statements' falsity, i.e., that "Powell had no reason to think that there was any significant 'problem' with the Premises." Even if Powell intended her statement to be limited in this sense, testimony from Hudson's regional manager indicated that he had told Powell that Hudson's Grill was having difficulties paying rent because of the odor problem in the

restaurant. Moreover, Powell's representations went far beyond simply stating that she knew of no problems that caused Hudson's Grill to close. Testimony showed that Powell knew about the odor from personal experience and that the odor problem was never resolved. Thus, even when considering the context of Powell's statements, it follows that her actionable representations implicated Powell in knowing that her statements were false when made.

We conclude that as a matter of law, Powell's representations were actionable, and legally sufficient evidence existed to demonstrate that they were known to be false when made. Because the court of appeals concluded that Italian Cowboy disclaimed reliance, it never reached Prudential's argument as to the factual sufficiency of the evidence supporting Italian Cowboy's fraud claims. Accordingly, having decided that there is no alternative legal basis to render judgment in favor of Prudential on Italian Cowboy's fraud claims, we remand the case to the court of appeals for further consideration.[11]

IV. Breach of the Implied Warranty of Suitability

Prudential next disputes whether the trial court erred in rendering judgment on Italian Cowboy's claim for breach of the implied warranty of suitability, arguing that this claim fails as a matter of law. In a commercial lease, the lessor makes an implied warranty that the premises are suitable for the intended commercial purposes. *Davidow v. Inwood N. Prof'l Group—Phase I*, 747 S.W.2d 373, 377 (Tex. 1988). Specifically, a lessor impliedly warrants that at the inception of the lease, no latent defects exist that are vital to the use of the premises for their intended commercial

[11] Although we affirm the trial court's award of actual damages on an alternative basis—breach of the implied warranty of suitability—as discussed below, only Italian Cowboy's fraud claim gives rise to punitive damages, which the trial court also awarded, and which Prudential continues to dispute. Thus, resolution by the court of appeals of whether factually sufficient evidence supports liability for fraud is a necessary predicate to determining whether punitive damages may be proper. *See* TEX. CIV. PRAC. & REM. CODE § 41.003(c) (allowing recovery of punitive damages for fraud if actual knowledge is further established by clear and convincing evidence).

purpose. *Id.* Moreover, a lessor is responsible for ensuring that "essential facilities will remain in a suitable condition." *Id.* Thus, to establish a breach of this warranty, a lessee must show that a latent defect in the facilities existed at the inception of the lease, that the facilities were vital to the use of the premises for the intended purposes, and that the lessor failed to repair the defect.[12] *See id.* However, if "the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control." *Id.*; *see also Gym-N-I Playgrounds, Inc., v. Snider*, 220 S.W.3d 905, 914 & n.1 (Tex. 2007) (holding that the implied warranty of suitability was disclaimed by an agreement providing that the landlord made no express or implied warranties regarding "fitness or suitability for a particular purpose or otherwise" and that "any implied warranties are expressly disclaimed and excluded"). Thus, by accepting responsibility to repair certain defects, a lessee relieves the lessor from liability for breach of the implied warranty of suitability as to those defects. *See Davidow*, 747 S.W.2d at 377. We must begin, then, by interpreting the lease contract at issue to determine the extent to which it relieved the lessor from liability for the implied warranty of suitability.

Here, Italian Cowboy did not expressly waive the implied warranty of suitability. However, it did accept responsibility to make certain repairs that might otherwise have run to Prudential as a result of the implied warranty of suitability. The parties dispute whether Italian Cowboy's responsibilities under the lease included repairs to the particular defect in the premises—the sewer gas odor, or its cause. Thus, there are two parts to this inquiry: first, what was the defect; and second, whether the lease allocated the responsibility to repair that defect to Italian Cowboy.

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[12] We offer no opinion as to whether an action may exist for harm resulting from a latent defect during the period of time before a landlord successfully repairs a defect. Here, there is no dispute that the defect was not remedied—and no evidence suggested it would likely be remedied any time soon—when Italian Cowboy closed and sued Prudential.

As to the first part of this inquiry, concerning a latent defect in the premises, we observe that "[t]he existence of a breach of the implied warranty of suitability in commercial leases is usually a fact question to be determined from the particular circumstances of each case." *Id.* While Italian Cowboy characterizes the defect as the presence of the odor itself, we agree with Prudential that the proper analysis of the defect in this particular case must inquire into the cause of the odor because this is the condition of the premises covered by the duty to repair. Thus, we examine first the trial court's findings of fact as to the causes of the odor, and whether such findings are supported by legally sufficient evidence.

Italian Cowboy offered uncontroverted evidence that a grease trap had been improperly installed, causing raw sewage to back up from the sewer lines. Indeed, testimony indicated that the persistent odor problem emerged when the inlet to the grease trap was opened months into Italian Cowboy's renovations. Moreover, testimony indicated that after the subsequent tenant leased the restaurant space, it severed the wastewater piping to the grease trap and moved the kitchen area to a new part of the building, blocking off the old wastewater system entirely and eliminating the odor. This evidence is legally sufficient to support the trial court's finding of fact that "the facilities producing the sewer gas odor . . . included the grease interceptor in the Common Areas adjacent to the Premises, [and] the waste-water and sanitary sewer utility lines in the Common Areas adjacent to the Premises." Prudential also offered uncontroverted evidence that a roof drain line had been misrouted, as well as that a sewer gas line was "hooked up at the wrong line going to the roof," and that after correcting these errors, along with raising vent stacks on the roof, the subsequent tenant experienced no further odor. This evidence is legally sufficient to support the trial court's finding that the sewer gas odor was also produced by "communication of the odors [from the grease trap and

sewer lines] via structural components and via the utility lines or systems serving and within the Premises which ultimately had to be altered (not just repaired) to arrest the sewer gas odor." In other words, the trial court concluded, by legally sufficient evidence, that several items—the grease trap, the plumbing lines and system, and the ventilation lines and system—caused the odor, either independently or in conjunction, because each was defective.

Our analysis turns next to whether under the lease contract, as a matter of law, Italian Cowboy assumed responsibility to repair each defect, relieving Prudential from liability for a breach of the implied warranty of suitability based on each defect. The contract provides in relevant part:

- 1.1 "Common Areas" - [Defined as] [t]hose areas, facilities, utilities, improvements, equipment and installations in the Shopping Center which are provided, or which may be designated by the Landlord, for the nonexclusive use or benefit of Landlord and tenants of the "Shopping Center," their employees, agents, customers, licensees and invitees, including but not limited to the parking areas, driveways, entrance/exitways, sidewalks, landscaped areas, water, gas (if available), electric, storm and sanitary sewer lines and appurtenant equipment.

- 5.1 Alterations by Tenant. Tenant shall not make any exterior or structural alterations to (including but not limited to alterations to the Premises exterior, or signs and/or utility lines or systems within or serving the Premises) without Landlord's prior consent . . . .

- 5.2 Repairs by Landlord and Tenant. Landlord shall make all repairs to the Common Areas adjacent to the Premises (other than the Premises and its perimeter sidewalks) as part of its obligation to maintain the Common Areas. Landlord shall also be responsible for repairs to structural components of the Premises (other than the roof). Tenant shall, at its expense, be responsible for all repairs to the interior and non-structural components of the Premises, including but not limited to the exterior and interior of the Premises and its perimeter sidewalks, whether structural or non-structural, foreseen or unforeseen, including but not limited to the storefront and all interior and exterior doors and plate glass, and all electrical, plumbing, heating, ventilating, air conditioning, sprinkler systems, and any other mechanical installations or equipment serving the Premises or located therein, whether or not in or under the floor slab or on the roof of the Premises. The duty to

> repair shall include the duty to replace, to the extent necessary. . . . Tenant shall also be responsible for regular cleaning of all grease traps and maintaining them in a safe condition. . . .

We observe at the outset that these provisions are in tension with one another, at one point allocating responsibility for repairs to the "water . . . storm and sanitary sewer lines and appurtenant equipment" to Prudential, while at another point allocating responsibility for repairs to the "plumbing . . . and ventilating" systems and "mechanical installations or equipment serving the Premises" to Italian Cowboy. We also observe, however, that while Italian Cowboy may have assumed at least some duty to repair, it was at the same time expressly precluded from making alterations to utility lines or systems without consent. Although the court of appeals did not discuss it, the trial court credited this distinction, finding the fact that "structural components and . . . utility lines or systems serving and within the Premises . . . ultimately had to be altered (not just repaired) to arrest the sewer gas odor." More specifically, the trial court found that the particular work done by the subsequent tenant that finally arrested the sewer gas odor problem qualified as "alterations" to the facilities described in section 5.1 of the lease.

The contract distinguishes between repairs and alterations, without defining the terms, and principles of contract interpretation require us to give effect to these distinctions, harmonizing their use in a meaningful way. *See JM Davidson, Inc.*, 128 S.W.3d at 229 ("[W]e 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."). To harmonize the repair and alteration provisions, the terms must refer to different categories of work that vary according to the work's character or extent. The trial court thus impliedly found that the work in question was of a character, or to a significant enough extent, that the work constituted an alteration. Indeed, the trial court was

in the best position to consider the evidence as to the character and extent of the work done by the subsequent tenant.

Because of the character and significant extent of the completed work that ultimately eliminated the odor, we agree that an alteration was needed as the term is used in section 5.1 of this particular contract, going beyond a repair as used in section 5.2. It was not the case that the sewer gas exhaust line on the roof was damaged and needed to be fixed. The problem was that the sewer gas exhaust line was working exactly as it was supposed to, as were components of the ventilation system, which had been placed near the sewer gas exhaust pipe. This suggests that the work was more than a repair to fix a broken system. Had a pipe become broken, it would have been Italian Cowboy's responsibility to patch it or replace it. But since the piping system had to be entirely rerouted, and vent stacks raised, Prudential was responsible for such alterations because Italian Cowboy was precluded from doing such work by section 5.1 without consent.[13] Likewise, the subsequent tenant severed the existing wastewater piping system and moved the kitchen to a new area of the building, abandoning the former grease trap. Again, such work amounts to more than a mere repair of broken equipment.[14]

Moreover, under section 5.2, Prudential had the express obligation to "maintain" the common areas, including the sanitary sewer lines and appurtenant equipment. Evidence showed that certain defects—essentially, a defective design—existed from the moment of the sewer system's installation, as it interacted with the grease trap and ventilation system. Thus, the responsibility for the work

[13] This work was performed by the subsequent tenant. Any questions of who was responsible for such work under that tenant's lease are not before us.

[14] Although we interpret the contract's provisions as a matter of law, we note that a plumber who attempted at various times to remedy Italian Cowboy's odor problem described the work done by the subsequent tenant as "structural alterations" at trial.

done to resolve the defects properly falls under Prudential's duty to maintain a working sewer system, not Italian Cowboy's responsibility to repair a previously working sewer system. The responsibility to maintain a system must contemplate the installation of a functional system in the first place; the responsibility to repair does not properly include the responsibility to completely re-work a system that was structurally defective. Prudential, then, was also responsible under its lease with Italian Cowboy for the work to remedy the defect because the responsibility to maintain sewer lines and equipment fell to Prudential under section 5.2.

Thus, we conclude that Prudential was not relieved by the contract from liability for breach of the implied warranty of suitability as to a latent defect in facilities that were vital to Italian Cowboy's use of the premises as a restaurant. Accordingly, we reverse the judgment of the court of appeals as to this claim. Moreover, because Prudential did not challenge the factual sufficiency of the evidence supporting any of the trial court's findings of fact on this issue in the court of appeals, and because the evidence supporting such findings is legally sufficient, we render judgment in favor of Italian Cowboy as to this claim.

Prudential asserts that even if rescission might have been proper at some point, Italian Cowboy ratified the lease by continuing in the lease for a period of time after having knowledge of the defect. However, even were we to consider ratification as a defense to breach of the implied warranty of suitability,[15] Italian Cowboy's actions in this case could not give rise to ratification. Texas law requires only that one rescind within a reasonable time from discovering the grounds for

[15] Prudential offers this argument as a defense to a claim for rescission based on unilateral or mutual mistake—a claim that we do not reach. However, inasmuch as ratification has been a defense to rescission more generally, we consider it here as it relates to all of Italian Cowboy's claims upon which rescission could be premised, without deciding whether ratification might be available as a defense against one asserting only a claim for breach of the implied warranty of suitability.

rescission. *Reagan & Co. v. Tabor*, 540 S.W.2d 575, 576 (Tex. Civ. App.—Waco 1976, writ ref'd. n.r.e.) ("[A] party is not required to exercise his right to rescind 'as soon as' he discovers grounds therefor, but only within a reasonable time."). Ratification by failure to act with reasonable promptness is an affirmative defense, with the burden upon the party asserting it. *See Crown Eng'g v. Grissom*, 343 S.W.2d 330, 332 (Tex. Civ. App.—Waco 1961, writ dism'd) ("The fact that the party seeking rescission failed to act with reasonable promptness after discovery of the facts, constitutes a waiver of his right to a rescission, and is an affirmative defense which must be pleaded and proven by the party asserting same." (emphasis omitted)) (citing TEX. R. CIV. P. 94, which lists affirmative defenses including "waiver, and any other matter constituting an avoidance"). "Time is material so far only as, when associated with other circumstances, [rescission] may produce injury or unjust consequences to the defendant or third persons." *Vandervoort v. Sansom*, 293 S.W.2d 271, 275 (Tex. Civ. App.—Fort Worth 1956, writ ref'd. n.r.e.) (discussing rescission and ratification in the context of fraudulent inducement).

Here, Prudential has failed to establish ratification. Foremost, it points to no way in which it was injured or suffered unjust consequences by Italian Cowboy's temporary efforts alongside Prudential to remedy the odor. *See id.* Moreover, Prudential has not established that Italian Cowboy waited an unreasonable length of time to terminate the lease. The latent defect was not yet remedied—indeed, the underlying cause(s) of the odor remained unknown—when Italian Cowboy closed and stopped paying rent, only a few weeks after the persistent odor materialized.[16] According to the Secchis' testimony, such a remedy did not seem likely, if even possible, at that time. Were

[16] We observe that Prudential here conflates separate incidents of odor problems during the course of Italian Cowboy's tenancy, despite the testimony that Italian Cowboy's initial odor problems, during the early part of its renovations, were separate from the persistent sewer gas odor problem that materialized upon opening of the grease trap.

we to find the attempts made here to remedy the defect sufficient to foreclose the possibility of rescission because of ratification, similarly-situated commercial tenants would be placed in the difficult position of being pushed to abandon a lease at the first sign of any trouble, so as to avoid potentially being trapped in a lease of property containing a defect rendering it unsuitable for commercial purposes. This is unsound policy; we must allow a balance between making initial attempts to diagnose and remedy a premises defect while preserving the right to rescind a lease if such attempts are unsuccessful. Thus, we conclude that under the facts of this case, Prudential has not established that Italian Cowboy's remaining in occupancy, while both parties made unsuccessful attempts to remedy the odor, gives rise to ratification of the lease contract after Italian Cowboy acquired knowledge of the defect.

The trial court awarded both rescission of the lease and damages to restore Italian Cowboy to the position it would have been in absent Prudential's breach of warranty. Rescission of a commercial lease is indeed a proper remedy for breach of the implied warranty of suitability, as are such damages. *See Davidow*, 747 S.W.2d at 377 (stating that because a landlord breached the implied warranty of suitability, the tenant "was therefore justified in abandoning the premises and discontinuing his rent payments"); *accord Gober v. Wright*, 838 S.W.2d 794, 798–99 (Tex. App.—Houston [1st Dist.] 1992, writ denied) ("[W]e upheld the jury's finding that the premises were unsuitable for their intended commercial purposes after June 2, 1988. This finding relieved lessees from their obligation to pay any rent after that date."), *abrogated on other grounds by State Farm Fire & Cas. Co. v. Morua*, 979 S.W.2d 616 (Tex. 1998). Accordingly, because rescission is proper, we need not consider further Italian Cowboy's remaining claims for negligent misrepresentation, constructive eviction, or rescission based on mistake, inasmuch as they afford no

opportunity for greater recovery. We turn next, however, to the issues that Prudential raises as to the amount of actual damages awarded by the trial court in light of rescission being a proper remedy for Prudential's breach of the implied warranty of suitability.

V. Damages

For its actual damages calculation, the trial court added the amount of capital Italian Cowboy's investors contributed, including interest ("interest carry") that the investors would have earned on that investment, as well as the debt Italian Cowboy incurred, then subtracted the value of the remaining assets that Italian Cowboy acquired, to reach a sum of $600,070.40. Prudential asserts that the actual damages award for loss of capital investment is an award of special damages that is unsupported because such damages were never pled, and because such an amount is unsupported by legally sufficient evidence.[17] We review Prudential's arguments as to the pleading requirement and legal sufficiency in turn.

"Rescission is an equitable remedy and, as a general rule, the measure of damage is the return of the consideration paid, together with such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract." *Smith v. Nat'l Resort Cmtys., Inc.*, 585 S.W.2d 655, 660 (Tex. 1979). Under Texas Rule of Civil Procedure 56, "[w]hen items of special damage are claimed, they shall be specifically stated." However, Texas Rule of Civil Procedure 90 states:

> Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of

[17] We note that most of Prudential's briefing on this point speaks to the factual sufficiency of the evidence, which we may not review, not the legal sufficiency. *See* TEX. CONST. art. V, § 6(a) ("[T]he decision of . . . courts [of appeals] shall be conclusive on all questions of fact brought before them on appeal or error.").

> the judge in the trial court . . . in a non-jury case, before the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account . . . .

Here, Prudential never filed a special exception in writing, and only filed written objections after the judgment was signed. Indeed, the only oral objection during trial that Prudential directs us to concerned testimony on lost profits, not lost investment, at which point the trial court allowed continued testimony on the damages data from both Jane Secchi and Italian Cowboy's expert. A party is not required to specially except to a pleading defect if it lacks notice of the other party's intent. *See Estate of Stonecipher v. Estate of Butts*, 686 S.W.2d 101, 103 (Tex. 1985) (holding that where "intent to seek other causes of action was clear on the face of his petition," and no special exceptions or other contests were made to the petition as to such a defect, the other party "waived this point of error"); *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982) ("A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense."). Here, however, the trial court had conducted a hearing more than a year and a half before trial regarding the admissibility of Italian Cowboy's expert's testimony including lost investment damages, and ruled that the expert could testify. Thus, under Rule 90, having notice of the specific damages Italian Cowboy intended to seek, Prudential waived its argument as to the inclusion of lost investment damages in the trial court's award by failing to specially except in writing to any pleading defect. *See* TEX. R. CIV. P. 90; *Roark*, 633 S.W.2d at 810 ("If Dr. Matthews considered the petition obscure, he should have specially excepted to it and he has waived any defect by his failure to do so."). We need not consider whether Italian Cowboy's pleading was defective in this regard.

Prudential next challenges the legal sufficiency of the evidence that its breach of warranty caused the special damages of Italian Cowboy. When rescission of a lease is appropriate for breach of the implied warranty of suitability, a tenant is entitled to be restored to the position it would have been in had it not leased the premises that turned out to contain a latent defect rendering the premises commercially unsuitable. *See Smith*, 585 S.W.2d at 660 (discussing how rescission is an equitable remedy that should accompany "such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract"). Thus, by electing rescission, Italian Cowboy did not need to prove that its damages were *caused* by the latent defect; it needed only to prove what amount would restore it to its original position. Italian Cowboy offered detailed expert testimony as to the amount required to make it whole. This is legally sufficient evidence as to the amount of damages Italian Cowboy was entitled to recover alongside rescission of the lease.[18]

Prudential also disputes three specific elements constituting a portion of Italian Cowboy's damages. We reject those arguments. First, the trial court concluded that Italian Cowboy was entitled to recover $81,000 based on the time and effort put in by the Secchis because evidence demonstrated that this "investment" was made in lieu of hiring other personnel. *See Tidrow v. Roth*, 189 S.W.3d 408, 411 (Tex. App.—Dallas 2006, no pet.) (observing that trial court had awarded damages for an investor's "time and effort"); *cf. Weaver v. Jock*, 717 S.W.2d 654, 661 (Tex.

[18] Again, we offer no opinion as to whether a tenant might elect instead to ratify the lease upon a breach of the implied warranty of suitability, and if so, whether it might be able to recover any damages; or whether a tenant might recover any damages incurred before a landlord repairs the latent defect. *Cf. Dallas Farm Mach. Co. v. Reaves*, 307 S.W.2d 233, 238–39 (Tex. 1957) ("[I]t is well settled that one who is induced by fraud to enter into a contract has his choice of remedies. 'He may stand to the bargain and recover damages for the fraud, or he may rescind the contract, and return the thing bought, and receive back what he paid.'" (quoting *Blythe v. Speake*, 23 Tex. 429, 436 (1859))). *But cf. Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 677 (Tex. 2000) (discussing the "intricacies of the remedies for fraud" and observing that "a party may affirm a contract that has been induced by fraud in such a way that damages are foreclosed.").

App.—Waco 1986, writ ref'd. n.r.e.) (affirming damages for services and labor expended in performance of a contract). Prudential offers no authority as to why this award was improper. Certainly a business owner's time and effort have value, and we see no reason why the trial court could not measure that value against the cost of hiring someone else instead. Accordingly, we are unwilling to strike this portion of Italian Cowboy's damages.

Prudential next argues that Italian Cowboy is not entitled to recover damages for accounts payable—$94,512.47 of the total damages calculation—because there is "no evidence that any of the creditors is seeking payment." But in this situation, where damages are proper in order to retire debt that would not have otherwise existed, we conclude that the burden is properly on Prudential to demonstrate that any such debts have been excused. Prudential points to no such evidence.

Finally, Italian Cowboy is entitled to recover the trial court's award of $27,505 for interest carry. The record shows that this figure represents what Italian Cowboy's damages expert called "an investment pay back calculation," which we take to mean the interest that Italian Cowboy's investors—the Secchis—would have earned on their investment had they made it elsewhere. Prudential suggests that this amounts to a double recovery because such "payment of interest would have been made from Italian Cowboy's assets," and therefore such interest was already "included in the difference between Italian Cowboy's initial assets and its assets when the restaurant closed." The logic of this position escapes us. Italian Cowboy could not have both paid interest or dividends from its assets and kept that money as an asset, which was a deduction in the trial court's calculation, not a credit as Prudential seems to suggest. More to the point, Prudential points to nothing indicating that the money invested in Italian Cowboy could not have earned interest elsewhere, or that its investors already received such payments.

We thus conclude that Italian Cowboy established its actual damages for breach of the implied warranty of suitability by legally sufficient evidence. Because Prudential also challenges the factual sufficiency of these damages, on remand, the court of appeals should consider any such remaining issues as to Italian Cowboy's rescission damages.

VI. Conclusion

We reverse the court of appeals' judgment and render judgment in favor of Italian Cowboy on its claim for rescission premised on Prudential's breach of the implied warranty of suitability. We remand the case to the court of appeals for additional consideration consistent with this Court's opinion.

_____
Paul W. Green
Justice

OPINION DELIVERED: April 15, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0989

ITALIAN COWBOY PARTNERS, LTD.,
FRANCESCO SECCHI AND JANE SECCHI, PETITIONERS,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA AND
FOUR PARTNERS, LLC D/B/A PRIZM PARTNERS AND
D/B/A UNITED COMMERCIAL PROPERTY SERVICES, RESPONDENTS

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

Argued April 14, 2010

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

Francesco and Jane Secchi owned and operated two successful Dallas-area restaurants. Italian Cowboy was to be the third. To find just the right location, they secured a broker, conducted demographic studies, examined restaurant reports by the Texas Alcoholic Beverage Commission, and viewed many potential sites. They learned that a restaurant was closing in the Keystone Park Shopping Center, an area they liked. They had eaten at other restaurants in the shopping center, and they found out those restaurants were operating profitably. They met with the landlord's agent, and for five months, assisted by their attorney, they negotiated a lease. In the meantime, they inspected

the property repeatedly, sometimes with the agent present and sometimes by themselves. The lease went through seven drafts. The Secchis had been in the restaurant business twenty-five years. This was not their first rodeo.

On October 18, 2000, Francesco Secchi signed a lease on behalf of the tenant, Italian Cowboy Partners, Ltd. Not quite nine months later, on July 12, 2001, the Secchis sued the landlord, Prudential Insurance Co., and its agent, Prizm Partners.

The lease stated:	The petition stated:
Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this lease except as expressly set forth herein.	Italian Cowboy Partners and the Secchis reasonably and detrimentally relied on the representations of Prudential and Prizm that the Premises were suitable for use as a restaurant and were a prime restaurant site.

Each statement is a statement of *fact*, like "the sun is shining" or "the sky is blue". In the lease, Italian Cowboy stated that Prudential and Prizm *did not make* representations other than those contained in the lease. In the petition, Italian Cowboy stated that Prudential and Prizm *did make* representations, representations that were not contained in the lease. Both statements cannot be true. Either representations not contained in the lease were made, or they were not made.

The Secchis knew full well whether the statement in the lease was true when they made it. They were Italian Cowboy's only representatives. They do not claim to have been mistaken — that representations made by Prudential and Prizm were supposed to have been included in the lease but were inadvertently omitted by mistake. They do not claim to have been tricked — that important provisions were surreptitiously removed from the lease before Francesco signed it. The Secchis do

not contend that after studying seven drafts of the lease with their lawyer, they just forgot to include representations that Prudential and Prizm had made about the suitability of the site for use as a restaurant. They do not plead that they were only rubes duped into stating something that was not true. The lease stated the facts as the Secchis knew them to be: representations not included in the lease were not made.

And that is exactly what Frances Fox Powell, the person who dealt with the Secchis for Prudential and Prizm, testified to at trial. The Secchis testified, contrary to the lease, that Powell had told them the building was "problem-free", that previous tenants had "no problems" with the building, and that it was a "perfect building". Asked at trial whether she had told the Secchis "that the building was in perfect condition", she answered, "No." Had she made "any misrepresentations concerning the condition of the building?" "No." Had "a sewer gas odor ever [been] pointed out . . . or mentioned . . . as being present" by the general manager of the restaurant that had vacated the premises before Italian Cowboy leased them? "No." Powell testified that the Secchis' first mention of an unpleasant odor was in February 2001. She testified:

> Q At any time prior to the closing of the restaurant permanently and the filing of this lawsuit, did either Mr. or Mrs. Secchi ever come to you and say, "Mrs. Powell, you failed to tell us something about this restaurant that was significant", or "there was something about this restaurant that you told us that proved to be contrary". Did that ever take place?
>
> A No.
>
> Q In December, January, February, March, April, May, June up through July, did Mr. and Mrs. Secchi and you have any conversation where it was suggested to you that you had made a statement to them that had proven to be untrue?
>
> A No.

Q Or that you failed to disclose something to them?

A No.

Had she concealed anything she knew about the premises from the Secchis? "No." Had she deceived them in any of her dealings with them? "No." Had she "always [been] truthful with them"? "Yes."

Of course, as the Court notes, Powell's testimony was rejected by the trial court, as reflected in its findings of fact and judgment. But the issue is not whether Powell was truthful or whether there is evidence to support the judgment. Powell's testimony cannot be ignored because it establishes that the parties now dispute *a fact* — what representations were made — about which they unquestionably agreed at the time they inked the lease. The issue is whether the law allows a sophisticated party in a commercial transaction, represented by counsel, with full knowledge of all the circumstances, without mistake or duress of any kind, to include in a contract a statement of fact that is important to the other party, and later disavow it as having been false at the time it was made. Italian Cowboy and the Secchis can prevail on their fraud claim only if they successfully defrauded Prudential and Prizm. Can a party claim fraud based on his own fraud?

The Court ignores this issue and presents instead the question "whether the lease agreement disclaims reliance on representations made by Prudential, negating an element of Italian Cowboy's fraud claim."[1] Since the lease says absolutely nothing about reliance, this is a pretty easy question to answer, and the Court's poor strawman does not put up much of a struggle before being

[1] *Ante* at ___.

demolished. As the Court observes, the law has long been skeptical of a party's agreement, sometimes referred to generally as a merger clause, not to rely on statements made by the other party outside the contract. Experience teaches that people are often not as serious as they should be in agreeing to such provisions. That, the Court concludes, is the situation we have here. Italian Cowboy intended nothing by its statement in the lease other than a merger clause; merger clauses often use similar language; merger clauses do not effectively disclaim reliance; and therefore, Italian Cowboy's statement does not disclaim reliance.

At the risk of appearing a stickler, I think what matters is the statement Italian Cowboy made, not what it may have intended would result. Even if intent were important in this situation, one cannot say the word "none" and intend by it to mean the word "some". In the Court's view, by stating that Prudential and Prizm had not "made any representations", Italian Cowboy either meant the exact opposite — that Prudential and Prizm had made *some* representations — or it meant nothing at all.

The principal authority on which the Court relies is our 1957 decision in *Dallas Farm Machinery Co. v. Reaves*,[2] so its facts are worth recounting. Reaves traded in his two Ford tractors and loaders for a new Oliver tractor and loader on the strength of a salesman's representations that the new equipment would do a better job faster.[3] After trying out the new machinery for 45 minutes,

[2] 307 S.W.2d 233 (Tex. 1957).

[3] *Dallas Farm Mach. Co. v. Reaves*, 300 S.W.2d 180, 181 (Tex. Civ. App.–Fort Worth 1957), *aff'd*, 307 S.W.2d 233 (Tex. 1957).

Reaves concluded it was worthless and the representations were false.[4] He demanded the return of his old equipment. Dallas Farm Machinery refused and sued for the balance due on the contract.[5] The contract was a one-page form with a provision on the back warranting that the goods sold were "well made and of good material", agreeing to replace defective parts for six months, and stating: "This warranty is made in lieu of all other warranties, express or implied, and no warranty is made or authorized to be made other than herein set forth."[6] The Court held that this provision did not preclude Reaves's counterclaim for rescission based on fraudulent inducement.[7] The Court did not suggest that Reaves was familiar with the capabilities of the equipment he bought — on the contrary, it was his lack of familiarity with the Oliver equipment that led to his complaints — or that the contract was negotiated, or that he was represented by counsel.

Reaves recognizes the reality that parties do not always pay attention to contractual provisions or recognize their consequences. But in three cases since — *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*,[8] *Schlumberger Technology Corp. v. Swanson*,[9] and *Forest Oil Corp. v. McAllen*[10] — we have refused to apply *Reaves* absolutely when sophisticated parties

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[4] 300 S.W.2d at 181.

[5] *Id.*

[6] 307 S.W.2d at 234.

[7] *Id.* at 239-241.

[8] 896 S.W.2d 156, 161-162 (Tex. 1995).

[9] 959 S.W.2d 171, 180 (Tex. 1997).

[10] 268 S.W.3d 51, 58 (Tex. 2008).

represented by legal counsel negotiate commercial agreements. The Court acknowledges that the *Reaves* rule has exceptions, but only if parties choose clear and unequivocal language and disclaim reliance on representations rather than the existence of representations. The contracts in *Schlumberger* and *Forest Oil* both stated that "no promise or agreement which is not herein expressed has been made",[11] provisions substantively indistinguishable to Italian Cowboy's acknowledgment that neither Prudential nor its agents had "made any representations or promises . . . except as expressly set forth" in the lease. But the parties in *Schlumberger* and *Forest Oil* added that they were not "relying upon any statement or representation" of any other party but were instead "relying on [their] own judgment".[12] According to the Court, the contracts in *Schlumberger* and *Forest Oil* precluded fraud claims only because they used the word "relying", which Italian Cowboy's lease did not do.

The requirement that parties use clear and unequivocal language helps ensure that they will understand the import of their contractual statements, so it is surprising that the examples the Court offers are provisions in which the language is internally inconsistent. The parties in *Schlumberger* and *Forest Oil* agreed that no representations had been made and that they were not relying on ones that had been made. For lawyers accustomed to pleading in the alternative, this may make perfect sense, but someone less flexible might have more trouble understanding how representations were both made and not made. A flat-out averment like Italian Cowboy's, that no representations were

[11] *Forest Oil*, 268 S.W.3d at 54 n.4; *Schlumberger*, 959 S.W.2d at 180.

[12] *Forest Oil*, 268 S.W.3d at 54 n.4; *Schlumberger*, 959 S.W.2d at 180.

made, period, is surely clearer and less equivocal than a statement that representations were not made, or if they were, they were not relied on.

The Court's preference for a disclaimer of reliance over a disclaimer of representations is simply a mystery. According to the Court, a party who states (somewhat equivocally) that although representations may have been made, he is not relying on any of them, should be held to his word and his later claim of fraud foreclosed. But a party who unequivocally denies that any representations were made to induce his agreement, other than those in the agreement itself, may later sue for fraud on representations he denied were ever made. For purposes of forestalling litigation, his denial is essentially void. If the Court has any reason for distinguishing between the two disclaimers, it is nowhere explained.

It may not matter. In a footnote, the Court warns that even "a clear and unequivocal disclaimer of reliance" may not be "binding on the parties involved", depending on "the circumstances".[13] When would such a disclaimer not be binding? According to the Court, whenever the parties have not discussed during their negotiations the substance of the later-alleged misrepresentation — in this case, the unpleasant odor on the premises.[14] But Italian Cowboy, Prudential, and Prizm all claim they knew nothing about the odor before the lease was signed. Since Italian Cowboy had had every opportunity to inspect the premises and discuss their suitability with prior restaurant tenants, the purpose of the disclaimer was to avoid disputes over such matters after the contract was signed. The trial court did not believe Prudential and Prizm, but if it had, the

[13] *Ante* at ___ n.8.

[14] This is one of several instances cited by the Court in which a disclaimer would not be binding.

discussion the Court would require to uphold the disclaimer would have been impossible, and the disclaimer would not have precluded the lawsuit. In the Court's view, a clear and equivocal disclaimer of reliance is effective only if no dispute arises after the contract was signed that was not discussed beforehand. Otherwise, the Court gives parties but one choice: litigate.

I would hold Italian Cowboy to the statement it made in the lease when it was completely capable of being accurate, ably counseled, and fully incentivized: "neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site".[15] Italian Cowboy's recourse should lie solely in its claim for breach of an implied warranty of suitability. But that claim, too, is precluded by Italian Cowboy's agreement. In the lease, it agreed to "be responsible for all repairs to the interior and non-structural components of the Premises, including but not limited to the interior . . . , and all . . . ventilating . . . systems . . . ." I disagree with the Court that work necessary to remedy the odor in the premises fell outside this responsibility. In fact, the odor was later remedied, by the restaurant-tenant who succeeded Italian Cowboy, by repairs to the interior, including the ventilating systems.

The Court's depreciation of the written word in this case is troubling and exacts a high price, not only to the parties here, but to all who are denied the right to negotiate freedom from uncertain, unending litigation. This case was filed in July 2001, over nine years ago. Were Italian Cowboy

[15] Apparently confused about the issues in the case, the Court mischaracterizes the dissent and Prudential as arguing that a merger clause excuses parties from "hav[ing] to disclose known defects". *Ante* at ___. This case does not involve an issue of nondisclosure. Italian Cowboy claims that Prudential made affirmative misrepresentations that were fraudulent, not that it failed to disclose information. "Failing to disclose information is equivalent to a false representation only when particular circumstances impose a duty on a party to speak, and the party deliberately remains silent." *In re Int'l Profit Assocs., Inc.* 274 S.W.3d 672, 678 (Tex. 2009) (citing *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001), and *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 353 (Tex. 1995)). Italian Cowboy does not assert that Prudential was under such a duty in negotiating the lease.

bound by its statements in the lease, its fraud claim could have been quickly dismissed, leaving only the warranty claim and the simpler issue of how the lease allocated responsibility for repairing a problem like the odor. The case has already been to this Court once before, with Italian Cowboy arguing unsuccessfully that its agreement to waive a jury was not binding — other words it used and didn't mean.[16] The trial court's judgment, rendered in 2005, awarded Italian Cowboy $650,700.40 in damages and $705,000 attorney fees. With interest, the judgment is well now over $2 million. The case is remanded for its third hearing in the court of appeals. A new trial is still a possibility. The cost and delay are no one's fault; they are simply the price the system exacts for the denial of freedom of contract. The law should allow willing and able parties to avoid a litigation toll-tax and agree to greater certainty in their dealings. Because today's opinion refuses that opportunity, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: April 15, 2011

[16] *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 140-141 (Tex. 2004).

IN THE SUPREME COURT OF TEXAS

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NO. 08-1056
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TGS-NOPEC GEOPHYSICAL COMPANY D/B/A TGS-NOPEC CORPORATION,
PETITIONER,

v.

SUSAN COMBS, SUCCESSOR-IN-INTEREST TO CAROLE KEETON STRAYHORN,
COMPTROLLER OF PUBLIC ACCOUNTS, AND GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS, RESPONDENTS

4444444444444444444444444444444444444444444444444444
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS
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Argued April 15, 2010

JUSTICE MEDINA delivered the opinion of the Court.

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

This appeal arises from a franchise tax dispute involving the apportionment of receipts from the licensing of geophysical and seismic data to customers in Texas. The taxpayer complains that the Comptroller has mischaracterized these receipts as Texas business and thereby has erroneously increased its franchise tax burden. At issue is whether these receipts should be categorized as receipts from the use of a license or as receipts from the sale of an intangible asset. If the receipts are from the use of a license, then the Comptroller has correctly assessed the tax. If the receipts are from the sale of an intangible, then the Comptroller has erred in assessing additional taxes because

receipts from the sales of intangibles are Texas receipts only if the legal domicile of the payor is Texas.

The lower courts concluded that the Comptroller had appropriately characterized the revenue as receipts from the use of a license in Texas and therefore correctly assessed the additional taxes. 268 S.W.3d 637 (Tex. App.—Austin 2010). We disagree and reverse and remand to the trial court for further proceedings.

I. Background

The taxpayer is TGS-NOPEC Geophysical Company ("TGS"), a Delaware Corporation with its principal place of business in Houston, Texas. It gathers, interprets, and markets seismic and geophysical data regarding subsurface terrains worldwide with sophisticated seismic equipment and software technology. TGS collects and stores this data in a master library and licenses various parts of the library to customers who use the licensed data to evaluate oil and gas formations for drilling operations. TGS requires its customers to enter into a master license agreement, which governs the parties' rights and obligations. The master license agreement describes TGS's seismic data as proprietary information and as valuable and highly confidential trade secrets. The master license agreement also states that TGS retains title to the seismic data and that it only licenses the limited use of the information to its customers.

When a customer wants to access data for a particular location, TGS and the customer enter into a specific license agreement under the master license agreement. TGS generally charges its customers a flat fee to access data under these specific license agreements and does not receive any additional payments, such as royalties. TGS delivers the data to its customers in tangible media forms such as magnetic tapes, printed materials, or film. Each piece of data provided by TGS includes the following notice:

> These data are owned by and are trade secrets of [TGS]. The use of these data is restricted to companies holding a valid use license from [TGS] and is subject to the strict confidentiality requirements of that license. The data may not be disclosed or transferred except as expressly authorized by the license. Unauthorized disclosure, use, reproduction, reprocessing or transfer of this data by or to a third party is strictly prohibited.

The licensing agreements are nonexclusive, and TGS may license the same data to multiple customers. Its customers receive unlimited access to the data under the specific license purchased, but they cannot disseminate the information to third parties, nor is the license transferrable.

The Comptroller audited TGS in 2004 for the 1997-2000 and 2001-2003 tax years and concluded that TGS owed additional franchise taxes, penalties, and interest. The audit deficiency arose from the Comptroller's determination that, for apportionment purposes, a significant amount of TGS's receipts should have been characterized as Texas receipts rather than non-Texas receipts. This caused a larger percentage of TGS's earned surplus and taxable capital to be subject to the franchise tax. The contested gross receipts are revenue that TGS received from licensing its seismic data to customers in Texas. TGS characterized these receipts as revenue from the sale of intangibles. TGS reported some of these receipts as coming from "other business done in the state," but the bulk of these receipts were reported as falling outside the category of business done in Texas. Receipts from the sale of intangibles are Texas receipts only if the payor is located in Texas. 34 TEX. ADMIN. CODE § 3.549(e)(30)(B). The payor's location is deemed to be its legal domicile.[1] 34 TEX. ADMIN. CODE § 3.549(b)(7).

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[1] The Texas Administrative Code provides:

> The legal domicile of a corporation is its state of incorporation. The legal domicile of a partnership or trust is the principal place of business of the partnership or trust. The principal place of business of a partnership or trust is the location of its day-to-day operations. If the day-to-day operations of the partnership or trust are conducted equally or fairly evenly in more than one state, then the principal place of business is the commercial domicile.

34 TEX. ADMIN. CODE § 3.549(b)(6).

For many years, the Comptroller characterized TGS's licensing of its geophysical information as the sale of an intangible and allocated the revenue TGS derived therefrom to the customer's legal domicile. *See* TEX. TAX CODE § 171.103(a)(6). The Comptroller's 2004 audit, however, characterized this revenue as receipts from the use of a license. This determination is significant because receipts from the use of a license are allocated to Texas if the license is used in Texas, whereas receipts from the sale of an intangible sold and used in Texas are not allocated to Texas, if the payor's domicile is elsewhere. TEX. TAX CODE § 171.103(a)(4); *see also* 34 TEX. ADMIN. CODE § 3.549(e)(30)(A)(iii) (providing that revenue an owner of a license receives is included in Texas receipts to the extent the license is used in Texas). The Comptroller's audit also concluded that most of TGS's licenses were used in Texas, which increased its Texas receipts and franchise taxes. After the audit, TGS owed $1,394,748.11 in additional franchise taxes and $333,741.60 in penalties and interest.

TGS paid the additional taxes, penalties, and interest under protest and timely filed this suit. *See* TEX. TAX CODE § 112.052(a) (requiring taxpayer to pay contested taxes as a predicate to filing suit). TGS and the Comptroller filed cross motions for summary judgment in the trial court, which granted both motions in part. The trial court granted the Comptroller's motion with regard to the assessment of the additional tax liability and TGS's motion with regard to penalties and interest, ordering the Comptroller to refund the assessed penalties and interest. The court of appeals affirmed the trial court's judgment, 268 S.W.3d 637 (Tex. App.—Austin 2010), and TGS appealed to this Court, complaining that it did not owe the additional franchise taxes assessed by the Comptroller and affirmed by the lower courts.

II. Analysis

The dispute here is over how the receipts TGS generates from licensing its data should be allocated. TGS asserts that the revenue it earns as the owner and licensor of seismic data should be characterized as receipts derived from the sale of an intangible asset and, as such, allocated to the state of the payor's domicile. TEX. TAX CODE § 171.103(a)(6). The Comptroller, on the other hand, argues that this revenue is derived from the use of a license because TGS employs license agreements to complete its sales in Texas. Receipts from the use of a license are allocated to the state in which the license is used. *Id.* § 171.103(a)(4).

The court of appeals agreed with the Comptroller, holding that "[t]he gross receipts earned by TGS are derived from TGS' use of a license within the meaning of the statutes." 268 S.W.3d at 646. The court thus interpreted the statutory phrase "use of a license" to apply to the use of a license as a transfer mechanism. *See id.* at 645 (holding that "the payments received by TGS for licensing its customers to use proprietary seismic data are gross receipts from the use of a license"). The question then is whether the act of licensing an intangible asset is the "use of a license" within the meaning of the franchise tax statute. To answer that question, we begin with the purpose and operation of the Texas franchise tax statute. *See* TEX. TAX CODE ch. 171.

A. The Texas Franchise Tax

The franchise tax is a tax on the privilege of doing business in Texas. *Bullock v. National Bancshares Corp.*, 584 S.W.2d 268, 270 (Tex. 1979), *cert. denied*, 444 U.S. 1016 (1980). It is imposed on each taxable entity that does business in this state or that is chartered or organized here. TEX. TAX CODE § 171.001(a); *see also id.* § 171.002 (defining taxable entity). Before 2008, the franchise tax was imposed on an entity's capital or earned surplus. *See* Act of May 30, 1997, 75th Leg., R.S., ch. 1185, §§ 5–6, 1997 Tex. Gen. Laws 4569, 4569-70. The tax code, however, presently imposes franchise tax on an entity's "taxable margin." TEX. TAX. CODE §§ 171.002, .101; *see* Act

of May 2, 2006, 79th Leg., 3rd C.S., ch.1, § 2, 2006 Tex. Gen. Laws 1, 6 (amending TEX. TAX CODE § 171.002). Because all of a company's capital, earned surplus, or taxable margin may not be attributable to business done in Texas, receipts must be apportioned between Texas and other jurisdictions. The tax code does this by multiplying an entity's capital, earned surplus, or taxable margin (depending on the applicable version of the code) by a fraction, the numerator of which consists of receipts from business done in Texas (Texas-sourced receipts), and the denominator of which consists of all receipts from business anywhere, including Texas. TEX. TAX. CODE § 171.006.

In sourcing receipts to Texas, the tax code identifies business done in this state as the sum of the taxable entity's gross receipts from the following activities:

> (1) each sale of tangible personal property if the property is delivered or shipped to a buyer in this state regardless of the FOB point or another condition of the sale;
>
> (2) each service performed in this state, except that receipts derived from servicing loans secured by real property are in this state if the real property is located in this state;
>
> (3) each rental of property situated in this state;
>
> (4) *the use of a patent, copyright, trademark, franchise, or license in this state;*
>
> (5) each sale of real property located in this state, including royalties from oil, gas, or other mineral interests; and
>
> (6) *other business done in this state.*

TEX. TAX CODE § 171.103(a)[2] (emphasis added) (hereafter referred to as the "sourcing statute"). The issue here is whether the revenue TGS earns licensing its seismic data library is appropriately sourced under subsection (4) as receipts from the "use of a license in this state," *id.* § 171.103(a)(4)[3]

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[2] Despite recent changes in the franchise tax laws, for convenience we cite to the current tax code sourcing provisions, which have not been affected by these changes. Although we cite to the current code, TGS taxes must, of course, be determined under the code in effect at the time the taxes were incurred.

[3] Formerly TEX. TAX CODE §§ 171.103(4) & 171.1032(a)(4).

or under subsection (6) as "other business done in this state," *id*. § 171.103(a)(6).[4] If subsection (4) applies, the Comptroller has appropriately sourced the receipts. But if subsection (6) applies, as TGS maintains, the receipts must be sourced to the state of the customers' domicile under the "location of the payor" rule, and the Comptroller's assessment must be revised. *See* 34 TEX. ADMIN. CODE § 3.549(e)(30)(B); *id*. § 3.557(e)(25)(B).

B. Standard of Review

The Comptroller is charged with administering the provisions of the franchise tax. *See* TEX. GOV'T CODE § 403.011 (enumerating general powers of the Comptroller's office). The Legislature has given the Comptroller broad discretion to adopt rules for the collection of taxes and other revenues so long as such rules do not conflict with state or federal law. *See* TEX. TAX. CODE § 111.002(a).

If there is vagueness, ambiguity, or room for policy determinations in a statute or regulation, as there is here, we normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule. *See Pub. Util. Comm'n v. Gulf States Utils. Co.*, 809 S.W.2d 201, 207 (Tex. 1991)*; Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944). Here, the Comptroller is the administrative agency charged with enforcing the tax code, and her construction of the code is therefore entitled to serious consideration. *See Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

Deference to the agency's interpretation, however, is not conclusive or unlimited. *See Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254–55 (Tex. 1999). We defer only to the extent that the agency's interpretation is reasonable, and no deference is due where an agency's interpretation fails to follow the clear, unambiguous language of its own regulations. *See Pub. Util.*

[4] Formerly TEX. TAX CODE §§ 171.103(5).

Comm'n, 809 S.W.2d at 207. We further interpret administrative rules, like statutes, under traditional principles of statutory construction. *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999).

When construing a statute, our primary objective is to ascertain and give effect to the Legislature's intent. TEX. GOV'T CODE § 312.005; *see Texas Dept. of Protective and Regulatory Services v. Mega Child Care*, 145 S.W.3d 170, 176 (Tex. 2004). To discern that intent, we begin with the statute's words. TEX. GOV'T CODE § 312.003; *see Texas Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004). If a statute uses a term with a particular meaning or assigns a particular meaning to a term, we are bound by the statutory usage. *Texas Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). Undefined terms in a statute are typically given their ordinary meaning, but if a different or more precise definition is apparent from the term's use in the context of the statute, we apply that meaning. *In re Hall*, 286 S.W.3d 925, 928–29 (Tex. 2009). And if a statute is unambiguous, we adopt the interpretation supported by its plain language unless such an interpretation would lead to absurd results. *Mega Child Care*, 145 S.W.3d at 177. We further consider statutes as a whole rather than their isolated provisions. *City of Sunset Valley*, 146 S.W.3d at 642. We presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). With these rules in mind, we turn to the sourcing statute, and the Comptroller's regulations which implement it.

C. Sourcing Receipts from Intangible Assets

The history of the franchise tax indicates that the Comptroller has been allocating receipts from intangibles to the state of the payor's domicile since 1917. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172, 180 (Tex. 1967). This practice ended in 1959, in part, when the

Legislature amended the sourcing statute to require use-based sourcing for two kinds of intangibles, patents and copyrights. *See* Act of August 6, 1959, 56th Leg., 3rd C.S., ch. 1, art. 12.02, 1959 Tex. Gen. Laws 187, 307 (sourcing "royalties from the use of patents or copyrights" to their place of use). Before this, the sourcing statute consisted of a single catch-all provision, for business done in the state, similar to subsection (6) of the current statute.[5] And under the earlier statute, the Comptroller sourced all receipts from intangibles under the "location of the payor" rule. *See Humble Oil & Refining Co.,* 414 S.W.2d at 180.

After the 1959 amendment, receipts from intangible assets, other than patents and copyrights, continued to be taxed as other business under the "location of the payor" rule until 1988, at which time the Comptroller began sourcing revenue from three additional intangible assets based on location of use. The Comptroller made this change by promulgating a new rule. Rule 3.403(e)(11) provided that "[r]eceipts to the owner for the use of trademarks, franchises, and licenses are allocated according to the location where used." 12 Tex. Reg. 2971 (1988) (to be codified at 34 Tex. Admin Code § 3.549). After Rule 3.403(e)(11)'s adoption, the Comptroller began sourcing receipts from licensing trademarks, franchises, and licenses according to their place of use, like patents and copyrights. Receipts from licensing other types of intangible assets, however, continued to be sourced to the location of the payor under the catch-all provision pertaining to "other business."

Comptroller letter rulings from the period confirm this practice. Concerning the licensing of data, the Comptroller issued the following guidance in 1990:

> . . . gross receipts from [licensing seismic data] are from a license to use the geophysical information. For franchise tax purposes, the gross receipts from the licensing of the use of the information would be considered receipts from the sale of an intangible and would be allocated to the legal domicile of the payor.

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[5] *See* former TEX. REV. CIV. STAT. art. 7084, repealed by Act of August 6, 1959, 56th Leg., 3rd C.S., ch. 1, art. 12.02, 1959 Tex. Gen. Laws 187, 307.

Comptroller Letter Ruling 9005L1019F09 (5/1/1990); *see also* Comptroller Letter Ruling 9103L1087B07 (3/1/1991) (issuing similar ruling to another licensor of seismic data). These rulings recognized that Rule 3.403(e)(1l)[6] did not apply to the receipts because the customers used seismic data rather than the license conveying the data.

The Legislature did not amend the sourcing statute to match the Comptroller's sourcing rule on trademarks, franchises, and licenses until 1997. After this amendment, subsection (4) of the sourcing statute provided that "gross receipts of a corporation from its business done in this state [includes] the corporation's receipts from . . . the use of a patent, copyright, trademark, franchise, or license in this state . . ." Act of May 20, 1997, 75th Leg., R.S., ch. 1185, § 5, 1997 Tex. Gen. Laws 4569, 4570. The amendment equalized the tax treatment among similar intangible assets by adding licenses, trademarks, and franchises to the provision governing patents and copyrights. *Id.* Although other amendments to the franchise tax have followed, the sourcing statute has not materially changed since 1997. Gross receipts derived from a license continue to be sourced to Texas when the license is used in this state. TEX. TAX CODE § 171.103(a)(4).

D. Receipts From the Use of a License

The Comptroller argues that because TGS uses a license agreement to transfer seismic data to its Texas customers, the receipts are from the use of a license in Texas. She further argues that

[6] In November 1992, the Comptroller renumbered and reorganized Rule 3.403(e)(11) as new Rule 3.549(e)(30). 17 Tex. Reg. 7663 (1992) (to be codified at 34 TEX. ADMIN CODE § 3.549(e)(30)). The reorganization did not substantively change the rule, which now provides that "Revenues received by the owner of a trademark, franchise, and license are included in Texas receipts to the extent used in Texas." *Id*. In 1996, however, the Comptroller returned to the "location of the payor" rule for these intangible assets, amending the rule to provide that "revenues received by the owner of a trademark, franchise, and licence are apportioned to the location of the payor." 21 Tex. Reg. 11511 (1996) (to be codified at 34 TEX. ADMIN. CODE § 3.549). TGS submits that an adverse district court ruling, invalidating an unrelated sourcing rule, caused the Comptroller to make the changes returning revenue derived from patents and copyrights to their unique position as the only receipts from intangible assets sourced according to place of use. TGS further submits that the Comptroller persuaded the Legislature to thereafter amend the sourcing statute in 1997 to adopt the Comptroller's prior practice under Rule 3.403(e)(11) so that she could go back to sourcing these additional intangible assets according to place of use.

the phrase "use of a license" encompasses licensing because there is no qualifying language in subsection (4) or in any other part of the sourcing statute to suggest that the licensing of data does not constitute the use of a license. The Comptroller concedes that previously the licensing of seismic data was sourced as a general intangible under the "location of the payor" rule, but she maintains that the Legislature changed that practice in 1997 when it decided to tax licenses like patents and copyrights, according to their place of use.

TGS argues that the Comptroller and the court of appeals have confused "receipts from licensing" with "receipts from the use of a license." TGS submits that there is a critical distinction between receipts from licensing transactions (in which a license is merely the transfer mechanism) and receipts from the use of a license (in which the license itself is a valuable asset). Because TGS's customers do not use a license but instead use seismic data, TGS submits that the receipts at issue are not from the use of a license but are from its customers' acquisition and use of TGS's data. TGS contends that its receipts are therefore essentially a limited sale of an intangible asset, geophysical data. Because this data is not one of the intangible assets listed in subsection (4), TGS concludes that the receipts it derives from this data must instead be sourced as other business under the catch-all provision, subsection (6), and allocated to the state of the payor's domicile. TEX. TAX CODE § 171.103(a)(4), (6).

As the arguments indicate, the term "license" has more than one meaning. It can be used as a verb to convey the act of giving permission or as a noun to represent the permission or right granted. See WEBSTER'S NEW INTERNATIONAL DICTIONARY 1425 (2d ed. 1960). As such, its use in the statute is ambiguous.

Instead of focusing on the word "license," as the Comptroller and court of appeals have done, the word must be read in the context of the whole statute and consideration given to what it means

to "use a license." *See City of Sunset Valley*, 146 S.W.3d at 642; *Mega Child Care*, 145 S.W.3d at 176. Language cannot be interpreted apart from context. The meaning of a word that appears ambiguous when viewed in isolation may become clear when the word is analyzed in light of the terms that surround it.[7] The word "use" poses some interpretational difficulties as well because of the different meanings attributable to it.[8] "Use" and the "use of a license" therefore, draw their meanings from context, so we look not only to the words themselves but to the statute in its entirety to determine the Legislature's intent.[9] It is a fundamental principle of statutory construction and indeed of language itself that words' meanings cannot be determined in isolation but must be drawn from the context in which they are used.[10]

The statute sources to Texas "receipts from the use of a patent, copyright, trademark, franchise, or license" to the extent they are used in Texas. TEX. TAX CODE § 171.103(a)(4). The canon of statutory construction known as *noscitur a sociis*, or "it is known by its associates" directs that similar terms be interpreted in a similar manner. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 750 n. 29 (Tex. 2006) (quoting BLACK'S LAW DICTIONARY 1087 (8th ed. 2004)). Thus, we interpret the similar terms license, patent, copyright, trademark, and franchise in a similar manner.

Considering how the statute applies to patents and copyrights is therefore instructive. When a business wishes to manufacture a patented item, it must purchase the patent or obtain permission

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[7] The United States Supreme Court has noted the difficulty of defining "use" in two criminal cases involving the use of a firearm. These cases provide helpful notes on linguistics for the present case. *See Bailey v. U.S.*, 516 U.S. 137, 143 (1995); *Smith v. U.S.*, 508 U.S. 223, 228–29 (1993).

[8] *Bailey*, 516 U.S. at 143.

[9] *See id.*

[10] *Smith v. U.S.*, 508 U.S. 223, 241 (1993)(Scalia, J., dissenting) (citing *Deal v. U.S.*, 508 U.S. 129, 132 (1993)) (Justice Scalia notes that this mandate of context is "particularly true of a word as elastic as 'use,' whose meanings range all the way from 'to partake of' (as in 'he uses tobacco') to 'to be wont or accustomed' (as in 'he used to smoke tobacco')).

to use the patent from the owner. Permission is usually granted in the form of a license. When the licensee thereafter produces the patented item, it uses the patent, and its payments to the patent's owner are "receipts from the use of a patent." *See* TEX. TAX CODE § 171.103(a)(4). The revenue or royalties that the patent owner receives is included in Texas receipts to the extent that the patent is used in production, fabrication, manufacturing, or other processing in Texas. 34 TEX. ADMIN. CODE § 3.549(e)(30)(A)(i). Even though a license is part of this transaction, the receipts are from the use of the underlying intellectual property, the patent, not from the use of a license.

Similarly, when a business wishes to publish copyrighted material, the owner of the copyright must grant permission through a license. When the licensee publishes the copyrighted material, it uses the copyright, and its payments to the owner are receipts from the use of a copyright. *See* TEX. TAX CODE § 171.103(a)(4). Revenue the copyright owner receives from the use of its copyright is included in Texas receipts to the extent the copyright is used in Texas. 34 TEX. ADMIN. CODE § 3.549(e)(30)(A)(ii). Even though a license is part of this transaction, the receipts are from the use of the underlying intellectual property, the copyright, not from the use of a license.

In these two situations, the owner of the intangible asset uses a license to convey limited rights to its intellectual property. But the revenue produced is not from the use of a license in Texas; it is from the use of the underlying intellectual property, the copyright or the patent. Similarly, the revenue TGS receives from conveying its geophysical data is not derived from the use of a license but from the use of the underlying intellectual property, the data. The term "license" in subsection (4) of the sourcing statute therefore refers to licenses that are themselves revenue-producing assets. It does not include the mechanism of licensing, which would subsume all intangible assets. Had that been the Legislature's intent, it would not have been necessary to name the intangible assets specifically as the Legislature has done in subsection (4). *See In re M.N.*, 262 S.W.3d at 802

(presuming that the "Legislature included each word in the statute for a purpose . . . and that words not included were purposefully omitted").

E. The Comptroller's Rules

The Comptroller's own administrative interpretation of the sourcing statute further contradicts her argument here. The Comptroller's regulations provide: "revenue that *the owner* of a trademark, franchise, or license receives is included in Texas receipts to the extent the trademark, franchise, or license is used in Texas." 34 TEX. ADMIN CODE § 3.549(e)(30)(A)(iii) (former franchise tax); *id.* § 3.591(e)(21)(A)(iii) (margin tax) (emphasis added). Under this rule, the intangible asset that is "used" must be owned by the revenue recipient and used by someone else. The underlying asset in a licensing transaction meets this standard because it is owned by the licensor, who receives the revenue, not the licensee, who uses the intangible asset. In contrast, the license resulting from a licensing transaction does not meet this standard because the licensee owns the license.

TGS, the revenue recipient, owns seismic data, which is its intellectual property. TGS's customers want to access this valuable intellectual property, and TGS thus grants them a right to access the data through license agreements. TGS grants its customers a license, or a limited right, to use its seismic data. The customers, however, then use the seismic data and not the licenses that vest in them as a result of the licensing transaction. Because TGS is not the owner of the license but the owner of the data, its receipts from customers, who use its seismic data, should not be sourced under subsection (4), and the assessment here conflicts with the Comptroller's own administrative rule. *See* 34 TEX. ADMIN. CODE § 3.549(e)(30)(A)(iii); *see also Rodriguez*, 997 S.W.2d at 254–55; *Mid-Century*, 243 S.W.3d at 623.

Moreover, the Comptroller's construction of the statute conflicts with her rule regarding the licensing of software. By rule, the Comptroller allocates receipts from licensing software to the location of the payor under subsection (6) as sales of intangibles. *See* 34 TEX. ADMIN. CODE §§ 3.549(e)(30)(A)(iii), (e)(7); TEX. TAX CODE § 171.103(a)(6). Because a license is used to transfer the underlying intangible, however, the Comptroller's argument in this case would dictate allocation of the receipts under subsection (4). TEX. TAX CODE § 171.103(a)(4). The Comptroller accordingly is inconsistent when equating the licensing of an intangible asset with the use of a license in this state. *See* TEX. TAX CODE § 111.002 (providing that Comptroller's rules must not conflict with state or federal law); *see also Pub. Util. Comm'n*, 809 S.W.2d at 207*; Stanford*, 181 S.W.2d at 273 (stating that an agency's construction of a statute may be considered only if it is reasonable and not inconsistent with the statute).

III. Conclusion

The Legislature could have allocated receipts from the use of intangible assets in this state to subsection (4) of the sourcing statute, generally, but it did not. *See*, *e.g.*, TEX. TAX CODE § 171.0004(d) (providing that an "entity conducts an active trade or business if assets, including royalties, patents, trademarks, and *other intangible assets*, held by the entity are used in the active trade or business of one or more related entities") (emphasis added). Some states do allocate revenues from intangible assets generally to the place of their use, but our Legislature has chosen to specifically name the intangibles which qualify for such treatment.[11] Because TGS's receipts from

[11] Compare the Texas statute with Wisconsin's. WIS. STAT. ANN. § 71.25(9)(dj) (West 2011) (sourcing gross royalties and "other gross receipts received for the use or license of intangible property, including patents, copyrights, trademarks, trade names, service names, franchises, licenses, plans, specifications, blueprints, processes, techniques, formulas, designs, layouts, patterns, drawings, manuals, technical know-how, contracts, and customers lists are sales in this state if ... [t]he purchaser or licensee uses the intangible property in the operation of a trade or business at a location in this state.") TGS's license of seismic data would certainly fall under this particular statute to the extent that the data was used in Wisconsin, but Texas's statute is not so broad. Several other states have similarly broad sourcing statutes under which TGS's transactions would fall. *See also* LA. REV. STAT. ANN. § 47:243(A)(5) (2011) ("Royalties or similar

licensing its seismic data are not receipts from the use of a license in this state within subsection (4)'s meaning, the court of appeals erred in upholding the Comptroller's franchise tax assessment in this case. Receipts from this intangible asset are not allocated according to its place of use under subsection (4) but rather are included under subsection (6)'s catch-all provision as a limited sale of an intangible and allocated under the "location of the payor" rule. We therefore reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

David M. Medina

revenue from the use of patents, trademarks, copyrights, secret processes *and other similar intangible rights* shall be allocated to the state or states in which such rights are used") (emphasis added); 35 ILL. COMP. STAT. ANN. 5/304(a)(3)(B-l)(I) (West 2011) ("Gross receipts from the licensing, sale, or other disposition of a patent, copyright, trademark, *or similar item of intangible personal property*") (emphasis added); MICH. COMP. LAWS ANN. § 208.1305(l)(e) (West 2011) ("Royalties and other income received for the use of or for the privilege of using *intangible property*, including patents, know-how, formulas, designs, processes, patterns, copyrights, trade names, service names, franchises, licenses, contracts, customer lists, computer software, *or similar items*, are attributed to the state in which the property is used by the purchaser") (emphasis added); OHIO REV. CODE ANN. § 5733.05(B)(2)(c)(ii) (West 2011) ("Receipts from the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, *and similar intellectual property* shall be situsedto this state to the extent that the receipts are based on the amount of use of that property in this state") (emphasis added); TENN. CODE ANN. § 67-4-2012(j) (West 2011) ("any person doing business in Tennessee, who licenses the use of patents, trademarks, tradenames, copyrights, or know-how, *or other intellectual property* to another person in Tennessee, and who is paid royalties or other income based on the sale of products or other activity in Tennessee by the licensee, shall source such income to Tennessee") (emphasis added).

Justice

Opinion Delivered: May 27, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-1066

MICHAEL T. JELINEK, M.D. AND COLUMBIA RIO GRANDE HEALTHCARE, L.P. D/B/A RIO GRANDE REGIONAL HOSPITAL, PETITIONERS,

v.

FRANCISCO CASAS AND ALFREDO DELEON, JR., AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ELOISA CASAS, DECEASED, RESPONDENTS

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

Argued February 18, 2010

JUSTICE GUZMAN delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE JOHNSON, and JUSTICE WILLETT joined, and in which CHIEF JUSTICE JEFFERSON, JUSTICE GREEN, and JUSTICE LEHRMANN joined as to Parts I and II.A.

CHIEF JUSTICE JEFFERSON filed an opinion, dissenting in part, in which JUSTICE GREEN and JUSTICE LEHRMANN joined.

JUSTICE LEHRMANN filed an opinion, dissenting in part.

When circumstantial evidence is consistent with several possible medical conclusions, only one of which establishes that the defendant's negligence caused the plaintiff's injury, an expert witness must explain why, based on the particular facts of the case, that conclusion is medically superior to the others. If the expert fails to give any reason beyond an unsupported opinion, the

expert's testimony is legally insufficient evidence of causation. In this case, we determine whether legally sufficient evidence supports the jury's verdict in favor of the estate of Eloisa Casas[1] against Rio Grande Regional Hospital (the Hospital).[2] Following her admission to the Hospital with abdominal pain, doctors placed Casas on antibiotics used to treat and prevent certain intra-abdominal infections. Two days later she underwent major abdominal surgery and continued on the antibiotics for another five days, but the Hospital allowed the prescriptions to lapse for four-and-a-half days. The Hospital admits it should have continued the antibiotics but denies that the lapse caused Casas any additional pain. We hold that the Casases failed to present legally sufficient evidence that Casas suffered from an infection the omitted antibiotics would have treated. Accordingly, we reverse the court of appeals' judgment and render judgment that the Casases take nothing.[3]

In a separate petition, Dr. Michael Jelinek, one of Casas's treating physicians sued by the Casases, argues that the trial court should have granted his motion for sanctions and dismissal because the Casases' expert report was deficient. We agree and hold that an award of attorney's fees is proper. Therefore, we reverse and remand to the trial court for an award of attorney's fees and costs.

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[1] Francisco Casas and Alfredo DeLeon Jr., Casas's husband and son, respectively, serve as personal representatives of her estate. We refer to them collectively as "the Casases."

[2] Columbia Rio Grande Regional Healthcare, L.P., d/b/a/ Rio Grande Regional Hospital.

[3] Because we conclude legally insufficient evidence supports the jury's verdict, we do not reach the Hospital's second issue—whether the Hospital preserved error regarding its proposed unavoidable accident instruction.

I. Background

In 2000, Eloisa Casas was diagnosed with colon cancer and underwent surgery, radiation, and chemotherapy. A year later, doctors told her that the cancer appeared to be in remission, and she thought she was cured. But on July 10, 2001, she was admitted to the Hospital with abdominal pains; she also had a fever and a mildly elevated white-blood-cell count, potentially indicating an infection. To treat this possible infection, her surgeon and primary physician, Dr. Carlos Garcia-Cantu, consulted with an infectious disease specialist at the Hospital, Dr. Michael Jelinek, who on July 11 prescribed two medications, Maxipime (a broad-spectrum antibiotic), and Flagyl (an antibiotic used to treat anaerobic bacteria).

The Hospital performed several diagnostic tests, which revealed abnormal collections of fluid in Casas's abdomen. On July 13, she underwent major abdominal surgery during which Dr. Garcia-Cantu discovered that "fairly extensive" metastatic cancer had perforated Casas's colon and allowed material to leak into her abdominal cavity, causing an intra-abdominal abscess. Dr. Garcia-Cantu drained the abscess, repaired Casas's colon, and inserted a Jackson-Pratt drain to prevent further problems. Following the surgery, Dr. Garcia-Cantu continued the Maxipime and Flagyl prescriptions, and a culture of the removed abscess revealed an E. coli infection, which is effectively treated with Maxipime. Casas received Maxipime and Flagyl for another five days, but hospital staff inadvertently failed to place a prescription renewal form on Casas's chart, resulting in a four-and-a-half-day period between July 18 and 23 during which Casas did not receive either medication. Even so, Casas never tested positive for E. coli again and a culture of the incision site on July 18 instead grew Candida (a fungus) for which Diflucan (an antifungal) was prescribed. Then, on July

21, a second culture from a blood sample grew coagulase-negative staph, for which Vancomycin was prescribed.[4] Neither Maxipime nor Flagyl would have treated the Candida or coagulase-negative staph infection.

On July 23, Dr. Garcia-Cantu noted an abscess in the wound, which he drained by removing the staples and opening the wound. The next day, records indicate that a foul smell was emanating from the wound site, and hospital staff brought fans into the room to dissipate the odor. When Dr. Jelinek learned of the lapsed prescription on July 23, he informed Casas and then prescribed different antibiotics, Levaquin and Vancomycin. On July 25, after a CAT scan showed no abscess, Dr. Garcia-Cantu removed the drain. Casas left the Hospital on August 23, but she returned in early September and died two months later.

In May 2003, several members of Casas's family, including her husband and son, filed suit against the Hospital, Dr. Garcia-Cantu, and Dr. Jelinek. The plaintiffs claimed that the defendants' negligence caused Eloisa Casas to "suffer grievous embarrassment and humiliation, as well as excruciating pain the remainder of her life which she would not have suffered to such degree or extent if properly diagnosed, treated and cared for." The plaintiffs sought to recover damages for Casas's injuries and mental anguish. They twice amended their petition, ultimately leaving the Casases as the sole plaintiffs.

[4] There was a several-day lag between taking the culture and ordering the prescription, presumably to allow the culture to grow and to transmit the results to the treating physicians. Thus, the Diflucan was prescribed on July 21 and the Vancomycin on July 23.

As required by former article 4590i § 13.01 of the Medical Liability and Insurance Improvement Act, *see* TEX. REV. CIV. STAT. art. 4590i § 13.01,[5] the Casases filed an expert report within 180 days of filing the original petition. In the report, Dr. John Daller opined that Dr. Garcia-Cantu and Dr. Jelinek were negligent in failing to discover that the antibiotics were not being given to Casas and that within "reasonable medical probability" this negligence resulted in a prolonged hospital stay and increased pain and suffering. Dr. Jelinek later filed a motion for sanctions and dismissal under article 4590i § 13.01(e), alleging that the expert report was deficient because, among other things, it failed to explain any causal connection between the negligence and the purported injury. The trial court denied the motion. Before trial began, however, the Casases nonsuited Dr. Jelinek and Dr. Garcia-Cantu.

At trial, Dr. Daller testified as the Casases' medical expert. During direct examination, he analyzed the Hospital's daily patient notes regarding Casas and identified the significant events. He noted changes in Casas's vital signs on July 21 and 22, such as increased heart rate and temperature, inflammation, and tenderness of the surgery site. Dr. Daller stated that "in medical probability" there was an infection in the abdomen, but on cross-examination he admitted that "there was no objective evidence present to demonstrate that intra-abdominal infection." When reviewing the patient notes for July 24, which noted the presence of a foul smell, he suggested that the smell was consistent with an anaerobic infection that would be difficult to culture because anaerobic bacteria die when exposed

[5] *See* Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, 986, *amending* the 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. Former article 4590i § 13.01 was replaced by Texas Civil Practice and Remedies Code § 74.351, as amended.

to air. Dr. Carl Berkowitz, the Hospital's expert, offered several other explanations for the smell, such as the Candida infection or dying tissue.

The Casases also called Casas's relatives to testify about her condition. Consistent with Dr. Daller's testimony, Casas's son linked the smell with the opening of the wound to drain the abscess: "The odor that I noticed was after they had taken out the staples on her incision, and one day that I went to see her as soon as they opened the door the whiff of this putrid smell just engulfed me." He also testified that Casas was upset upon learning that she had not received the antibiotics but was even more upset when the incision had to be opened and drained: "Well, after she was told and I was told that she wasn't getting antibiotics, like I said, she was upset. What really upset her more was when they had to—they had to take out the staples out of her incision, and they had to open her incision up again." Casas's husband testified that, while she was upset and did not trust the nurses or doctors after learning of the lapsed prescription, "she was still fighting. She . . . wanted to beat this cancer she had." The son testified that Casas did not lose hope until she witnessed the events of September 11, 2001, following her re-admission to the Hospital: "That's why I remember that day so vividly in my mind because that was the turning point in my mom. She seemed to just give up, not fight, not want to fight anymore like she used to. And that was a very, very sad day."

The jury found that the negligence of the Hospital, Dr. Jelinek, and Dr. Garcia-Cantu proximately caused Casas's injury. The jury apportioned ninety percent of the negligence to the Hospital, five percent to Dr. Jelinek, and five percent to Dr. Garcia-Cantu. It awarded $250,000 in damages to the Casases as compensation for Casas's pain and mental anguish.

The Hospital appealed, arguing that the evidence was legally and factually insufficient to prove causation or damages for mental anguish. Dr. Jelinek also appealed, challenging the trial court's denial of his motion for sanctions and dismissal. The court of appeals affirmed on all issues. __ S.W.3d __.

II. Analysis

We address in turn the two issues raised in this appeal: the legal sufficiency of the causation evidence and the sufficiency of the Casases' expert report.

A. Sufficiency of the Evidence

The facts of this case are unfortunate: a woman with advanced colon cancer underwent surgery to repair her cancer-perforated and infected colon, and in the course of treatment for her many symptoms the Hospital failed to renew her antibiotic prescriptions for a four-and-a-half-day period. The Hospital admits it should have continued the antibiotics. Even so, the plaintiff bears the burden to prove that the negligence caused an injury: "[A]t trial the plaintiff must establish two causal nexuses in order to be entitled to recovery: (a) a causal nexus between the defendant's conduct and the event sued upon; and (b) a causal nexus between the event sued upon and the plaintiff's injuries." *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984). Only the second nexus is at issue here.

In *City of Keller v. Wilson*, we considered at length the parameters of legal sufficiency review, quoting with approval Chief Justice Calvert's seminal article on the topic:

> "No evidence" points must, and may only, be sustained when the record discloses one of the following situations: (a) 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 mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact.

168 S.W.3d 802, 810 (Tex. 2005) (quoting Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362–63 (1960)). "When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). The same is true when the evidence equally supports two alternatives: "'When the circumstances are equally consistent with either of two facts, neither fact may be inferred.'" *City of Keller*, 168 S.W.3d at 813 (quoting *Tubelite, a Div. of Indal, Inc. v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991)). When considering such cases, "we must 'view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances,'" *id.* at 813–14 (quoting *Lozano v. Lozano*, 52 S.W.3d 141, 167 (Tex. 2001) (per curiam)), and we "must consider not just favorable but all the circumstantial evidence, and competing inferences as well." *Id.* at 814.

To meet the legal sufficiency standard in medical malpractice cases "plaintiffs are required to adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more defendants, meaning simply that it is 'more likely than not' that the ultimate harm or condition resulted from such negligence." *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 399–400 (Tex. 1993) (citations omitted). Thus, we examine the record to determine if the Casases presented legally sufficient evidence that "in

reasonable medical probability" the Hospital's negligence caused Casas additional pain and suffering.

When distilled to its essence, the Casases' claim is predicated on the presence of an infection—treatable by the lapsed antibiotics—that caused Casas pain and mental anguish above and beyond that caused by the cancer, the surgery, and the other known infections. The absence of an infection treatable by Maxipime and Flagyl would undermine the Casases' claim, for then the prescription lapse would amount to an unfortunate, but harmless, occurrence. The Hospital argues that the Casases presented no evidence that the Hospital's negligence caused such an infection. The Casases' expert admitted there is no direct evidence of an anaerobic infection, leaving the jury to consider the circumstantial evidence and make proper inferences from it. In reviewing the record, we initially decide if jurors can determine causation under these facts unaided by expert testimony—that is, whether lay testimony regarding causation is legally sufficient.

1. Lay Testimony of Causation

Lay testimony may be used as evidence of causation in certain circumstances, but "[w]hen expert testimony is required, lay evidence supporting liability is legally insufficient." *City of Keller*, 168 S.W.3d at 812. In medical malpractice cases, expert testimony regarding causation is the norm: "The general rule has long been that expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors." *Guevara v. Ferrer*, 247 S.W.3d 662, 665 (Tex. 2007); *see also Bowles v. Bourdon*, 219 S.W.2d 779, 782 (Tex. 1949) ("It is definitely settled with us that a patient has no cause of action against his doctor for malpractice, either in diagnosis or recognized treatment, unless he proves by a doctor of the same

school of practice as the defendant: (1) that the diagnosis or treatment complained of was such as to constitute negligence and (2) that it was a proximate cause of the patient's injuries."). We have allowed lay evidence to establish causation "in those cases in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition." *Morgan*, 675 S.W.2d at 733 (citing *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 706 (Tex. 1970)). Care must be taken to avoid the *post hoc ergo propter hoc* fallacy, that is, finding an earlier event caused a later event merely because it occurred first. Stated simply, correlation does not necessarily imply causation. As we noted in *Guevara*, "[e]vidence of an event followed closely by manifestation of or treatment for conditions which did not appear before the event raises suspicion that the event at issue caused the conditions. But suspicion has not been and is not legally sufficient to support a finding of legal causation." 247 S.W.3d at 668.

When lay testimony is credited as evidence of causation, it usually highlights a connection between two events that is apparent to a casual observer. In *Morgan*, for example, a previously healthy employee, upon exposure to leaking chemicals, suffered watering of the eyes, blurred vision, headaches, and swelling of the breathing passages. 675 S.W.2d at 733. In such a circumstance, lay testimony sufficed to connect the specific injury to the negligence with no evidence of causation beyond the leaking chemicals. *Id.* Likewise in *Guevara*, we stated that determining causation of "certain types of pain, bone fractures, and similar basic conditions" following an automobile accident was within the competence of lay jurors. 247 S.W.3d at 668. But we held that expert testimony was required to prove that a patient's medical expenses resulted from the accident, noting that "[p]atients in hospitals are often treated for more than one condition brought on by causes independent of each

other." *Id.* at 669. These cases illustrate this basic premise: "[N]on-expert evidence alone is sufficient to support a finding of causation in limited circumstances where both the occurrence and conditions complained of are such that the general experience and common sense of laypersons are sufficient to evaluate the conditions and whether they were probably caused by the occurrence." *Id.* at 668.

The present case does not fall within this rule. Unlike in *Morgan*, an otherwise healthy person did not suddenly experience health difficulties following the defendant's negligent conduct when the plaintiff's symptoms were reasonably attributable to the negligence and to nothing else. Rather, a patient with terminal colon cancer did not receive antibiotics for four-and-a-half days following major abdominal surgery and after having received the medications for eight days. There is no direct evidence that she suffered from an infection treatable by the omitted antibiotics, but there is evidence that she had two other infections that accounted for all of her symptoms during that time. Given Casas's medical condition, expert testimony was crucial to link the prescription lapse to an infection causing additional pain and suffering beyond what she would otherwise have experienced. *See Kaster v. Woodson*, 123 S.W.2d 981, 983 (Tex. Civ. App.—Austin 1938, writ ref'd) ("What is an infection and from whence did it come are matters determinable only by medical experts."); *see also Hart v. Van Zandt*, 399 S.W.2d 791, 792 (Tex. 1966) ("In determining negligence in a case such as this, which concerns the highly specialized art of treating disease, the court and jury must be dependent on expert testimony. There can be no other guide, and where want of skill and attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury.").

The Casases point to testimony by Casas's husband and son to support their argument that she deteriorated rapidly after discovering she did not receive the antibiotics. But this characterization overstates the evidence. While Casas's husband testified she was upset and did not trust her doctors following the discovery, she was still determined to fight her cancer. The son also observed Casas's anger and lack of trust but testified that the opening of her wound, which occurred the same day she learned of the lapse, upset her even more. As Dr. Daller admitted, Candida likely caused the abscess that required Dr. Garcia-Cantu to drain the wound. Further, based on his experience at Casas's bedside, her son pinpointed the tragic events of September 11, 2001, and their effect on his mother as the turning point in her mental state. The latter event was some seven weeks after discovery of the lapsed prescriptions and after Casas's discharge from and re-admission to the Hospital. This evidence does not bear out the Casases' claim of a marked shift in Casas's mental resilience following the omission of the medications.

More importantly, Casas's husband and son were unable to precisely identify the cause of her suffering. While they could accurately describe her discomfort, they were unable to say if it was the cancer, the surgery, the other infections, or the lapse that caused it. Even testimony that Casas suffered after learning of the omission raises no more than a mere suspicion of causation, and that is not enough, *see Guevara*, 247 S.W.3d at 668, particularly in light of the evidence that Casas thought she was cured of cancer before the surgery and then learned that not only was it "back with a vengeance," it was terminal. The testimony of Casas's husband and son is evidence of her suffering, but not of its cause. Thus, we hold that the lay testimony presented by the Casases is

legally insufficient to establish that the Hospital's negligence caused Casas additional pain and suffering.

2. Expert Testimony

The Casases also presented expert testimony regarding causation. The Casases' expert, Dr. Daller, testified that the Hospital's negligence "in medical probability" caused Casas additional pain and suffering. He based this opinion on the presence of an intra-abdominal infection that could have been treated using Maxipime and Flagyl. Admitting that no direct evidence indicated such an infection, Dr. Daller pointed to various circumstantial indicators that suggested an infection. These indicators were primarily Casas's changed vital signs, such as fever and increased heart rate: "Well, given the fact that two to three days after the antibiotics had been mistakingly [sic] stopped her fever curve went up and her heart rate went up, to me that suggests the presence of on going [sic] infection."[6] But on cross-examination, he conceded these data were equally consistent with two other infections cultured from Casas's incision and blood—Candida and coagulase-negative staph—neither of which is treatable by Maxipime or Flagyl:

> Q. Now, Candida, infection of a wound like this, they can cause high temperatures. Correct?

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[6] When asked if the lapsed prescriptions affected Casas's hospital stay, Dr. Daller equivocated:

> A. I think that it certainly did impact it. However, I cannot quantitate that because there are multiple variables that are present in a clinical condition. Whether it lengthened her stay by one day, two days, three days, I cannot say that. What I would say from a scientific standpoint is that for four and a half days she did not receive appropriate therapy. Had she received the appropriate therapy then *you would expect* her length of stay to be shortened somewhat. To quantitate that, I could not do that.
>
> . . . .
>
> A. Obviously, not receiving antibiotics is not going to shorten your stay. Therefore, *if it impacted the stay* it must have lengthened it. (emphases added).

A. Fungal infections can cause a high temperature, yes.

Q. It can cause increased heart rate?

A. That is correct.

Q. And inflammation?

A. That is correct.

Q. Pain?

A. That is correct.

Q. How about an abscess?

A. It caused or is part of the abscess in that wound that was present, that wound infection that needed to be opened.

Q. So when Doctor Garcia went in on 7/23 . . . and drained that wound at bedside that abscess was within a reasonable degree of medical probability caused by the Candida?

A. That was one of the organisms that was there. It was the organism that was cultured. That is correct.

. . . .

Q. . . . This coagulase negative staph causes fever?

A. Correct.

Q. Increased heart rate?

A. The fever will cause increased heart rate.

. . . .

Q. It can cause pain?

A. Depending upon the site. Correct.

Q. Okay. All of these things can be caused by coagulase negative staph and Candida, which we know were present 7/18 through 7/23, the time period she did not get antibiotics?

A. That's correct.

Q. Neither one would have been killed by Maxipime or Flagyl?

A. That's correct.

It is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury. The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury. We have rejected expert opinions not grounded in a sound evidentiary basis: "[I]f no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection. '[A] claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.'" *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)); *see also Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009) ("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."). When the only evidence of a vital fact is circumstantial, the expert cannot merely draw possible inferences from the evidence and state that "in medical probability" the injury was caused by the defendant's negligence. The expert must explain why the inferences drawn are medically preferable to competing inferences that are equally consistent with the known facts. Thus, when the facts support several possible conclusions, only some of which establish that the defendant's negligence

caused the plaintiff's injury, the expert must explain to the fact finder why those conclusions are superior based on verifiable medical evidence, not simply the expert's opinion. *See Lenger*, 455 S.W.2d at 707 ("[E]xpert testimony that the event is a possible cause of the condition cannot ordinarily be treated as evidence of reasonable medical probability except when, in the absence of other reasonable causal explanations, it becomes more likely than not that the condition did result from the event."); *Hart*, 399 S.W.2d at 792 ("The burden of proof is on the plaintiff to show that the injury was negligently caused by the defendant and it is not enough to show the injury together with the expert opinion that it might have occurred from the doctor's negligence and from other causes not the fault of the doctor. Such evidence has no tendency to show that negligence did cause the injury.").

By conceding that Casas's symptoms were consistent with infections not treatable by Maxipime or Flagyl, Dr. Daller undermined his conclusion that an undetected infection was also present. While it is possible that Casas did have such an infection, its presence can only be inferred from facts that are equally consistent with the Candida and coagulase-negative staph infections. "'When the circumstances are equally consistent with either of two facts, neither fact may be inferred.'" *City of Keller*, 168 S.W.3d at 813 (quoting *Tubelite*, 819 S.W.2d at 805). Here, objective data—the cultures—support the Candida and staph infections but not the supposed anaerobic infection.[7]

[7] Admittedly, anaerobic bacteria are hard to culture because they are averse to oxygen.

Based on the record evidence, an anaerobic infection cannot be proved or disproved. It is equally plausible that Casas had such an infection or that she did not. Dr. Daller opined that she did, but he did not explain why that opinion was superior to the opposite view. Such evidence raises no more than a possibility of causation, which is insufficient. As we said in *Bowles v. Bourdon*, "'[t]he proof must establish causal connection beyond the point of conjecture. It must show more than a possibility. Verdicts must rest upon reasonable certainty of proof. Where the proof discloses that a given result may have occurred by reason of more than one proximate cause, and the jury can do no more than guess or speculate as to which was, in fact, the efficient cause, the submission of such choice to the jury has been consistently condemned by this court and by other courts.'" 219 S.W.2d at 785 (quoting *Ramberg v. Morgan*, 218 N.W. 492, 498–99 (Iowa 1928)).

The Casases argue that the foul smell, which is consistent with an anaerobic infection, is strong evidence of such an infection. Looking at the patient notes for July 24, Dr. Daller commented on the smell:

> A. The text says something about drainage to the abdomen with moderate amount of drainage. And it says that it is foul smelling.
>
> . . . .
>
> Q. The [previous notes] that I remember that we have gone over didn't say anything about foul smelling?
>
> A. That's correct. They were just described as I recall as being purulent and looking like puss [sic].
>
> Q. What does that mean when it says "foul smelling"?

> A. When you have foul smelling, it suggests that the organism is an anaerobe. In other words, one of those bacteria that didn't need oxygen in order to grow that, for example, Flagyl would treat.
>
> Q. Okay. Does that give you clinical evidence that had she been continued on Maxipime and Flagyl that they would have had some effect with regards to the condition as we see it on the 24th?
>
> A. Well, like I said, most anaerobes are sensitive or susceptible to Flagyl. And she had previously been on Flagyl and at this time she is not. So I would have expected that that would be an appropriate antibiotic that would have covered the organism that's causing that foul smell.

Dr. Berkowitz, the Hospital's expert, offered several other explanations for the smell, including necrotic tissue, dead cancer tissue, and the Candida infection.[8] As noted, Casas's son noticed the smell after the incision was opened to drain the abscess, which Dr. Daller admitted was likely caused by Candida.

Here again, there are competing explanations for the smell, which amounts to no more than circumstantial evidence of some kind of infection or possibly dying tissue. Because there is no direct evidence of the infection and the circumstantial evidence is meager, we "must consider not just

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[8] Dr. Berkowitz testified:

> I think that there are a number of things that can cause things smelling bad besides just infection. Tissue that dies doesn't smell good. There's bacteria and products released by the dead tissue that don't smell good.
>
> And we know based on the pathology report of the cancer that they took out of her abdomen, that this had grown enough that it was dying. In other words, it was probably outgrowing it's [sic] blood supply and was starting to die. That in and of itself can smell bad. Then you have a wound that is infected; although Candida itself does not typically smell bad, not like something dead. It smells funky and people don't like the way it smells. The wound itself when it wasn't healing was probably having some necrotic tissue, as well, or dead tissue that is in the wound. I'm sure that smelled bad, as well. And they were never able to completely get rid of all that dead cancer tissue that was in her abdomen.
>
> I think there's a number of reasons why she would have had a bad smell, none of which can be explained by four or five days of not getting Flagyl [or] Maxipime.

favorable but all the circumstantial evidence, and competing inferences as well." *City of Keller*, 168 S.W.3d at 814. Courts should not usurp the jury's role as fact finder, nor should they question the jury's right to believe one witness over another. But when reviewing a verdict for sufficiency of the evidence, courts need not—indeed, must not—defer to the jury's findings when those findings are not supported by credible evidence. When the evidence compels the jury to guess if a vital fact exists, a reviewing court does not undermine the jury's role by sustaining a no-evidence challenge. The evidence in this case—being consistent with an anaerobic infection that was treatable by Flagyl, a fungal infection that was not, or even with dying tissue, cancerous or otherwise—did not provide the jury a reasoned basis from which to infer the presence of a negligence-induced infection. Because the jury could not reasonably infer an infection caused by the Hospital's negligence, we agree with the Hospital that no evidence supports the jury's verdict.

We understand the Casas family's predicament and frustration at the Hospital's conduct, and we recognize the difficulty of proving that the lapsed prescriptions caused a painful infection. But the Casases shouldered that burden and must prove the causal link with reasonable certainty. In that quest, the Casases offered the testimony of Dr. Daller, but he did not explain why an undetected, anaerobic infection is medically more probable than one based on the known infections and the dying tissue, leaving the jury to guess if the lapsed prescriptions caused additional pain and suffering. Without probative medical testimony that the lapse caused—by means of an infection treatable by Maxipime and Flagyl—more pain than the cancer, the surgery, and the other infections already inflicted, there is no legally sufficient evidence of causation. Dr. Daller did not provide that causal link; accordingly, we hold that his testimony is legally insufficient to support the jury's verdict.

Because the Casases failed to prove causation, we reverse the judgment of the court of appeals and render judgment that the Casases take nothing.

B. Adequacy of the Expert Report

In his petition, Dr. Jelinek raises a single issue: whether the trial court abused its discretion by denying his motion for sanctions and dismissal because the Casases' expert report was deficient under former article 4590i § 13.01, the statute in effect at the time. *See* TEX. REV. CIV. STAT. art. 4590i § 13.01. Article 4590i required the report to provide "a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." *Id.* § 13.01(r)(6). "If a plaintiff timely files an expert report and the defendant moves to dismiss because of the report's inadequacy, the trial court must grant the motion '*only if* it appears to the court, after hearing, that the report does not represent a *good faith effort* to comply with the definition of an expert report in Subsection (r)(6) of this section.'" *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 51–52 (Tex. 2002) (per curiam) (quoting § 13.01(l)). Dismissal for failure to serve an adequate expert report also carried mandatory sanctions, requiring an award to the defendant of his costs and attorney's fees against the plaintiff or the plaintiff's attorney. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001) (citing § 13.01(e)).

We have defined a "good-faith effort" as one that provides information sufficient to (1) "inform the defendant of the specific conduct the plaintiff has called into question," and (2) "provide a basis for the trial court to conclude that the claims have merit." *Wright*, 79 S.W.3d

at 52 (citing *Palacios*, 46 S.W.3d at 879). All information needed for this inquiry is found within the four corners of the expert report, which need not "marshal all the plaintiff's proof" but must include the expert's opinion on each of the three main elements: standard of care, breach, and causation. *Id.* Importantly for this case, the "report cannot merely state the expert's conclusions about these elements," but "'the expert must explain the basis of his statements to link his conclusions to the facts.'" *Id.* (quoting *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)). "A report that merely states the expert's conclusions about the standard of care, breach, and causation" does not fulfill the two purposes of a good-faith effort. *Palacios*, 46 S.W.3d at 879.

We review the trial court's grant or denial of a motion for sanctions and dismissal under the abuse-of-discretion standard. *Palacios*, 46 S.W.3d at 877–78. A district court "abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles." *Wright*, 79 S.W.3d at 52 (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)).

Dr. Jelinek argues that the Casases' report is deficient in two ways, failing (1) to state the applicable standard of care, and (2) to provide more than conclusory statements of causation. We focus on the latter. Dr. Daller's report concluded that Dr. Jelinek's breach of the appropriate standard of care in "reasonable medical probability, resulted in a prolonged hospital course and increased pain and suffering being experienced by Ms. Casas." Aside from repeating essentially the same phrase twice more, the report says nothing more regarding causation. The Casases argue this statement is sufficient to meet the good-faith requirement. We disagree.

An expert cannot simply opine that the breach caused the injury. Stated so briefly, the report fails the second *Palacios* element—it does not give the trial court any reasonable basis for concluding that the lawsuit has merit. *See* 46 S.W.3d at 879. An expert's conclusion that "in medical probability" one event caused another differs little, without an explanation tying the conclusion to the facts, from an *ipse dixit*, which we have consistently criticized. *See Pollock*, 284 S.W.3d at 818 (citing *Burrow*, 997 S.W.2d at 235); *Earle*, 998 S.W.2d at 890 ("An expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of his statements to link his conclusions to the facts."). Instead, the expert must go further and explain, to a reasonable degree, how and why the breach caused the injury based on the facts presented. While we have said that no "magical words" need be used to meet the good-faith requirement, mere invocation of the phrase "medical probability" is likewise no guarantee that the report will be found adequate. *See Wright*, 79 S.W.3d at 53.

Under these standards, the Casases' report is conclusory on causation. It offers no more than a bare assertion that Dr. Jelinek's breach resulted in increased pain and suffering and a prolonged hospital stay. Beyond that statement, the report offers no explanation of how the breach caused the injury. Again, the plaintiff need not marshal all of his proof in the report, but he must include sufficient detail to allow the trial court to determine if the claim has merit. Because the Casases' report lacks any explanation linking the expert's conclusion to the relevant facts, we hold that the trial court abused its discretion by denying Dr. Jelinek's motion and the court of appeals erred by

affirming that ruling.[9] *See id.* at 52. Accordingly, we remand the case to the trial court for an award of attorney's fees and costs[10] under former article 4590i § 13.01(e) against the Casases and their counsel.[11]

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[9] In his dissent, CHIEF JUSTICE JEFFERSON argues that an expert report need not meet the legal sufficiency requirements necessary to support a judgment and suggests that we hold it must. We agree that an expert report need not "meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial." *Palacios*, 46 S.W.3d at 879. But, as we stated earlier, the report must provide more than conclusory statements concerning applicable standards of care, breach of those standards, and causation. *See id.* An expert report must instead, within its four corners, provide some explanation as to each of these elements. TEX. REV. CIV. STAT. art. 4590i § 13.01(r)(6); *Wright*, 79 S.W.3d at 52. The report here offered only a conclusory statement concerning causation with no explanation as to how the lapse in antibiotic treatment resulted in longer hospitalization, increased pain and suffering, or ultimately Casas's death.

[10] In her dissent, JUSTICE LEHRMANN indicates that (1) she would remand the case to allow the Casases an opportunity to show that their failure to present an adequate report was not intentional or the result of conscious indifference, and (2) Dr. Jelinek should not be entitled to attorney's fees and costs if the Casases can make this showing and submit an adequate report. We note that the Casases did not request a remand of this nature, nor brief the attorney's fees issue. *See State v. Brown*, 262 S.W.3d 365, 370 (Tex. 2008) (observing that "[a] party generally is not entitled to relief it does not seek" and refusing to sua sponte grant relief that was not sought); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 410 (Tex. 1997) (noting that ordinarily, failure to brief an argument waives error on appeal); TEX. R. APP. P. 38.1(h).

[11] We briefly note that under former article 4590i a trial court's order denying a motion to dismiss premised on an inadequate expert report was not immediately appealable, as it now is under Texas Civil Practice and Remedies Code §§ 51.014 and 74.351. Nor did we definitively say that mandamus review was appropriate for such orders until almost four years after the trial court denied Dr. Jelinek's motion for dismissal and sanctions. *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 461–62 (Tex. 2008). Thus, we do not fault Dr. Jelinek for waiting until final judgment to seek review of the trial court's order. *See Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009) ("Generally, appeals may only be taken from final judgments . . . .").

We mention this point because we have since cautioned that a defendant—having foregone the interlocutory appeal now available—risks losing the right to appeal following final judgment if, after a trial on the merits, the jury finds the defendant liable. *See id.* at 321. Even if the present statute applied here, this caution would not bar Dr. Jelinek's appeal because he was not a party at trial, having been nonsuited earlier. We will not bar a nonsuited defendant's appeal after final judgment because the jury finds him liable at a former codefendant's trial. Such a defendant did not call or cross-examine witnesses, present evidence, or otherwise participate at trial and should not be bound by what happens there.

III. Conclusion

For the foregoing reasons, we reverse the court of appeals' judgment, render judgment that the Casases take nothing, and remand to the trial court for an award of Dr. Jelinek's attorney's fees and costs consistent with this opinion.

_____
Eva M. Guzman
Justice

OPINION DELIVERED: December 3, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-1066

MICHAEL T. JELINEK, M.D. AND COLUMBIA RIO GRANDE HEALTHCARE, L.P. D/B/A RIO GRANDE REGIONAL HOSPITAL, PETITIONERS,

v.

FRANCISCO CASAS AND ALFREDO DELEON, JR., AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ELOISA CASAS, DECEASED, RESPONDENTS

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

Argued February 18, 2010

CHIEF JUSTICE JEFFERSON, joined by JUSTICE GREEN and JUSTICE LEHRMANN, dissenting in part.

We must decide whether an expert report gave a "fair summary" of the expert's opinions regarding standard of care, failure to meet the standard, and the link between that failure and the patient's damages. We must consider the expert's opinions "as of the date of the report." TEX. REV. CIV. STAT. art. 4590i § 13.01(r)(6) (repealed 2003). To do so, we must disregard today's holding that, at trial, there was no evidence linking the discontinuation of antibiotics to increased suffering by Casas. The expert report submitted in this case gave fair notice of a meritorious claim—that the doctor failed to ensure that his patient received antibiotics, thereby increasing her pain and suffering. I would affirm the court of appeals' judgment with respect to the doctor.

I. Background

Eloisa Casas, a patient recently diagnosed with colon cancer, was admitted to Rio Grande Hospital for abdominal pain. The cancer had perforated her colon, the contents of which leaked into her abdominal cavity, causing an abscess. After the doctor drained and surgically removed the abscess, he discovered that Casas had an E. coli infection, for which the doctor prescribed two antibiotics. Although those prescriptions were supposed to have been renewed five days later, they lapsed. Casas contends this mistake occurred because the doctor failed to ensure that hospital staff complied with his renewal order. During the four days after the prescriptions expired, Casas's surgical incision began to emit a putrid odor. She developed several infections in addition to E. coli, exacerbating her pain and extending her stay in the hospital. Casas died two months after she was discharged.

Casas's estate sued the Hospital and two of the treating doctors, Dr. Garcia-Cantu and Dr. Jelinek, for negligently causing Mrs. Casas "grievous embarrassment and humiliation, as well as excruciating pain the remainder of her life which she would not have suffered to such degree if properly diagnosed, treated and cared for . . . ." The trial court denied Dr. Jelinek's motion to dismiss the case against him. Nevertheless, the estate nonsuited both doctors more than a year before Casas's claim against the Hospital was tried to a jury. At that trial, the jury found the hospital 90% negligent, and each doctor 5% negligent. The trial court rendered judgment against the hospital, and the court's order non-suiting Dr. Jelinek "with prejudice" merged into that final judgment.

Dr. Jelinek and the hospital appealed the trial court's judgment. The hospital complained that the evidence was legally insufficient to support the verdict. Dr. Jelinek complained that the trial

court improperly denied him attorney's fees, as the expert report was not a good faith effort to comply with statutory requirements. The court of appeals affirmed, 2008 Tex. App. LEXIS 5647, *28-*29, and the appellants below are now petitioners here. I fully join the Court's rendition of judgment for the hospital. I disagree with the Court's holding as to the doctor.

II. Good faith effort; fair summary

Former article 4590i provided that "[a] court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent a good faith effort to comply with the definition of an expert report in [the statute]." TEX. REV. CIV. STAT. art. 4590i § 13.01(l). "That definition requires, as to each defendant, a fair summary of the expert's opinions about the applicable standard of care, the manner in which the care failed to meet that standard, and the causal relationship between that failure and the claimed injury." *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001) (citing TEX. REV. CIV. STAT. art. 4590i § 13.01(r)(6)). Because an expert report is filed long before discovery is complete, we cannot judge it according to what subsequent discovery reveals or how the evidence develops at trial. The question is whether the report fairly summarizes the malpractice elements before the case is tested in a full adversary process. For that reason, "to avoid dismissal, a plaintiff need not present evidence in the report as if it were actually litigating the merits. The report can be informal in that the information in the report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial." *Id*. at 879.

The report must also give the defendant notice of the conduct the plaintiff challenges, and the trial court must have a basis to determine whether the claim has merit. *Id*. The dividing line

between a sufficient and an inadequate report is impossible to draw precisely. We have said, therefore, that the determination must be made in the first instance by the trial court, and review of that decision asks not how an appellate court would have resolved the issue, but instead whether the trial court abused its discretion. *See, e.g.*, *Jernigan v. Langley*, 195 S.W.3d 91, 93 (Tex. 2006); *Walker v. Gutierrez*, 111 S.W.3d 56, 63 (Tex. 2003).

III. Dr. Daller's report

Dr. Daller is a physician and an expert on intra-abdominal abscesses and infection. His report states that a doctor treating a patient like Casas must ensure that the antibiotics he prescribes are actually administered. Despite that standard, Dr. Daller states that antibiotics prescribed for Ms. Casas were not administered from July 17 through July 23, even though "[t]here [wa]s no order to discontinue the antibiotic therapy." He concluded that Dr. Jelinek breached the standard of care by his "failure to recognize that the antibiotics were not being administered as ordered." Dr. Daller concludes that "[t]his breach in the standard of care . . . , within reasonable medical probability, resulted in a prolonged hospital course and increased pain and suffering . . . ."

IV. Dr. Daller gave a "fair summary" of the required standard of care and how the allegedly inadequate care fell below that standard.

The Court concludes that Dr. Daller's report lacks the detail necessary to conclude that the estate's lawsuit has merit. But the cases it cites as support involve situations in which a hindsight view is entirely appropriate. *Earle v. Ratliff*, for example, is a summary judgment case; it presents the higher evidentiary standard that *Palacios* rejected for expert reports. *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999) ("Summary judgment can be granted on the affidavit of an interested expert

witness, . . . but the affidavit must not be conclusory. . . . [R]ather, the expert must explain the basis of his statements to link his conclusions to the facts."). Similarly, the standard employed in *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817-18 (Tex. 2009), also cited by the Court, is inapplicable here, since it examined an expert report under the "no evidence" standard of review. *See* ___S.W.3d at___.

In *Palacios* we held that an expert report that failed to articulate a standard of care or explain how the defendant hospital breached that standard was not a good faith effort to comply with the statutory requirements. *Palacios*, 46 S.W.3d at 880. The expert in that case blamed the hospital for taking no action to prevent a patient from falling out of his bed, even though the patient "had a habit of trying to undo his restraints." *Id*. at 879-880. The report, as such, was not a fair summary of the evidence because it neglected to articulate what actions the hospital *should* have taken that it did not. *Id*. at 880. Thus, the trial court did not abuse its discretion by dismissing the plaintiff's claim for lack of a good faith effort to summarize the expert's opinions.

Subsequently, in *Bowie Memorial Hospital v. Wright,* we held that the trial court did not abuse its discretion in concluding that an expert report failed to comply with the statute, as the report did not "establish how any act or omission of employees of Bowie Memorial Hospital caused or contributed to [the patient's] injuries." *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 51-53 (Tex. 2002) (quoting the expert in that case as speculating, "I do believe that it is reasonable to believe that if the x-rays would have been correctly read and the appropriate medical personnel acted upon those findings then [the plaintiff] would have had the possibility of a better outcome."). We observed that a report must satisfy *Palacios*'s two-part test. *Id*. at 52. Because the report "lack[ed]

information linking the expert's conclusion (that [the plaintiff] might have had a better outcome) to [the defendant's] alleged breach (that it did not correctly read and act upon the x-rays), the trial court could have reasonably determined that the report was conclusory." *Id*. at 53.

In each of those cases, the trial court could not have evaluated the claim's merit without speculating about actions the defendant could have taken to prevent injury. No such speculation is required here. Dr. Daller states that had the antibiotics been administered from July 17 through July 23, Eloisa Casas would have suffered less. Dr. Daller could have stated that conclusion in greater detail, of course, but "[a] report need not marshal all the plaintiff's proof." *Palacios,* 46 S.W.3d at 878. Daller's report includes his opinions on (1) the applicable standard of care (to maintain vigilance over a patient's treatment), (2) the manner in which the care failed to meet that standard (failing to ensure the treatment he ordered was actually administered), and (3) the causal connection between the failure and the claimed injury (without the antibiotics, the patient's pain and suffering increased and she required additional hospitalization).

A "good faith effort" does not require that the report "meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial"; therefore, an expert report does not fail the good faith effort test merely because it may not later prove legally sufficient to support a judgment. *Id*. at 879. So, here, whether the Casas estate ultimately amassed sufficient proof in an adversarial trial is beside the point; the claim itself was far from frivolous. *See id*. at 878 (noting that "one purpose of the expert-report requirement is to deter frivolous claims"). The law imposes a penalty for filing a frivolous suit. Only by today's decree does it also punish a claimant for failing to win an arguably meritorious case. *Cf. TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d

913, 918 (1991) (holding that "sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the . . . process justifies a presumption that its claims or defenses lack merit.").

I agree with the Court that the Estate failed to prove causation at trial; I disagree that, as to Dr. Jelinek, the expert report was not a good faith attempt to comply with the statute. I respectfully dissent in part from the Court's judgment.

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: December 3, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-1066

MICHAEL T. JELINEK, M.D. AND COLUMBIA RIO GRANDE HEALTHCARE, L.P. D/B/A RIO GRANDE REGIONAL HOSPITAL, PETITIONERS,

v.

FRANCISCO CASAS AND ALFREDO DELEON, JR., AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ELOISA CASAS, DECEASED, RESPONDENTS

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

Argued February 18, 2010

JUSTICE LEHRMANN, dissenting in part.

I fully join Chief Justice Jefferson's dissent. I write separately, however, to highlight the incongruity inherent in the Court's decision to remand the case for an award of attorney's fees and costs under former article 4590i § 13.01(e), given this case's circumstances. *See* TEX. REV. CIV. STAT. art. 4590i § 13.01(e) (repealed 2003)[1]. The Court presumes that Dr. Michael Jelinek is entitled to attorney's fees because the expert report filed by Eloisa Casas's estate[2] was, on appeal,

[1] *See* Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, 986, *amending* the 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. For ease of reference, I will refer to the relevant provisions as they were identified in article 4590i.

[2] I refer to the estate, which was represented by Casas's husband and son, as "the Casases."

determined to be insufficient. But, after a pre-trial hearing was held on the defendant's motion to dismiss the lawsuit, the trial court rejected Dr. Jelinek's contention that the report was inadequate; consequently, the Casases had no opportunity to rectify any deficiencies as the statute and our precedent would have allowed.

Section 13.01(e) of article 4590i provided for an order awarding attorney's fees and costs if a health care claimant failed to supply an expert report within the time required under subsection (d)—180 days. But the statute provided several avenues for health care claimants to obtain an extension of the 180-day deadline, including section 13.01(g). That provision required the trial court to grant a thirty-day extension of the statutory deadline if a claimant's failure to provide an expert report was not intentional or the result of conscious indifference. And we have expressly held that "a party who files a timely but inadequate expert report may seek relief under the grace period provisions of section 13.01(g)." *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003). Thus, health care claimants could receive an opportunity to rectify deficiencies in a report if they could show that they did not intentionally, or with conscious indifference, submit an inadequate report.

Here, the Casases never had the chance to request an opportunity to cure any deficiencies in their report because the trial court determined that the report adequately complied with section 13.01(d). In *Gutierrez*, we were guided by our recognition that it would be "perverse" to allow a claimant who filed no report a second chance to comply with the statute's expert report requirement, while "punishing those who attempt to comply with the statute but fail." *Id.* In this case, perversely, the Casases may have been in a better position than they are now if the trial court had found that the report was inadequate; they might have had an opportunity to eliminate any deficiencies.

I agree fully with Chief Justice Jefferson that the report represents a good-faith effort to comply with section 13.01. Even if it did not, however, I would remand the case to allow the Casases an opportunity to show that their failure to present an adequate report was not intentional or the result of conscious indifference. See City of DeSoto v. White, 288 S.W.3d 389, 401 (Tex. 2009) (remanding in the interest of justice *sua sponte* to allow police officer "to make an appellate election with full knowledge of his appellate rights and with knowledge of" the guidance provided in Court's opinion). In my view, the Casases should not be assessed attorney's fees and costs if they can make the showing section 13.01(g) requires and then submit a report complying with the statute. For these reasons, as well as those expressed by Chief Justice Jefferson, I respectfully dissent in part.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: December 3, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0025

HARRIS METHODIST FORT WORTH, PETITIONER,

v.

JO FAWN OLLIE, RESPONDENT

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

PER CURIAM

At issue in this appeal is whether a patient's claim against a hospital for injuries suffered when she slipped and fell on a wet bathroom floor during her post-operative confinement constitutes a health care liability claim (HCLC). We hold that it does.

Jo Fawn Ollie underwent total arthroplasty knee replacement surgery at Harris Methodist Hospital. She alleges that during her post-surgery hospitalization she took a bath, slipped on the wet floor while getting out of the bathtub, and injured her right shoulder. She sued the hospital.

In Ollie's original petition she asserted under a "general negligence theory" that the hospital owed her "the duty to provide a safe environment, maintained properly, so as to not cause harm and/or injury." She claimed that the hospital breached that duty by failing to properly maintain the floor and warn her of the dangerous condition. In a separate part of her pleading, Ollie asserted what she labeled as a "medical malpractice" cause of action based on the same facts as her general

negligence claim. In the medical malpractice section of her pleadings, she claimed the hospital breached its duty "by failing to provide a safe environment, maintained properly, so as to not cause harm and/or injury." She alleged that Harris Methodist breached that duty in the same manner as it was generally negligent: by failing to properly maintain the floor and warn her of the dangerous condition. On the day she filed suit Ollie sent the hospital a statutory notice letter. *See* TEX. CIV. PRAC. & REM. CODE § 74.051(a). She subsequently amended her petition and omitted the allegations that had been labeled as a medical malpractice claim.

Ollie did not serve an expert report, so the hospital filed a motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a) (requiring an HCLC claimant to serve an expert report within 120 days of filing suit). The trial court denied the hospital's motion. A divided court of appeals affirmed, concluding that Ollie's claim was for a breach of ordinary care and thus was not an HCLC. ___ S.W.3d ___. The dissenting justice was of the opinion that the claim was an HCLC because Ollie claimed that the hospital's actions departed from accepted standards of safety and were directly related to actions Harris Methodist took or failed to take during her confinement. ___ S.W.3d ___ (Walker, J., dissenting).

In this Court, the hospital argues that the court of appeals erred (1) in its construction of the definition of an HCLC, and (2) by concluding that Ollie's claim is not an HCLC. Ollie maintains that the court of appeals was correct: her claim is not an HCLC and she was not required to serve an expert report. We disagree with Ollie.

In 2003, the Texas Legislature repealed the Texas Medical Liability and Insurance Improvement Act and recodified it in the Texas Civil Practice and Remedies Code as the Texas

Medical Liability Act.[1] At that time the definition of "health care liability claim" was amended to add the phrase "or professional or administrative services directly related to health care." As applicable to Ollie's case, an HCLC is

> [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 or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). "Health care" remained defined as

> any act or treatment performed or furnished, or that 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. § 74.001(a)(10); *see Diversicare v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005) (describing health care as "broadly defined"). The TMLA does not define "safety." *See id.*

In support of its argument that Ollie's claim is an HCLC because it is a claimed departure from accepted standards of safety, Harris Methodist first argues that section 74.001(a)(13) does not require that a safety claim be "directly related to health care." The hospital maintains that the Legislature did not intend to substantively alter the scope of the definition by adding language to section 74.001(a)(13). It proposes we construe the statute to mean that "directly related to health care" modifies only the words "professional or administrative services" and not the word "safety." *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 10.01, 10.09, 2003 Tex. Gen. Laws 847, 864, 884 (current version at TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13)). The hospital further asserts

[1] Medical Liability and Insurance Improvement Act, 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 (current version at TEX. CIV. PRAC. & REM. CODE §§ 74.001-.507).

that even if the statute requires that safety claims be directly related to health care to be HCLCs, Ollie's claim is so related. We agree that Ollie's claim is directly related to health care and is an HCLC.[2]

In determining whether a claim falls within the scope of section 74.001(a)(13), courts are not bound by the form of the pleading. *See Yamada v. Friend*, ___ S.W.3d ___, ___ (2010); *Diversicare*, 185 S.W.3d at 847; *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543-44 (Tex. 2004). Rather, the underlying nature of the claim determines whether it is an HCLC, and the statutory requirements cannot be circumvented by artful pleading. *Yamada*, ___ S.W.3d. at ___. Thus, it is the underlying nature of Ollie's claim that determines whether the claim is for a departure from accepted standards of safety relating to "an act . . . that should have been performed or furnished by [Harris Methodist] for, to, or on behalf of [Ollie] during [Ollie's] medical care, treatment, or confinement." *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10), (13). And services a hospital provides its patients necessarily include those services required to meet patients' fundamental needs such as cleanliness—whether that cleanliness is obtained by means of hospital employees cleaning or bathing the patient, or by providing means for the patient to do so herself—and safety.

The essence of Ollie's claim centers on the failure of Harris Methodist to act with a proper degree of care to furnish a dry floor, warn her of the hazards of a wet bathroom floor, or some similar failure to act. *See Garland*, 156 S.W.3d at 543-44 (explaining that the Court is not bound by the manner in which the plaintiff's pleadings characterize the claim in determining whether the claim

[2] Because we agree with Harris Methodist that Ollie's safety claim is directly related to health care, we need not address here whether safety claims must be so related to fall within the definition of an HCLC. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10), (13).

is an HCLC). Ollie's pleadings show that her action is a safety claim directly related to services meeting her fundamental needs. The claim falls within the statutory definition of an HCLC and she was required to serve an expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

Because Ollie was required to, but did not, serve an expert report, the trial court should have dismissed her claim. The court of appeals erred in holding otherwise.

Harris Methodist requested its attorney's fees and costs in the trial court pursuant to Texas Civil Practice and Remedies Code section 74.351(b)(1). Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court with instructions to dismiss Ollie's claims against Harris Methodist and consider the hospital's request for attorney's fees and costs.

OPINION DELIVERED: May 13, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0026

WIND MOUNTAIN RANCH, LLC, PETITIONER,

v.

CITY OF TEMPLE, TEXAS, RESPONDENT

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

PER CURIAM

In this case, we decide whether Wind Mountain Ranch's foreclosure of its deed-of-trust lien was barred by limitations. Texas registration law allows debtors and creditors to suspend limitations, but requires that extension agreements be recorded. TEX. CIV. PRAC. & REM. CODE § 16.037. Today's question is whether a bankruptcy order enforcing a Chapter 11 restructuring plan is a debtor-creditor extension agreement under the terms of the statute. We answer "no"—a bankruptcy order is not subject to section 16.037's recording requirements. We reverse the court of appeals' judgment and, without hearing oral argument, render judgment in favor of Wind Mountain Ranch.

Robert K. Utley, as trustee, signed a note secured by a deed of trust encumbering 6.16 acres of land in Bell County, Texas. The note was set to mature in 1993. The property was later conveyed

to Centex Investments. Centex agreed to assume all of Utley's obligations under the note and deed of trust. In 1992, Centex commenced voluntary Chapter 11 proceedings in the Central District of California. A *lis pendens* referencing the ongoing Chapter 11 proceeding was recorded in the real-property records of Bell County. The bankruptcy court confirmed Centex's reorganization plan and issued an order in 1994. The reorganization plan extended the note's 1993 maturity date to 1999. Neither Centex's reorganization plan, nor the bankruptcy court's confirmation order were filed in Bell County.

The City of Temple, alleging numerous municipal code violations, filed suit against Centex in 2002. The City obtained a judgment against Centex for $936,250 in December 2002, and recorded an abstract of its judgment on May 22, 2003. On July 3, 2003, the note and deed of trust were assigned to Wind Mountain Ranch. Wind Mountain then acquired the 6.16 acres securing the note at a non-judicial foreclosure sale.

Following Wind Mountain's acquisition, the City brought claims of fraudulent transfer, wrongful foreclosure, and conspiracy. The City also sought a declaration that, because the foreclosure occurred after the four-year statute of limitations lapsed, Wind Mountain's foreclosure was invalid. The City further contends that the extension of the maturity date was never recorded in Bell County, and is therefore void. The City presumes that the bankruptcy order, and its extension of the maturity date, was effectively an extension agreement subject to section 16.037's recording requirements.

Following a bench trial, the trial court rendered judgment for the City. The court of appeals affirmed, holding the order was subject to section 16.037. *Wind Mountain Ranch, LLC v. City of Temple*, ___ S.W.3d ___. The court of appeals noted that Texas registration laws "seek[] to require that the public records disclose all matters affecting land titles." *Id.* (internal citation omitted). The court further held that, although the *lis pendens* was constructive notice of the California bankruptcy proceeding, it was not actual notice. *Id.*

A party who sues to recover real property subject to a lien or who intends to foreclose on a lien encumbering real property must do so within four years of the date on which the cause of action accrues. TEX. CIV. PRAC. & REM. CODE § 16.035(a). "The party or parties primarily liable for a debt or obligation secured by a real property lien" may suspend the statute of limitations on the lien by executing a written extension agreement. *Id.* § 16.036(a). The Code further requires that any such agreements are to be filed in the county clerk's office and "signed and acknowledged as provided by law for a deed conveying real property." *Id.* § 16.036(b). An extension agreement is without effect against "a bona fide purchaser for value, a lienholder, or a lessee" who, "without actual notice of the agreement and before the agreement is acknowledged, filed, and recorded," deals with the real property that is subject to a lien. *Id.* § 16.037.

Guided by the principle that the words the Legislature uses are the clearest guide to its intent, we begin our analysis with the statute's plain language. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). When the words of the statute are clear and unambiguous we interpret

them according to their plain and common meaning. *City of Rockwell v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008). That the Civil Practice and Remedies Code requires an extension *agreement* to be recorded is not in dispute; however, its plain language imposes no such requirement on a bankruptcy court order. TEX. CIV. PRAC. & REM. CODE §§ 16.035–.037. Neither can we say that an order issued by the bankruptcy court amounts to an agreement between the parties. *See id.* § 16.036(b). It necessarily follows that a bankruptcy court order need not be recorded to effectively extend a note's maturity date. The Code's requirements for recording an extension agreement are clear and unambiguous; we therefore decline to look beyond the statute's plain language. As such, the maturity date of the note was effectively extended to 1999. Wind Mountain foreclosed on the property before the statute of limitations lapsed, and its interest is superior to the City's.

Accordingly, without hearing oral argument, we reverse the court of appeals' judgment and render judgment for Wind Mountain Ranch. TEX. R. APP. P. 59.1, 60.2(d).

OPINION DELIVERED: December 3, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0039

BIC PEN CORPORATION, PETITIONER,

v.

JANACE M. CARTER, AS NEXT FRIEND OF BRITTANY CARTER, RESPONDENT

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

Argued March 23, 2010

JUSTICE JOHNSON delivered the opinion of the Court.

JUSTICE GREEN did not participate in the decision.

Six-year-old Brittany Carter was burned when her five-year-old brother accidently set fire to her dress with a BIC lighter. The trial court entered judgment against BIC based on jury findings that the lighter was defectively designed and manufactured and that each of the defects caused Brittany's injuries. The court of appeals affirmed based on the defective design finding and did not reach BIC's other issues. *BIC Pen Corp. v. Carter*, 171 S.W.3d 657, 662 (Tex. App.—Corpus Christi 2005), *rev'd* 251 S.W.3d 500 (Tex. 2008). In a prior appeal we held that the design defect claim was preempted by federal law and remanded the case to the court of appeals. *BIC Pen Corp. v. Carter*, 251 S.W.3d 500, 511 (Tex. 2008). The court of appeals then affirmed the trial court's judgment based on the manufacturing defect finding. ___ S.W.3d ___.

We conclude that no evidence supports the finding that a manufacturing defect caused Brittany's injuries. We reverse and render judgment for BIC.

I. Background

Jonas Carter and his sister Brittany were playing when Jonas accidently set fire to Brittany's dress with a J-26 model BIC lighter (the Subject Lighter). Brittany was badly burned and Janace Carter, Brittany's mother, sued BIC as Brittany's next friend. Janace claimed that Brittany's injuries were the result of manufacturing and design defects in the Subject Lighter. A jury found that both types of defects were producing causes of Brittany's injuries. The trial court rendered judgment against BIC for actual and exemplary damages found by the jury. BIC appealed and the court of appeals affirmed. *BIC Pen*, 171 S.W.3d at 662. The appeals court held, in part, that the design defect claim was not preempted by federal law and the evidence was sufficient to support the finding that a design defect in the lighter was a producing cause of the fire that burned Brittany. *Id.*

We granted BIC's petition for review, held that the design defect claim was preempted by federal law, and remanded the case for the court of appeals to consider the remaining issues. *BIC Pen*, 251 S.W.3d at 511. On remand the court of appeals concluded that Carter's manufacturing defect claim was not preempted by federal law, the jury's finding on that claim was supported by the evidence, the trial court did not err by giving a spoliation instruction, and there was no evidence BIC acted with malice. ___ S.W.3d at ___. The appeals court affirmed the trial court's judgment as to actual damages and reversed and rendered as to exemplary damages. *Id.*

BIC again petitioned for review, asserting that (1) Carter's manufacturing defect claim is preempted by federal law, and (2) Carter did not prove a manufacturing defect caused Brittany's

injuries because there was no evidence (a) that the lighter varied from manufacturing specifications, (b) that the lighter was unreasonably dangerous, or (c) of causation. Carter filed a conditional petition for review, arguing that the court of appeals erred in reversing the award of punitive damages.

We conclude that Carter's manufacturing defect claim is not preempted by federal law. We further conclude, however, that the evidence is legally insufficient to support the finding that a manufacturing defect caused Brittany's injuries.

We first address BIC's assertion that Carter's manufacturing defect claim is preempted.

II. Preemption

A state law that conflicts with federal law is preempted and has no effect. U.S. CONST. art. VI, cl. 2; *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981); *BIC Pen*, 251 S.W.3d at 504. State law may be preempted in three ways: (1) expressly, by a federal law specifically preempting state law; (2) impliedly, by the scope of a federal law or regulation indicating Congress intended the federal law or regulation to exclusively occupy the field; or (3) impliedly, by the state law conflicting with a federal law or regulation to the extent it is impossible to comply with both or by the state law obstructing Congress's objectives as reflected by the federal law. *BIC Pen*, 251 S.W.3d at 504.

A. Federal Standards

In 1972, the Consumer Product Safety Act (CPSA) created the Consumer Product Safety Commission (CPSC). The CPSC is an independent regulatory body charged with (1) protecting the public against unreasonable risks of injury associated with consumer products, (2) developing safety standards for consumer products, and (3) promoting research and investigation into the cause and

prevention of injuries. 15 U.S.C. §§ 2051(b)(1), (b)(2), (b)(4), 2053(a); *BIC Pen*, 251 S.W.3d at 503. As relevant to this matter, the CPSC analyzed costs and benefits to the public of requiring disposable lighters to be child resistant. It then adopted regulations requiring disposable lighters to be child resistant as to children under five years of age and standards for certifying lighters as child resistant. *BIC Pen*, 251 S.W.3d at 503; 16 C.F.R. § 1210.1. The CPSC does not impose design requirements on manufacturers. Rather, the child-resistance requirements are performance based so the burden is on manufacturers to design lighters that comply with the performance standards. *BIC Pen*, 251 S.W.3d at 504 (citing Safety Standard for Cigarette Lighters, 58 Fed. Reg. 37,580-81 (July 12, 1993) (codified at 16 C.F.R. pt. 1210)). Before a lighter may be distributed, the manufacturer must submit a detailed description of the lighter and its child resistant features to the CPSC and the lighter must be certified. 16 C.F.R. § 1210.15.

In order for a lighter such as BIC's J-26 to be certified as child resistant, CPSC requires that tests be performed to determine the extent to which children under five years of age can operate the lighter. At least eighty-five percent of the children who are tested must be unable to operate it. *BIC Pen*, 251 S.W.3d at 504; 16 C.F.R. § 1210.4(h)(1).

The CPSC regulations require a specific testing protocol to be followed for a lighter to be certified as child resistant. Before testing is begun, measurements are taken to ensure that all operating components on which child resistance is dependent are within designed tolerances. 16 C.F.R. § 1210.4(c)(4). The test protocol then begins with a panel of one hundred children ages forty-two to fifty-one months being divided into six groups of fifteen to seventeen children. The children on each panel must consist of three age groups: forty-two to forty-four months, forty-five to forty-

eight months, and forty-nine to fifity-one months, with approximately thirty, forty, and thirty percent of the children to be of the respective age groups. *See id.* § 1210.4. Each group uses one of six surrogate lighters that look like actual lighters, but emit signals rather than flames when operated. *Id.* Each child is given two five-minute attempts to operate the lighter being tested. If no more than ten of the children on the first test panel operate the lighter, the lighter is certified as child resistant and no further testing is necessary. *Id.* § 1210.4 (h)(1). If more than ten children on the first panel operate the lighter, however, another panel of 100 children is tested. *Id.* If no more than thirty of the 200 children on the two panels operate the lighter, it is certified as child resistant and no further testing is required. *Id.* § 1210.4(h)(2).

B. The J-26 Lighter

To operate a J-26 lighter, the user must press a shield over the sparkwheel and rotate the sparkwheel to generate a spark while pressing a fork near the sparkwheel to release fuel. In 1995, BIC reported to the CPSC that testing had been conducted on the J-26 and ninety percent of the children tested could not operate the surrogate lighters. The report set out specifications for the J-26's five components[1] that collectively resulted in the lighter being child-resistant: (1) the distance that the shield over the sparkwheel must be pushed down, (2) the force required to move the shield; (3) the distance the fork must move to release butane; (4) the force required to depress the fork; and (5) the force required to produce a spark by rotating the sparkwheel. Carter's manufacturing defect

[1] The report could be read to list six components. The parties reference five components and we will use their representations.

claim was that two components of the Subject Lighter, the shield force and the fork force, deviated from specifications BIC furnished to the CPSC.

In BIC's previous appeal, we noted that the savings clause in the CPSA allows state-law tort claims so long as they do not conflict with applicable federal regulations. *BIC Pen*, 251 S.W.3d 506. On that basis, we held Carter's design defect claim was preempted because the design of the J-26 was properly certified according to federal protocol, and state law imposing a higher common-law standard for child resistance would conflict with the federal regulations. *Id.* at 509. BIC asserts that Carter's manufacturing defect claim is similarly preempted because the imposition of manufacturing defect liability based on a product that complies with federal manufacturing requirements would impose a more strict standard than federal law.

C. Do Carter's Claims Impose a Higher Requirement

BIC argues that Carter's manufacturing defect claim effectively imposes a higher child-resistant standard than the CPSC standard because (1) the CPSC standard applies only to children under age five while Jonas was over age five and (2) the CPSC standards do not apply to children such as Jonas who are five years old or older, even if they suffer developmental delays. We disagree with the argument.

Carter's manufacturing defect claim is not based on whether the lighter would be child resistant as to older children in general, or even older children with developmental delays. Her claim is that BIC failed to manufacture the lighter to the specifications BIC submitted to the CPSC, the resulting manufacturing defect lessened the force required to operate the Subject Lighter, and the lighter was unreasonably dangerous because the defect reduced the force required to operate the

lighter. Thus, her claim that Jonas would not have been able to light the Subject lighter if BIC had manufactured it according to the specifications submitted to the CPSC does not add to the federal requirements for child resistant status.

BIC also asserts that the jury charge allowed the jury to decide—contrary to federal law—that no child of any age should be able to operate a lighter. BIC points to Carter's counsel's arguments during trial such as "if the cigarette lighter is supposed to be child-resistant, how was he able to use it," and claims that the jury was allowed to impose liability "merely because a 62-month old child was able to operate the Subject Lighter." BIC's argument has traction. However, we believe the argument does not implicate preemption; rather, it is directed toward the evidence and the jury instruction defining "unreasonably dangerous product" to which BIC did not object.

BIC also submits that the court of appeals held that the jury was entitled to assume the lighter deviated from BIC's internal specifications, which were more strict than specifications it submitted to the CPSC and, based on that assumption, the jury could have concluded that deviations from BIC's internal specifications resulted in a manufacturing defect. BIC asserts this conflicts with federal law by holding BIC liable for failing to meet internal goals that exceeded specifications it submitted to the CPSC. We do not agree.

The court of appeals held that "there was sufficient evidence adduced for the jury to have concluded that the 1995 [CPSC-submitted] specifications applied and that the Subject Lighter deviated from those specifications." ___ S.W.3d at ___. Although the court went on to discuss whether BIC failed to comply with its internal manufacturing specifications, the court noted that evidence of BIC's failure to comply with its internal specifications was an alternative basis for the

jury to have found liability. Carter's claim is not preempted simply because the court of appeals found an alternative ground for liability, and we need not determine whether a claim based solely on BIC's failure to comply with its internal specifications would be preempted.

BIC next asserts that in order for Carter's claim not to have been preempted, she was required to prove that the lighter failed to meet BIC's specifications to the extent it would not pass the eighty-five percent CPSC child testing protocol. BIC argues that imposing liability without such a showing would allow recovery for a variance from manufacturing specifications even if the lighter exceeded the performance-based CPSC mandated testing. This argument also fails. Under the court's charge, Carter was required to prove that a manufacturing variance was of such degree that it was a "defect" as defined in the jury charge, not that the lighter was child resistant. "Defect" was defined as "dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics."

Finally, BIC claims that Carter's use of data regarding one particular surrogate lighter (surrogate 5) that was used by sixteen children in the J-26 testing is inconsistent with federal standards that require testing of 100 children. BIC asserts that to the extent Carter's claim is supported by this data, it obstructs the federal objectives and is preempted. But Carter presented the surrogate 5 data to demonstrate the effect of low force requirements on the ability of children to operate the J-26. A state law claim is preempted under the obstruction of federal objectives aspect of preemption analysis when state law imposes duties that conflict with the federal regulatory scheme. *BIC Pen*, 251 S.W.3d at 509. Carter's use of the surrogate 5 data was not an attempt to

impose a duty inconsistent with the federal regulatory scheme, and her use of the data does not form a basis for holding the manufacturing defect claim was preempted.

We conclude that Carter's manufacturing defect claim was not preempted and next address BIC's challenge to the jury's finding that there was a manufacturing defect in the Subject Lighter.

III. Manufacturing Defect

A manufacturing defect exists "when a product deviates, in its construction or quality, from the specifications or planned output in a manner that renders it unreasonably dangerous." *Id.* (quoting *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006)). First, BIC claims that Carter did not present any evidence of a deviation from manufacturing specifications. We disagree.

In 1995, BIC submitted specifications for child resistant features of the J-26 to the CPSC. Two years later it made design modifications to the lighter and submitted new specifications. BIC asserted in the court of appeals that the 1997 specifications, and not the 1995 specifications, applied to the Subject Lighter and the results of the Subject Lighter's tests could not support a finding that it was outside manufacturing specifications. The court of appeals held that there was sufficient evidence for the jury to have concluded that the 1995 specifications applied, and BIC does not challenge that holding here. *See* ___ S.W.3d ___. Rather, BIC asserts that the testing methods to determine compliance with the CPSC specifications in 1997 were different from the testing methods used in 1995, and the specifications BIC submitted to the CPSC did not set out the testing protocol. BIC claims that (1) when it performed the post-accident testing of the Subject Lighter it used 1997 testing methods so those test results were invalid to measure compliance with the 1995

specifications; and (2) the specifications it submitted to the CPSC were expressed as approximate ranges and even the post-accident testing showed that the subject lighter "approximately" complied with specifications. But BIC fails to address Carter's evidence to the contrary.

After Carter filed suit, BIC twice tested and measured the child-resistant features of the Subject Lighter. The specifications submitted to the CPSC in 1995 and the results from BIC's post-accident tests of the Subject Lighter's fork force and sparkwheel force were as follows:

	1995 Specifications	Post-accident Test 1	Post-accident Test 2
Fork Force	.4-.6 kg[2]	.353 kg	.349 kg
Sparkwheel Force	1.0-1.7 kg	.975 kg (Average)	.962 kg (Average)

In regard to the fork force testing, Carter presented evidence that the testing protocol BIC used in the post-accident test was actually used as early as 1994 when the 1995 specifications were developed. As for the sparkwheel force testing, Carter presented expert testimony that the post-accident measurements of the sparkwheel rotation force were consistent with the 1995 testing protocol, and the measurements were not within specifications. And with regard to BIC's assertion that the lighter showed "approximate" compliance with the specifications, Carter presented expert testimony that rounding measurements to meet specifications in the manner BIC described was unreasonable, even if the specifications themselves were designated as approximate. BIC does not challenge Carter's evidence or her expert's conclusions.

[2] One kilogram equals 2.2 pounds, or 35.3 ounces.

We conclude that Carter presented legally sufficient evidence that the subject lighter did not meet manufacturing specifications.

IV. Causation

BIC claims that even if the Subject Lighter deviated from specifications, Carter failed to prove that the deviation was a producing cause of Brittany's injuries. We agree.

The jury charge asked whether there was a manufacturing defect in the Subject Lighter "that was a producing cause of the occurrence in question." "Producing cause" was defined as "an efficient, exciting or contributing cause that, in a natural sequence, produced the occurrence."[3] A producing cause must be a cause-in-fact; that is, it must be a substantial factor in bringing about the injury, and a cause without which the injury would not have happened. *See Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995) (noting that producing cause must be a cause-in-fact which "means that the defendant's act or omission was a substantial factor in bringing about the injury which would not otherwise have occurred").

The court of appeals noted that "the jury may determine causation based on circumstantial evidence." ___ S.W.3d at ___ (citing *Ford Motor Co. v. Ridgeway*, 135 S.W.3d 598, 601 (Tex. 2004)). Although we do not disagree generally with that statement, we disagree with how the court of appeals applied it in this case. The court of appeals' opinion was to the effect that the evidence at trial showed Jonas was playing with the Subject Lighter when he accidently caught Brittany's dress on fire; the Subject Lighter did not meet BIC's child-resistance specifications; and "[a]

[3] After the case was tried we held that "producing cause" should be defined as "a substantial factor in bringing about an injury, and without which the injury would not have occurred." *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007).

reasonable finder of fact could infer from the circumstances of the case that the Subject Lighter's defect was a substantial cause of Brittany's injuries and that such injuries would not have occurred if the Subject Lighter complied with BIC's specifications." *Id.* However, evidence that components of a product deviated from manufacturing specifications, an accident occurred, and the deficient parts were involved in the accident is insufficient evidence to support a causation finding. *See Ledesma*, 242 S.W.3d at 41-42 (noting that the requirement of causation is separate from the requirement that the product deviated from specifications); *Mack Trucks v. Tamez*, 206 S.W.3d 572, 580-81 (Tex. 2006) (holding plaintiffs failed to present evidence of causation in a products liability case where, even assuming a fuel and battery system were defectively designed, there was no evidence a fire started because of the defects); *Volkswagon of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 911 (Tex. 2004). Rather, there must have been some evidence that the fire that burned Brittany started because of the specific manufacturing defects and that absent those defects Brittany's injuries would not have occurred.

Expert testimony is generally required in manufacturing defect cases to prove that the specific defect caused the accident. *Ledesma*, 242 S.W.3d at 42 & n.23; *see Mack Trucks*, 206 S.W.3d at 583 ("Proof other than expert testimony will constitute some evidence of causation only when a layperson's general experience and common understanding would enable the layperson to determine from the evidence, with reasonable probability, the causal relationship between the event and the condition."). The reason is demonstrated by the facts of this case. The J-26 lighter had five child-resistant design features. The deviations from specifications for the Fork Force and Sparkwheel Force—two of the five features—were measured in small quantities. The 1995 minimum

specification for Fork Force was .4 kg and BIC's two post-accident tests of the Subject Lighter yielded readings of .353 kg and .349 kg. Thus, the test differences between the Subject Lighter and the minimum 1995 specification were .047 kg (1.6 ounces) and .051 kg (1.8 ounces). The 1995 minimum Sparkwheel Force specification was 1.0 kg. BIC's two post-accident tests of the Sparkwheel Force yielded readings of .975 kg and .962 kg. The differences between the two Subject Lighter test results and the minimum specification were .025 kg (.88 ounces) and .038 kg (1.34 ounces). In light of the five features that combined to make the lighter child resistant, the impact of the small deviations in two of those features on how the Subject Lighter would have functioned in the hands of a child such as Jonas is not an issue within a lay juror's general experience and common understanding. Therefore, we look to see if there is expert testimony to support the causation finding.

As previously noted, BIC submitted specifications to the CPSC regarding five characteristics of the J-26 that as a whole established compliance with the CPSC's child-resistance requirements. The characteristics were shield force, shield movement, fork force, fork movement, and sparkwheel force. There is no evidence that a lighter's failure to meet any particular one or more of the characteristics by some factor would negate the lighter's compliance with the CPSC requirements. The relationship between the five characteristics was not quantified and there was no determination of which characteristic was the most or least important with regard to those requirements.

BIC's two post-accident measurements of the Subject Lighter's Sparkwheel Force showed an average of .0315 kg (1.1 ounces) below the minimum specification. The post-accident measurements of the Fork Force showed an average of .049 kg (1.7 ounces) below the minimum.

Carter asserts that because the J-26 relied on force to provide child resistance the jury could have concluded that the deviations posed a significantly increased risk to a user of the lighter. But she does not point to evidence that would have guided the jury in determining what impact the small deviations would have had, either independently or when considered in conjunction with the other features. And as previously noted, the impact of the small deviations in two of the five factors designed to affect the Subject Lighter's operability is beyond a lay juror's general experience and common understanding.

Carter asserts that she circumstantially proved the impact of decreased force measurements through evidence of BIC's certification test of the J-26. BIC tested six surrogate lighters and overall only ten percent of the 100 children tested were able to operate the lighters. However, six of the sixteen children (37.5%) who were tested with surrogate 5 were able to operate it, and surrogate 5 had the lowest sparkwheel rotational force of all six surrogates—1.04 kg. This, Carter argues, illustrates the impact of low force measurements. However, this testing failed to demonstrate a causal link between lower sparkwheel force and an increased ability of children to operate the lighter. *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 718 (Tex. 1997) (noting that studies showing an association between two matters or facts do not necessarily show a causal relationship between them). Other evidence showed that the number of children who could successfully operate the other five surrogate lighters did not decrease as the sparkwheel force of the other surrogates increased. For example, no children were able to operate surrogate 6 which had the second lowest sparkwheel rotational force of 1.13 kg while one child was able to operate the surrogate lighter with the highest sparkwheel rotational force of 1.49 kg.

Carter asserts that although the test results of the other surrogates do not show a correlation between sparkwheel rotational force and child resistance, such a correlation is not negated because other differences in the child-resistant characteristics also impacted the number of children who could operate the other surrogates. This argument, however, supports BIC's claim that all five child-resistance characteristics worked together to make its lighters compliant with the CPSC requirements. Additionally, in a 1997 test on the redesigned J-26 lighter, only four out of 100 children under the age of five years could operate the surrogate lighters. Although the lighter had been redesigned, it still used a sparkwheel that required rotation in order to generate sparks and the sparkwheel force (measured in the same manner as the force of surrogate 5) for at least one of the 1997 surrogates was less than the sparkwheel force of surrogate 5. The highest number of children who operated one particular surrogate in testing of the redesigned lighter was two.

Even more important than the statistics referenced above is the fact that even a lighter that meets CPSC child-resistant specifications is not intended to be completely inoperable by children, whether they are under or over five years of age. The specifications contemplate that some children less than five years old will be able to operate a lighter certified as child resistant. *See* 16 C.F.R. § 1210.3(a) (providing that a lighter subject to the CPSC requirements "shall be resistant to successful operation by at least 85 percent of the child-test panel"); Safety Standard for Cigarette Lighters, 58 Fed. Reg. 37,557, 37,578 (July 12, 1993) ("A lighter that no child under 5 could operate would likely be very difficult for adults to operate as well. In order for child-resistant lighters to address the risk of injury most effectively, adults must be willing to use them."). Because the lighter is designed so that when it is manufactured to specifications, it still can be operated by some children

even younger than five years of age, Carter had the burden to prove that Jonas probably would not have operated the lighter but for the manufacturing defects, regardless of his age and physical and mental condition. We next address whether she did so.

The witnesses at trial identified several human factors that impacted whether a child could successfully operate the lighters: dexterity, strength, motivation, hand size, and instruction the child received. Some of the J-26 lighter features that BIC identified as contributing to the lighter being child resistant were cognitive based—meaning a user would have to overcome a series of steps to operate the lighter. The cognitive-based characteristics required a user to depress the guard over the sparkwheel, rotate the sparkwheel in the correct direction, and depress the fork. The characteristics of the Subject Lighter that did not meet specifications—Sparkwheel force and Fork force—were not cognitive based, but were force based.

There was evidence that when Jonas was eight years and nine months old he was evaluated at Baylor College of Medicine. He had a normal physical evaluation and "visual perceptual/fine motor tasks at an 8 y/o level; [and] gross motor skills at appropriate age level." A year after the Baylor evaluation Jonas was evaluated by Dr. Mark Blotkey, a board certified child psychiatrist.

Although the Baylor evaluation rated Jonas's visual perceptual/fine motor tasks at an eight year old level, Dr. Blotkey testified that a child with developmental delay characteristics such as Jonas exhibited would have fine motor skill problems. But there was no evidence regarding, for example, Jonas's physical strength or the size of his hands or whether, once he overcame the cognitive-based features of the lighter he would not have been able to turn the sparkwheel or depress the fork had those forces met specifications. Dr. Blotkey testified that Jonas would have been

functioning below his age level at the time of the accident, but he did not explain what that meant in terms of his physical ability to turn the sparkwheel and depress the fork. That is, he did not explain whether either a .0315 kg increased force required to operate the sparkwheel or a .049 kg increased fork force, or both, probably would have prevented Jonas from operating the lighter.

Carter argues that even though Jonas was over the age of five at the time of the fire, his developmental delays would have made him unable to light the lighter if it had been manufactured to specifications. But she did not present evidence regarding what impact Jonas's developmental delays had on his ability to operate the Subject Lighter in its condition. Evidence regarding the effect of the specific manufacturing deviations discovered in the Subject Lighter was necessary to show that but for those deviations, Jonas probably would not have been able to operate the lighter. The Baylor report, Dr. Blotkey's testimony, and other evidence introduced at trial reflected on Jonas's abilities to overcome the cognitive-based characteristics of the lighter. But there was no evidence to show that Jonas's abilities related to the force-based features of the lighter—turning the sparkwheel and depressing the fork—would probably have prevented him from operating the lighter if it had met manufacturing specifications.

Carter also asserts that there is evidence of causation based on this Court's holding in *Havner*, 953 S.W.2d 706. The issue in *Havner* was whether a woman's use of a drug while she was pregnant caused her baby's birth defects. *Id.* at 708. We concluded that properly designed and executed epidemiological studies may support causation in certain types of toxic tort cases if the studies show that there is more than a "doubling of the risk" of the particular injury after exposure to the particular substance. *Id.* at 716-17. Carter argues that the principle behind *Havner*—increased

relative risk may be evidence of causation—should be applied in this case. She references BIC's CPSC certification tests and maintains they illustrate that low force levels in lighters such as the J-26 can quadruple risk. We disagree with her position.

In toxic tort cases, causation is often discussed in terms of general and specific causation. *Id.* at 714. General causation involves whether the substance at issue is capable of causing the injury at issue while specific causation involves whether the substance at issue in fact caused the particular injury at issue. *Id.* While testing can be done in some toxic tort cases to determine specific causation, direct experimentation cannot be done in many instances. *Id.* at 715. Recognizing that in such a situation there is no precise fit between science and legal burdens of proof, we concluded that epidemiological studies showing a doubling of the risk after exposure to a substance may be evidence of causation. *Id.* at 717. We explained, for example, that if the number of people who take a drug and contract a disease is more than double the number of people who contracted the disease but did not take the drug, then it may be statistically more likely than not that a given individual's disease was caused by the drug. *Id.* at 717.

The nature of the injury-causing activities and testing that would have to be done to show causation in this case are not similar to, nor do they pose the practical difficulties posed by, those we considered in *Havner*. In this case, testing of J-26 lighters posed no unreasonable risk of injury to the test subjects as would have been the case if testing of the drug on humans had been performed under the facts of *Havner*. The difference in the situations is shown by the CPSC certification protocols. In such instances, tests are done with surrogate lighters that do not pose a risk of harm to the participating children. And testing was also performed on the Subject Lighter itself that posed

no risk of injury. Thus we decline to adopt a *Havner*-type analysis as to causation in this case where manufacturing defects are the basis for the liability claim.

Because our determination that there was no evidence of causation is dispositive of the appeal, we do not address BIC's contention that there was no evidence the Subject Lighter was unreasonably dangerous.

V. Conclusion

The facts of this case are unfortunate. Nevertheless, we must apply established legal principles in reviewing the parties' positions. In applying those principles, we conclude there is legally insufficient evidence to support the finding that manufacturing defects in BIC's Subject Lighter were a cause-in-fact of Brittany's injuries. We reverse the court of appeals' judgment and render judgment for BIC.

_____

Phil Johnson
Justice

OPINION DELIVERED: June 17, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0048

MCI SALES AND SERVICE, INC., F/K/A HAUSMAN BUS SALES, INC. AND MOTOR COACH INDUSTRIES MEXICO, S.A. DE C.V., F/K/A DINA AUTOBUSES, S.A. DE C.V., PETITIONERS,

v.

JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DOLORES HINTON, DECEASED, ET AL., RESPONDENTS

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

Argued March 24, 2010

JUSTICE GUZMAN delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE LEHRMANN joined, and in which CHIEF JUSTICE JEFFERSON joined as to Parts I and II.

CHIEF JUSTICE JEFFERSON filed an opinion, dissenting in part.

JUSTICE GREEN did not participate in the decision.

This appeal arises from a jury's verdict in a suit brought against the manufacturer, importer, and distributor of a motorcoach. In 1995, when the motorcoach at issue here was manufactured, federal safety regulations governing the performance of these motorcoaches neither required nor forbade passenger seatbelts. These same regulations allowed manufacturers to choose between

several types of glazing materials for use in the motorcoaches' windows, and a manufacturer complied by using one of the required types. We must decide whether that regulatory silence and that choice evidence a congressional intent to preempt a McLennan County jury's finding that the manufacturer of a motorcoach should have installed passenger seatbelts and should have used another permitted type of glazing material. Because we conclude that the jury's verdict which is grounded in this state's common law does not present any obstacle to the accomplishment of the federal regulatory scheme's purpose, we hold that the federal safety standards at issue do not preempt state law.

We also apply Chapter 33 of the Texas Civil Practice and Remedies Code to a plan adopted by a bankruptcy court to apportion a debtor's insurance proceeds among a group of creditors who filed claims against the bankruptcy estate. The unique plan allowed the claimants to either accept a mediated percentage of the proceeds or to litigate their claims before a special judge. Even if the claimants chose the latter course, their recovery was capped at 110% of the mediator's award, and the claimants could agree at any time to full or partial distributions to any or all of the claimants. We must decide if this plan renders the debtor—who purchased the insurance policy funding the plan and whose further liability was discharged in bankruptcy—a settling person under Chapter 33 for purposes of determining proportionate liability. We conclude that it does. Accordingly, we affirm the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion.

I. Background

On February 14, 2003, a group of friends chartered a bus[1] from Central Texas Trails to take them from Temple to Dallas for a concert. Heavy rain and fog reduced visibility, and as the bus crested a hill on Interstate 35 south of Waco, the driver saw that traffic had stopped due to an accident farther north. He attempted to change lanes to increase his stopping distance, but another car cut him off, so he steered into the earthen median and lost control of the bus. It crossed the median into southbound traffic and collided with a large sport utility vehicle, spun counterclockwise, and tipped over on its right side. The bus slid across the southbound lanes and came to rest in the ditch on the far side of the road. Most of the large, non-laminated glass windows on the right side of the bus shattered when it tipped over. The passengers were tossed from their seats and some were ejected through the broken windows. Five passengers were killed and several others were injured to varying degrees.

The bus owner and operator, Central Texas Trails, Inc., Central Texas Bus Lines, Inc., and Kincannon Enterprises, Inc. (collectively Central Texas), filed for Chapter 11 bankruptcy protection shortly after the accident. The bus crash victims filed creditor claims against Central Texas in the bankruptcy court. Central Texas maintained a $5 million liability insurance policy, and the carrier paid the policy limits into the bankruptcy court's registry, creating a liability fund. The bus crash claimants participated in non-binding mediation, the goal of which was to formulate a plan for apportioning the fund. The mediator assigned a percentage of the fund to each claimant, and these

[1] Motorcoach, intercity bus, and bus are used interchangeably in this opinion, but are distinguished from transit buses. *See* Notice of Public Meeting on Motorcoach Safety Improvements, 67 Fed. Reg. 14,903 (Mar. 28, 2002).

percentages were incorporated into a plan submitted to the bankruptcy court for approval, which was given on October 21, 2003. Under the "Apportionment Plan," a claimant could accept the mediator's percentage and immediately receive that portion of the liability fund. If the claimant chose not to accept the mediator's allocation, the claimant participated in a "Litigation Plan." Under this plan, the claimants tried their claims to a special judge agreed to by the participants, and their recovery under this plan was capped at 110% of the mediator's allocation. Further, the parties could agree at any time to approve a full or partial distribution to any or all participants. Central Texas's tort liability in excess of the liability fund was discharged upon approval of its reorganization plan the following year.

On June 26, 2003, a group of the injured bus occupants (or their estates) and their relatives (the Plaintiffs)[2] filed suit against Motor Coach Industries Mexico, S.A. de C.V., and MCI Sales and Service, Inc., the bus's manufacturer, importer, and distributor (collectively MCI), alleging the motorcoach was defectively designed because it lacked passenger seatbelts and laminated-glass windows. MCI attempted to join Central Texas and the bus driver as responsible third parties, but the trial court denied the motion and also refused to submit a question asking the jury if Central Texas and the driver were liable as responsible third parties or as settling parties to determine proportionate liability. Following a jury trial, the jury found for the Plaintiffs, making separate causative findings as to each claim. The jury found that the lack of seatbelts caused injuries to all

[2] To be clear, the bus crash victims who submitted claims in the bankruptcy proceeding are a larger group than the Plaintiffs here. Some of these claimants opted for compensation under the Apportionment Plan, leaving about half of the insurance proceeds for distribution to those who chose to participate in the Litigation Plan.

of the Plaintiffs, and the lack of laminated-glass windows caused injuries to those ejected from the bus. The jury awarded over $17 million in damages.

After the jury's verdict but before entry of judgment, the Plaintiffs, all of whom opted for resolution of their claims against Central Texas via the Litigation Plan, appeared before the special judge. The judge found that the bus driver's negligence proximately caused the accident that produced the Plaintiffs' injuries and that he was acting within the scope of his employment with Central Texas. Further, the judge determined that the jury's damage awards in this case, with one exception, significantly exceeded the 110% maximum recovery under the Litigation Plan. Limiting the one participant's recovery to what the jury awarded, the judge capped the remaining damage awards at the 110% maximum. Because of the limited funds, however, the awards were prorated so that each participant received a relative percentage of the actual award. In the end, each Litigation Plan participant (again, with the one exception) received a sum that is within two percent of the amount allocated by the mediator.[3] The bankruptcy judge approved the special judge's report, and the payments were made. Thereafter, the trial court in this case entered judgment, adjusting the damage awards to account for the funds received under the Litigation Plan.

MCI appealed, and the court of appeals reversed and remanded. 272 S.W.3d 17, 20. As relevant here, the court rejected MCI's preemption arguments but agreed that the trial court abused its discretion by not submitting a question to the jury regarding Central Texas and the bus driver's proportionate liability as settling persons. MCI then petitioned this Court for review of the

[3] One participant received less than the amount assigned by the mediator in line with the jury findings in the trial court.

preemption issues, and the Plaintiffs cross-petitioned for review of the proportionate responsibility issue. We granted both petitions and consider the issues in order, beginning with federal preemption.

II. Federal Preemption

The Supremacy Clause dictates that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Thus, a law passed by Congress—acting within its enumerated powers—and signed by the President preempts any state law to the contrary, rendering it without effect. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 426 (Tex. 2005) (per curiam); *see also Wyeth v. Levine*, 129 S. Ct. 1187, 1206–07 (2009) (Thomas, J., concurring in the judgment) (noting the two structural limitations on the federal government's power to preempt state laws, namely, the enumerated powers of Congress and the procedural requirements to enact a law, including bicameral passage and presentment to the President). Federal regulations properly adopted by an agency acting within its congressionally delegated authority likewise preempt a contrary state law. *E.g.*, *City of New York v. FCC*, 486 U.S. 57, 63–64 (1988) (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986)).

Congress may expressly preempt state law by means of statutory language, *see, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001), or it may do so impliedly in one of two ways, by "so thoroughly occup[ying] a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it,'" *Cipollone*, 505 U.S. at 516 (quoting *Fidelity Fed. Sav. &*

Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (quotation marks omitted)), or by enacting a law that actually conflicts with state law, *see id.* (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983)). A state law actually conflicts with a federal law when compliance with both is impossible or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *accord Great Dane Trailers*, 52 S.W.3d at 743. The latter kind of conflict preemption, sometimes called obstacle preemption, is the only theory of preemption advanced by MCI in this case. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000) (holding that the National Traffic and Motor Vehicle Safety Act's express preemption clause does not apply to common-law tort actions).

As the Supreme Court has observed, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth*, 129 S. Ct. at 1194 (quotation marks omitted). When Congress has explicitly stated that its legislation preempts state law, that intent is plain. *See, e.g.*, *Geier*, 529 U.S. at 867–68 (concluding that the Safety Act's express preemption clause preempts nonidentical standards contained in state legislation and regulations). At other times, Congress does not expressly state its preemptive purpose, but such intent is discoverable through the statutory language and structure, as when Congress occupies a field of regulation and leaves no room for states to operate. *See, e.g.*, *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973) ("It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption."). But when preemption is premised on the obstacle a state law erects to

accomplishing a federal purpose, divining that intent can be more challenging.[4] To discover the federal purpose with which the state law is in conflict, we examine the text of the relevant federal statute or regulation, the history of federal regulation in that subject area, and the agency's statements construing the regulation. *See Geier*, 529 U.S. at 875–77; *O'Hara v. Gen. Motors Corp.*, 508 F.3d 753, 759 (5th Cir. 2007) ("To determine the federal policy expressed in [the regulation], this Court looks to the text of the regulation, the history of [the agency's] regulation in this area, and [the agency's] statements construing [the regulation]."). A "specific, formal agency statement identifying conflict" is not necessary to conclude that a conflict exists, *Geier*, 529 U.S. at 884, and "[t]he weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness," *Wyeth*, 129 S. Ct. at 1201. Courts must cautiously approach this interpretive task lest it become a "free wheeling judicial inquiry into whether a state [law] is in tension with federal objectives," which "undercut[s] the principle that it is Congress rather than the courts that pre-empts state law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

With this framework in mind, we turn to the relevant federal law that MCI asserts preempts the jury's verdict.

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[4] Justice Thomas has gone so far as to question whether implied obstacle preemption can be reconciled with the Supremacy Clause's mandate that only federal law can preempt state law: "Congressional and agency musings, however, do not satisfy the Art. I, § 7 requirements for enactment of federal law and, therefore, do not pre-empt state law under the Supremacy Clause." *Wyeth*, 129 S. Ct. at 1207 (Thomas, J., concurring in the judgment). Instead, Justice Thomas contends, "[p]re-emption must turn on whether state law conflicts with the text of the relevant federal statute or with the federal regulations authorized by that text." *Id.* at 1208. However, the United States Supreme Court continues to uphold and apply obstacle preemption based on federal purpose, and we are bound to follow.

A. The Federal Motor Vehicle Safety Standards

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act), to reduce traffic accidents and their resulting injuries. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983) (citing 15 U.S.C. § 1381 (1976) (current version at 49 U.S.C. § 30101)). Congress gave the Secretary of Transportation the authority to "prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a). A motor vehicle safety standard is "a minimum standard for motor vehicle or motor vehicle equipment performance." *Id.* § 30102(a)(9). The Secretary of Transportation in turn delegated authority to create the safety standards to the Administrator of the National Highway Traffic Safety Administration (NHTSA). 49 C.F.R. § 1.50. Over the years, NHTSA has promulgated and modified the Federal Motor Vehicle Safety Standards (FMVSS), of which FMVSS 205 and 208 are at issue here. *See id.* §§ 571.205, .208.

1. FMVSS 208—Federal Regulation of Seatbelts

In 1971, NHTSA issued FMVSS 208, which governed occupant crash protection and mandated seatbelts in motorcoaches for the driver only. *See id.* § 571.208, S4.4.1.[5] Two years later, NHTSA issued a Notice of Proposed Rule Making addressing passenger seating in buses. Bus

[5] For buses manufactured between January 1, 1972 and September 1, 1990, manufacturers actually had a choice even for the driver position. § 571.208, S4.4.1. They could design a "complete passenger protection system"—applicable only to the driver—that fulfilled certain crash requirements, *id.* S4.4.1.1, or they could install a seatbelt at the driver's position, *id.* S4.4.1.2. For buses weighing more than 10,000 pounds, like the bus here, manufacturers still have that choice, although the seatbelt option is more stringent. *See id.* S4.4.3.1. Since 1991, buses weighing less than 10,000 pounds are required to have seatbelts both for passengers and for the driver. *Id.* S4.4.3.2.

Passenger Seating and Crash Protection, 38 Fed. Reg. 4776 (Feb. 22, 1973) (to be codified at 49 C.F.R. pt. 571). NHTSA designed the proposed rules to protect bus passengers by requiring higher, stronger, and softer seats that contained the passengers during a crash. *Id.* In response to suggestions that seatbelts should be required, NHTSA proposed adding them as an alternate restraint system, replete with a detection system that warned the passenger and the driver of unfastened seatbelts. *Id.* The proposed rules were to affect all buses.

The following year, however, NHTSA withdrew the proposed standard for motorcoaches, determining that seating requirements for intercity and transit buses were not justified from a cost/benefit standpoint, and that seatbelt-usage surveys in intercity buses indicated few passengers would utilize seatbelts if provided. *See* School Bus Passenger Crash Protection, 39 Fed. Reg. 27,585 (July 30, 1974). The NHTSA did indicate that it would "propose standards in the future in this area if they are found desirable." *Id.*[6]

[6] NHTSA did issue a new safety standard applicable only to school buses. *See* 49 C.F.R. § 571.222. The standard required a system of compartmentalization, which uses engineered seating arrangements to protect passengers during a crash. In 1983, NHTSA denied a petition for rulemaking that sought to require seatbelts in school buses. *See* Denial of Petition for Rulemaking, 48 Fed. Reg. 47,032 (Oct. 17, 1983).

MCI draws our attention to several other events of note.[7] In 1992, the chief counsel for NHTSA wrote a letter responding to an inquiry about New York legislation that would require seatbelts in motorcoaches. Letter from Paul Jackson Rice, Chief Counsel, NHTSA to C.N. Littler, Coordinator, Regulatory Affairs, Motor Coach Indus. (Aug. 19, 1992). He concluded that FMVSS 208 would preempt the New York legislation regarding, as relevant here, intercity buses weighing more than 10,000 pounds. He stated that "NHTSA expressly determined that there is not a safety need for safety belts or another type of occupant crash protection at these [passenger] seating positions." In so opining, NHTSA's counsel expressly cited and relied upon the 1974 notice in which NHTSA withdrew its proposed standards for motorcoach seating and seatbelt standards, the latter because of low usage rates.

[7] MCI asks the Court to take judicial notice of a 1977 study performed by the Indiana University at Bloomington Institute for Research in Public Safety. *See* STANSIFER ET AL., INST. FOR RESEARCH IN PUB. SAFETY, ANALYSIS FOR NEED FOR PASSENGER SAFETY BELT REQUIREMENTS IN INTERCITY BUSES (1977). The study was commissioned by the Federal Highway Administration, an agency within the Department of Transportation, and addressed the desirability of seatbelts in intercity buses. The report concluded that, among other things, the usage rate of seatbelts during the study period (1972–1976) was quite low and did not recommend a seatbelt requirement. While the report viewed seatbelts as desirable, it noted that the cost of installation could not be justified unless 80% of passengers properly wore the belts, while current rates of voluntary usage were then less than 20%.

While the report meets the requirements for judicial notice, *see* TEX. R. EVID. 201; *Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 878 S.W.2d 598, 600 (Tex. 1994) (per curiam) ("To be the proper subject of judicial notice, a fact must be capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Judicial notice is mandatory if requested by a party and [the court is] supplied with the necessary information." (quotation marks and citation omitted; alteration in original)), and we therefore take judicial notice of it, we fail to see the relevance of the report to NHTSA's regulatory function. NHTSA did not commission the report, and it did not change any federal safety standard in response to the report. Because only federal *law* can preempt contrary state law—which, in that context, is the domain of NHTSA through its rule-making process—this report does not affect our analysis of the preemption issues. *See Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3d Cir. 2008) ("[W]e must reiterate, lest the analysis become unmoored, that it is federal *law* which preempts contrary state law; nothing short of federal law can have that effect."). Even if NHTSA was aware of the report, NHTSA's non-action in response cannot reasonably be interpreted as more than preserving the status quo, which at that time meant no seatbelt requirement in motorcoaches like the one at issue here. NHTSA's inaction regarding this report cannot be interpreted as expressing a policy forbidding seatbelts, or even as a deliberate decision not to require seatbelts.

In 2000, five years after the motorcoach here was built, NHTSA's acting administrator wrote a letter to the chairman of the National Transportation Safety Board (NTSB), which had repeatedly asked NHTSA to study the desirability of seatbelt standards for motorcoaches, noting that motorcoach crashes killed about five people per year. Letter from Rosalyn G. Millman, Acting Adm'r, NHTSA, to Jim Hall, Chairman, NTSB (Mar. 3, 2000). Even so, NHTSA said it would explore ways to study the crashworthiness of motorcoaches, including the feasibility and safety of seatbelts, in association with their manufacturers. Two years later, NHTSA announced a joint public meeting with its Canadian counterpart, Transport Canada, regarding the safety of motorcoaches. *See* Notice of Public Meeting on Motorcoach Safety Improvements, 67 Fed. Reg. 14,903 (Mar. 28, 2002). NHTSA invited comment on several proposed safety improvements, including limiting the size of glazing materials, introducing roof crush safety standards, requiring side curtain airbags, and requiring seatbelts. *Id.* at 14,904–05. Finally, in 2007, NHTSA issued a report recommending passenger seatbelts in motorcoaches following research designed to determine the best performance standards for the seatbelt assembly and seat anchorages. *See* NHTSA, Docket 2007-28793, NHTSA'S APPROACH TO MOTORCOACH SAFETY 12–14. Based on this report, the Department of Transportation issued an action plan for motorcoach safety, in which it proposed to begin rulemaking to require seatbelts in motorcoaches. *See* U.S. DEP'T OF TRANSP., MOTORCOACH SAFETY ACTION PLAN 5 (2009). In August 2010, NHTSA followed up by publishing a Notice of Proposed Rulemaking (NPRM) that calls for three-point seatbelts for passenger seats in new motorcoaches.

See Federal Motor Vehicle Safety Standards; Motorcoach Definition; Occupant Crash Protection, 75 Fed. Reg. 50,958 (Aug. 18, 2010) (to be codified at 49 C.F.R. pt. 571).[8]

2. FMVSS 205—Federal Regulation of Glazing Materials

FMVSS 205 "specifies requirements for glazing materials for use in motor vehicles." 49 C.F.R. § 571.205, S1. It is intended to "reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions." *Id.* at S2. FMVSS 205 incorporates by reference the standards of the American National Standards Institute (ANSI), specifically the standard for Safety Glazing Materials Z26.1 [hereinafter ANSI/SAE Z26.1-1996].[9] *Id.* at S3.2(a). The parties do not dispute that the standard permitted several kinds of glazing materials, including, as relevant here, laminated or tempered glass,[10] and that MCI complied with the standard in manufacturing the subject bus. *See* ANSI/SAE Z26.1-1996, T.1

[8] Hinton asks this Court to take judicial notice of both the report and the NPRM. MCI does not oppose either request, and we agree the standards of judicial notice are met. *See supra* note 7. Accordingly, we grant Hinton's request and take judicial notice of both the report and the NPRM.

[9] The ANSI/SAE standard in effect in 1995 was the American National Standard "Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land Highways" Z-26.1-1977, January 26, 1977, as supplemented by Z26.1a, July 3, 1980. *See* Glazing Materials Final Rule, 49 Fed. Reg. 6732, 6734 (Feb. 23, 1984) (formerly codified at 49 C.F.R. pt. 571). NHTSA adopted the 1996 version in 2003 to increase safety, to harmonize with foreign glazing standards, and to streamline and clarify the standard. *See* Glazing Materials Final Rule, 68 Fed. Reg. 43,964, 43,965 (July 25, 2003) (to be codified at 49 C.F.R. pt. 571). The difference between the older and newer versions is immaterial to this appeal given that both permitted laminated and tempered glass.

[10] Laminated glass means two or more pieces of sheet, plate, or float glass bonded together by an intervening layer or layers of plastic material. It will crack or breach under sufficient impact, but the pieces of glass tend to adhere to the plastic. If a hole is produced, the edges are likely to be less jagged than would be the case with ordinary annealed glass. ANSI/SAE Z26.1-1996 § 1.6. Tempered glass means a single piece of specially treated sheet, plate, or flat glass possessing mechanical strength substantially higher than annealed glass. When broken an any point, the entire piece breaks into small pieces that have relatively dull edges as compared to those of broken pieces of annealed glass. *Id.* § 1.21.

(Items 1 & 2) (permitting laminated glass throughout a vehicle and tempered glass anywhere other than the windshield). The ANSI standard notes that "[o]ne safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type. Since accident conditions are not standardized, no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards." *Id.* § 2.2.

In 1988, NHTSA proposed advanced glazing requirements for passenger vehicles and received numerous comments questioning, among other things, "whether this material would actually increase injuries to belted occupants due to head injury, neck loading, and lacerations." Withdrawal of Advance Notices of Proposed Rulemaking, 67 Fed. Reg. 41,365, 41,366 (June 18, 2002). In 1991, Congress mandated that NHTSA initiate rulemaking on rollover protection. *Id.* As part of this study, NHTSA focused on advanced glazing research as a possible method to reduce passenger ejections. *Id.* In 2001, Congress directed NHTSA to complete its study of glazing materials, and NHTSA issued a final report on the use of glazing materials to mitigate ejections. *Id.* at 41,367. Based on this report, NHTSA decided to terminate rulemaking on the issue of advance glazing, citing safety and cost concerns. *Id.* Noting the advent of other ejection mitigation systems (such as side air curtains) and the possibility that advanced side glazing increased the risk of neck injuries in some cases, NHTSA determined that its time and resources were better spent on other projects that focused on developing "more comprehensive, performance-based test procedures." *Id.* In the 2007 report on motorcoaches, NHTSA emphasized the importance of roof strength because deformations following a crash compromise the window's ability to prevent ejections. *See*

NHTSA'S APPROACH TO MOTORCOACH SAFETY, *supra*, at 20. For that reason, NHTSA concluded that "purs[u]ing the seat belt and roof strength approaches has greater potential for providing improved motorcoach occupant protection than continuing only the glazing/window retention strategy." *Id.* In sum, FMVSS 205 reflects NHTSA's conclusion that no one type of glazing material is superior in all situations, and it leaves to the manufacturers the decision of what kind of material—so long as it is one of the required kinds—to use in a particular setting.

B. The Presumption Against Preemption

Before discussing whether preemption applies here, we must first address MCI's argument that the court of appeals improperly applied a presumption against preemption. MCI contends that *Geier* rejected any "special burden" beyond the application of ordinary preemption principles. The Plaintiffs counter that the presumption is rooted in federalism, not in *Geier*'s analysis of the interplay between the Safety Act's preemption and saving clauses. We agree in principle with the Plaintiffs while recognizing that the exact contours of the presumption are far from clear. *See* Robert N. Weiner, *The Height of Presumption: Preemption and the Role of Courts*, 32 HAMLINE L. REV. 727, 727 (2009) ("Few aspects of Supreme Court jurisprudence are as contradictory and convoluted as the so-called 'presumption against preemption.'").

The United State Supreme Court noted a presumption against preemption in *Rice v. Santa Fe Elevator Corp.*, grounding it in the states' police power to regulate for the good of their citizens: "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 331 U.S. 218, 230 (1947); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[B]ecause the

States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). The presumption is particularly strong when Congress legislates "in [a] field which the States have traditionally occupied." *Rice*, 331 U.S. at 230; *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." (quotation marks omitted)). Citizens' health and safety are "'primarily and historically, . . . matter[s] of local concern,'" and thus states have "'great latitude'" to protect "'the lives, limbs, health, comfort, and quiet of all persons.'" *Lohr*, 518 U.S. at 475 (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) and *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)) (alterations in original).

Against this backdrop, the Supreme Court in *Geier* analyzed whether the Safety Act and FMVSS 208 preempted a common-law tort action in which the plaintiff claimed the automobile manufacturer was liable for failing to install airbags in a 1987 vehicle. 529 U.S. at 865. The Court first addressed the Safety Act's express preemption clause[11] and limited its application to state

[11] The 1987 version of the preemption clause read:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Former 15 U.S.C. § 1392(d) (1988) (current version at 49 U.S.C. § 30103(b)).

legislative and regulatory enactments, concluding that the Act's saving clause[12] exempted common-law tort actions from the preemption clause's scope. *Id.* at 867–68. The Court then rejected the argument that the saving clause foreclosed the operation of ordinary implied preemption principles, including obstacle preemption. *Id.* at 869. Further, the majority disagreed with the dissent's suggestion that the two clauses together created a "special burden" disfavoring preemption. *Compare id.* at 870–74, *with id.* at 898–99 (Stevens, J., dissenting). Instead, the majority considered the "language, purpose, and administrative workability" of the statutes and concluded that no reading of the two clauses favored jury-imposed safety standards over federal safety standards with which they actually conflict. *Id.* at 872–73. In such a case, the operation of ordinary preemption principles dictates that the state-law standard must give way.

We do not read *Geier*'s special-burden discussion to undermine the presumption against preemption. The former is rooted in two statutory provisions of the Safety Act, the latter in principles of federalism. Merely because the Safety Act's saving clause does not create a special burden disfavoring preemption does not eliminate the respective spheres of state and federal sovereignty, and the presumption simply affords deference to the states' long-standing rights to protect their citizens absent a clear directive from Congress. In the end, what the majority said in *Geier* does not negate the presumption against preemption.

What the majority did not say is another matter. MCI correctly notes the *Geier* majority's silence regarding the presumption. The *Geier* dissent noticed as well and decried the majority's

[12] The 1987 version of the saving clause read: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Former 15 U.S.C. 1397(k) (1988) (current version at 49 U.S.C. § 30103(e)).

refusal to apply what the dissent considered to be an "'ordinary experience-proved principle[] of conflict pre-emption.'" *Id.* at 906–07 (Stevens, J., dissenting) (quoting *id.* at 874); *see also Altria Group, Inc. v. Good*, 129 S. Ct. 538, 558 (2008) (Thomas, J., dissenting) (noting in a discussion of *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), which involved express preemption, the effect of the majority's refusal to invoke the presumption: "Given the dissent's clear call for the use of the presumption against pre-emption, the Court's decision not to invoke it was necessarily a rejection of any role for the presumption in construing the statute."). Commentators likewise concluded that the *Geier* majority upended the normal presumption against preemption.[13] In view of the Supreme Court's recent statements on the issue, however, we cannot agree.

In *Wyeth v. Levine*, the Court considered whether federal law preempted, under the actual conflict theory, a Vermont jury's finding that the manufacturer of the drug Phenergan failed to adequately warn of the risks associated with directly injecting the drug into a patient's vein. 129 S. Ct. at 1190–91. The Court, relying on *Lohr*, stated the classic formulation of the presumption against preemption and rejected the dissent's contention that the presumption should not apply to claims of implied conflict preemption. *Id.* at 1194–95 & n.3 (citing *Lohr*, 518 U.S. at 485 and *Rice*, 331 U.S. at 230). According to the dissent, the Court had never—prior to *Wyeth*—definitively applied the presumption in the actual-conflict context. *Id.* at 1228–29 & n.14 (Alito, J., dissenting).

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[13] *See, e.g.*, Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1319 (2004) ("The only way to make sense of [*Geier*] is to see it as putting a presumption in favor of preemption."); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did* Geier v. American Honda Motor Co. *Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1, 2 (2002) ("The five-member majority [in *Geier*] accomplished its apparent goal of preemption in the case by abandoning the long-standing presumption against preemption and the concomitant requirement that Congress's intent to preempt be clear, and it thereby removed any protections the presumption provided to federalism principles, state tort law, and Congress's own preemptive intentions." (footnotes omitted)).

From the majority's language in *Wyeth*, we fail to see how the presumption does not apply to all preemption cases, including implied conflict cases. *Id.* at 1194–95 & n.3 ("For its part, the dissent argues that the presumption against pre-emption should not apply to claims of implied conflict pre-emption at all, but this Court has long held to the contrary." (citation omitted)); *see also Altria Group*, 129 S. Ct. at 543 ("When addressing questions of express or implied pre-emption, we begin our analysis with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quotation marks omitted; alteration in original)). That *Geier* addressed the Safety Act and *Wyeth* a different statute is, contrary to MCI's position, irrelevant.[14] Accordingly, we apply the presumption that Congress did not intend to preempt contrary state law absent evidence that such a result was Congress's clear and manifest purpose.

C. Seatbelts and Federal Preemption

Given that no federal safety standard even discusses passenger seatbelts in motorcoaches, MCI's preemption claim is predicated on regulatory silence. That is, MCI argues that NHTSA's failure to regulate was deliberate and has the same preemptive force as a regulation forbidding passenger seatbelts. While we agree that regulatory silence can preempt state law in rare occasions, we do not agree that NHTSA's decision not to require seatbelts in motorcoaches is such an occasion.

[14] We have applied the presumption against preemption since *Geier*, even when considering the preemptive effect of the Safety Act and the safety standards promulgated thereunder. *See Great Dane Trailers*, 52 S.W.3d at 743; *see also Graber v. Fuqua*, 279 S.W.3d 608, 611–12 (Tex. 2009) (applying the presumption when deciding if the federal bankruptcy regime preempted a state malicious prosecution claim).

The Supreme Court has stated that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002) (quoting *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (quotation marks omitted)). In applying this standard, the Court focused on the agency's explanation for its decision not to regulate. *See id.* at 66–67. Two cases in which the Court considered the preemptive effect of an agency's decision not to regulate illustrate the rule's application.

In *Sprietsma*, the Supreme Court considered whether a claim that a motor boat should have been equipped with a propeller guard was preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301–4311 (Boating Act). Like the Safety Act, the Boating Act contains both an express preemption clause and a saving clause, which the Court interpreted the same way—the preemption clause only affected state legislation and regulations, and the saving clause preserved common-law tort actions. 537 U.S. at 63. Finding no express preemption, the Court unanimously rejected the claim that the tort action conflicted with the federal regulatory scheme. *Id.* at 65. Addressing the boat manufacturer's argument that the "Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats" had preemptive force, the Court responded: "It is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Id.* Rather, that decision "is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards." *Id.* The Coast Guard decided not require propeller guards because doing so was not technically

feasible, the cost of retrofitting boats was substantial, and accident data did not support such regulation; as such, the high standard for justifying regulations was not met. *Id.* at 66. Given this explanation, the Court found nothing in the Coast Guard's statement "inconsistent with a tort verdict premised on a jury's finding that some type of propeller guard should have been installed." *Id.* at 67.

Similarly, in *Freightliner Corp. v. Myrick*, the Supreme Court refused to give preemptive force to regulatory silence: "We hold that the absence of a federal standard cannot implicitly extinguish state common law." 514 U.S. 280, 282 (1995). The plaintiffs claimed the tractor-trailers that crashed into their vehicles should have been equipped with antilock braking systems (ABS). The Safety Act and NHTSA regulations did not require such braking systems,[15] but the manufacturer argued "that the absence of regulation itself constitutes regulation." *Id.* at 286. The Court distinguished an earlier case in which it had stated that the failure of federal officials "affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Id.* at 286 (quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978) (quotation marks omitted)). In *Ray*, Congress had intended to consolidate all regulatory power in the federal government, whereas in *Myrick*, "NHTSA did not decide that the

[15] NHTSA had promulgated a safety standard requiring trucks using air brakes to stop within certain distances. *See Myrick*, 514 U.S. at 284 (citing Air Brake Systems; Trucks, Buses, and Trailers, 36 Fed. Reg. 3817 (Feb. 27, 1971) (to be codified at 49 C.F.R. pt. 571)). Manufacturers notified NHTSA that the distances could not be achieved without using ABS devices and that these devices were unreliable. *Id.* at 285. When NHTSA disagreed, the manufacturers brought suit and succeeded in having the standard suspended until NHTSA compiled sufficient evidence that ABS devices did not create a greater danger. *Id.* As of the Supreme Court's writing, the standard was still suspended. *Id.* at 285–86.

minimum, objective safety standard required by [the Safety Act] should be the absence of all standards, both federal and state." *Id.* at 286–87.

From these cases, it follows that an agency's mere decision to leave an area unregulated is not enough to preempt state law. Instead, the agency must, consistent with the authority delegated to it by Congress, affirmatively indicate that no regulation is appropriate. That is, the agency must state that not only will it leave the area unregulated, it will not allow any regulation in that area as a matter of policy. Unless the agency takes this "further step" to disallow state regulation, its decision not to regulate has no preemptive force. *Sprietsma*, 537 U.S. at 67.

When looking at NHTSA's comments regarding passenger seatbelts in motorcoaches, we do not find any expression of intent to forbid state regulation. NHTSA proposed a requirement for passenger seatbelts in 1973 along with modified seating standards designed to contain passengers during a crash. *See* 38 Fed. Reg. 4776 (Feb. 22, 1973). The following year NHTSA continued to advance such seating standards in school buses, but decided to withdraw the proposed standards for motorcoaches and transit buses: "The NHTSA has in fact determined that seating requirements for intercity and transit buses are not justified, based on benefit/cost studies of present seating performance in these buses. . . . Seat belt usage surveys in intercity buses also indicate that a very low percentage of passengers would utilize seat belts if they were provided. . . . The NHTSA will, of course, propose standards in the future in this area if they are found desirable." School Bus Passenger Crash Protection, 39 Fed. Reg. 27,585 (July 30, 1974). This explanation indicates that NHTSA simply determined that the cost of installing seatbelts was not justified given the low usage

rates.[16] Nothing in these few sentences evidences an intent to prevent a state jury from concluding that seatbelts in a particular setting were appropriate. The similarity of NHTSA's decision to the Coast Guard's decision in *Sprietsma* not to regulate is compelling. Like NHTSA, the Coast Guard had considered and rejected a proposed standard intended to increase user safety on the grounds that it was not justified. *See* 537 U.S. at 66. Both agencies engaged in cost/benefit analyses and concluded that the costs outweighed the benefits based on the relevant data. In *Sprietsma*, the Supreme Court found no preemption under these circumstances. On these facts, we reach the same conclusion. Because we find no clear and manifest statement in the 1974 withdrawal of the proposed regulations—NHTSA's final, official statement on the subject before the motorcoach here was manufactured—that NHTSA intended as a matter of policy to forbid any state requirement of passenger seatbelts in motorcoaches, we must conclude that the jury's verdict in this case is not preempted by federal law.[17]

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[16] To the extent it is relevant at all, the 1977 study commissioned by the Federal Highway Administration corroborates this conclusion. *See supra* note 7. The report gives no indication that NHTSA affirmatively opposed any state law requiring seatbelts in motorcoaches. To be sure, seatbelts are not, according to the study, an unmitigated benefit to the passengers. The kind of accident, such as a side collision, could well neutralize the seatbelts' protection.

[17] We recognize that several other courts have reached the opposite conclusion. *See Lake v. Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 WL 891867, at *9–*11 (Tenn. Ct. App. Mar. 15, 2010); *Doomes v. Best Transit Corp.*, 890 N.Y.S.2d 526, 526 (N.Y. App. Div. Dec. 10, 2009); *Surles v. Greyhound Lines, Inc.*, No. 4:01-CV-00107, 2005 WL 1703153, at *5–*6 (E.D. Tenn. July 20, 2005). We are not persuaded by these opinions, particularly as to their reliance on the 1992 letter from NHTSA's chief counsel. We further note that while Congress may have intended to create uniform standards for the motor vehicle industry, it also allowed—via the saving clause—juries to hold manufacturers liable for inadequate safety measures. *See Wyeth*, 129 S. Ct. at 1200 ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989) (alteration in original)).

Nor does any later evidence change the analysis. The letter of NHTSA's chief counsel in 1992 is unremarkable insofar as it concludes that the Safety Act would preempt nonidentical New York legislation—the Act's express preemption clause compels such a conclusion. *See* 49 U.S.C. § 30103(b)(1). But then NHTSA's counsel opined that the agency had "expressly determined that there is not a safety need for safety belts or another type of occupant crash protection at these seating positions" and cited the 1974 withdrawal of proposed regulation. Letter from Paul Jackson Rice, Chief Counsel, NHTSA to C.N. Littler, Coordinator, Regulatory Affairs, Motor Coach Indus. (Aug. 19, 1992). We refuse to give preemptive force to this sentence for two reasons. First, there is nothing in this statement that indicates opposition to seatbelts and an affirmative desire to forbid their use. Second, to hold that NHTSA's decision not to regulate preempts state law based on a letter written eighteen years after the official decision illustrates the dangers of obstacle preemption grounded in agency musings. A letter, even by NHTSA's chief counsel, is not federal law, nor it is particularly persuasive regarding NHTSA's intent in the 1974 withdrawal. The text of the withdrawal notice is not technical or complex and speaks for itself; a later interpretation of that text is persuasive only to the extent it is correct. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (giving weight to an agency's "rulings, interpretations and opinions" depending "upon the thoroughness evident in [their] consideration, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade, if lacking power to control"); *cf. Wyeth*, 129 S. Ct. at 1201 (giving "some weight" to an agency's views on the impact of tort law on federal objectives when the subject matter is technical and the relevant history complex). We will not overturn a jury's verdict on such tenuous grounds.

All of NHTSA's later statements, from letters to notices of public meetings to reports and action plans, demonstrate the agency's increased willingness to reconsider its 1974 decision to leave motorcoaches essentially unregulated. These events culminated in the initiation of rulemaking for the installation of passenger seatbelts on motorcoaches. The jury anticipated NHTSA's future actions, and we find no conflict between its verdict and the federal safety standards.

MCI argues that the history of NHTSA's motorcoach regulation points in a very different direction. It contends that NHTSA chose an alternate method of passenger protection, compartmentalization, *see supra* note 6, and required seatbelts only for the driver. Further, MCI asserts that three different cases are more relevant than *Sprietsma* or *Myrick*: *Geier*, *Carden v. Gen. Motors Corp.*, 509 F.3d 227 (5th Cir. 2007), and *BIC Pen Corp. v. Carter*, 251 S.W.3d 500 (Tex. 2008). In these latter cases, MCI argues, the agencies carefully weighed competing interests and chose not to require safety devices the plaintiffs wanted. So too here, MCI continues, NHTSA evaluated the seating designs and desirability of seatbelts in motorcoaches and purposefully chose a limited scope of regulation.

We disagree with MCI's interpretation of NHTSA's actions. In particular, there is nothing in the regulatory history of motorcoaches to suggest that NHTSA intended to rely on seating design rather than seatbelts and promulgated standards to that effect. As discussed above, the 1973 notice proposed changing seat design to better protect passengers and also to incorporate seatbelts as an alternative restraint system. In 1974, NHTSA withdrew both proposals, finding that the cost of the methods did not justify their benefits. NHTSA did issue seating standards for school buses, *see* 49 C.F.R. § 571.222, but not for motorcoaches. Thus, it is inaccurate to suggest that NHTSA chose

an alternate method to protect passengers; instead, NHTSA chose not to regulate seating design or seatbelts in motorcoaches, a decision that does not have preemptive force for the reasons explained above.

Nor do we find *Geier*, *Carden*, or *BIC Pen* more analogous to the present situation. In *Geier*, the Supreme Court considered whether FMVSS 208 preempted a claim that a 1987 vehicle should have had airbags. 529 U.S. at 865. FMVSS 208, as in effect at the time, "deliberately sought variety—a mix of several different passive restraint systems." *Id.* at 878. NHTSA also chose to gradually phase in the requirements for passive restraints and made them conditional; because seatbelts provided the same or greater benefit at a lower cost, the passive-restraint standard would be rescinded if two-thirds of the states mandated seatbelt use within a certain period of time. *Id.* at 879–80. The reasons for this mix of restraints and gradual phase-in over time reflected NHTSA's experience and considerations of cost and public acceptance. Even though seatbelts provided the best protection in the event of a crash, most of the public did not wear them at the time. *Id.* at 877. While passive restraints such as airbags could provide some of that lost protection, they created problems of their own (e.g., harm to children), cost more than seatbelts, and were viewed with suspicion by the public. *Id.* at 877–78. Thus, rather than simply mandate airbags—a tactic that had failed when NHTSA required seatbelt buzzers and ignition interlocks[18]—NHTSA decided that public "safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Id.* at 881 (quotation marks omitted). Because

[18] An ignition interlock "force[s] occupants to buckle up by preventing the ignition otherwise from turning on." *Id*. at 876. Public displeasure at these methods resulted in Congress passing a law disallowing DOT from requiring them. *Id.*

the plaintiffs' suit required a single standard mandating the installation of airbags, it "presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* Because the suit required all of the manufacturer's cars sold in the District of Columbia to be equipped with airbags, when FMVSS 208 only required ten percent of the manufacturer's nationwide fleet to be so equipped, it "stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Id.* Accordingly, the rule of law advocated by the plaintiffs was preempted by federal law. *Id.*

In *Carden*, the Fifth Circuit considered whether FMVSS 208 preempted the plaintiffs' claim that a car manufacturer should have installed a lap/shoulder seatbelt rather than a lap belt alone in the rear center seat of a 1999 Pontiac Grand Am. 509 F.3d at 229. Finding *Geier* directly on point, the court reviewed the history of FMVSS 208 and concluded that NHTSA deliberately gave manufacturers the choice of which kind of seatbelt to install based on specific policy reasons. *Id.* at 230–31. These reasons included the technical difficulties associated with installing a shoulder belt in the rear center position, and the greater cost of doing so even when the expected safety benefit was minimal given the low occupancy rate in that seat. *Id.* at 231. The Fifth Circuit then distinguished *Sprietsma* and its analysis of non-regulation by noting the presence of explicit regulation and the choice given therein. *Id.* at 232.

Finally, in *BIC Pen*, this Court considered whether federal law preempted a design defect claim regarding a BIC lighter. 251 S.W.3d at 503. We reviewed the certification process lighters must undergo at the direction of the Consumer Product Safety Commission, the regulatory agency charged with developing safety standards for consumer products. *Id.* The Commission adopted

regulations that require lighters to successfully resist operation by eighty-five percent of a child-test panel. *Id.* This number was chosen based on numerous factors, "including child resistence, overall safety, the realities of manufacturing, the variability and randomness of child testing, the product's utility, and the importance of customer acceptance." *Id.* at 507 (citing 16 C.F.R. § 1210.5(c)). The Commission was particularly concerned that lighters not be too difficult to operate or adults would forgo their use and resort to non-child-resistant lighters or matches, which posed even greater dangers to children. *Id.* Because the Commission weighed these factors and struck a delicate balance between them, we concluded that "imposing a common law rule that would impose liability above the federal standard is contrary to the Commission's plan and conflicts with federal law." *Id.* Accordingly, we held that the design defect claim was preempted. *Id.* at 509.

MCI argues these cases illustrate the preemptive effect of an agency's regulatory action following a careful analysis of various, and often competing, considerations of safety and cost. But MCI misses a telling distinction between these cases and the present one. In *Geier*, *Carden*, and *BIC Pen*, the agencies actually *issued* regulations. These regulations balanced competing considerations, as MCI notes, but in each case the courts considered the preemptive effect of a *regulation*. When an agency issues regulations, a federal law exists with which a state law can conflict. But when the agency chooses not to regulate, there is no preemptive federal law absent a clear and manifest indication of the agency's intent to forbid all regulation. NHTSA has not taken that further step regarding passenger seatbelts in motorcoaches. In this respect, the present case is more akin to *Sprietsma* and *Myrick*, in which the Supreme Court found no preemptive intent in the agencies' non-action.

Regulatory silence will not preempt a state law absent a clear and manifest statement of intent to forbid all regulation in that area. Applying this standard to NHTSA's decision not to require passenger seatbelts in motorcoaches, we find nothing in the regulatory history or agency statements indicative of such intent. In this lacuna of regulation, the jury's finding that MCI should have installed seatbelts on its motorcoach does not conflict with any federal law and is not preempted.

D. Glazing Materials and Federal Preemption[19]

We next consider the effect of FMVSS 205 on the Plaintiffs' claim that the motorcoach should have had laminated-glass windows. Unlike the seatbelt claim, here NHTSA issued an actual federal safety standard giving manufacturers a choice of glazing materials, including laminated and tempered glass. The jury determined that MCI should have used laminated glass rather than tempered glass and that this defect caused some of the Plaintiffs' injuries. The parties agree that FMVSS 205 gives a choice but disagree on its significance. Thus, we must decide if an agency's deliberate decision to give manufacturers a choice between several different materials, none of which is superior to the others in all circumstances, preempts a jury's conclusion that another of the required types should have been used. We conclude that it does not.

The Safety Act defines the federal motor vehicle safety standards as "minimum standard[s]." 49 U.S.C. § 30102(a)(9). And state regulation of vehicle safety through common-law tort actions

[19] The jury found that the lack of seatbelts caused the injuries of all the Plaintiffs. Thus, our conclusion that the seatbelt claim is not preempted is sufficient to uphold the jury's verdict. Even so, we discuss the preemptive effect of FMVSS 205 because, in light of the remand for a new trial, the issue of glazing materials will feature prominently on retrial. Accordingly, we address it to provide guidance to the trial court. *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 . . . .").

is expressly allowed: "[The Safety Act's saving clause] preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Geier*, 529 U.S. at 870; *see also* 49 U.S.C. § 30103(e). Of course, a tort action that seeks to impose a requirement forbidden by a federal standard, or that forbids what the standard requires, is preempted due to the actual conflict. Likewise, a tort action that presents an obstacle to the federal purpose is preempted—*Geier* is clear that ordinary preemption principles apply. 529 U.S. at 874. But we must be mindful that Congress generally intended the federal safety standards to set a minimum standard for performance and allowed juries to determine in particular cases if the vehicle manufacturer should have done more.

The text of FMVSS 205 states its three-fold purpose—to reduce injuries resulting from impact to glazing surfaces, to provide driver visibility, and to minimize ejections—and incorporates by reference the standards of ANSI/SAE Z26.1-1996. 49 C.F.R. § 571.205, S2, S3.2(a). The ANSI standard delineates the testing requirements for the various glazing materials and allows the use of either laminated glass or tempered glass in vehicle windows other than the windshield, which must have laminated glass. *See* ANSI/SAE Z26.1-1996, T.1 (Items 1 & 2). Nothing in the text of FMVSS 205 indicates that it is anything other than a minimum materials standard. In the absence of the standard, manufacturers could use any material allowed by state law; the standard simply limits the range of available choices.

MCI argues that the choice of glazing materials is enough to preempt a jury's finding that a different material should have been used. To be clear, the jury did not find that MCI should have used a glazing material not permitted by FMVSS 205, only that MCI should have used a different

glazing material allowed by the standard. Even such a finding, MCI contends, violates the purpose of FMVSS 205 and the policy-motivated decisions NHTSA made in adopting it. Central to MCI's argument is its interpretation of *Geier* and that opinion's analysis of FMVSS 208. MCI claims that *Geier* and lower courts following it have applied FMVSS 208 to preempt tort actions that sought to hold manufacturers liable for not choosing a different safety measure allowed by the standard.

Lower courts have, in fact, interpreted *Geier* in this fashion,[20] but we believe these courts have read *Geier* too broadly. The Supreme Court in *Geier* did not condemn a common-law rule merely because it foreclosed a choice under the relevant safety standard. Rather, the Court emphasized the purpose of the choice: "FMVSS 208 embodies the Secretary's policy judgment that

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[20] *See, e.g.*, *Carden*, 509 F.3d at 230–31 ("*Geier*, thus, compels the conclusion that a state tort suit that would foreclose a safety option intentionally left to vehicle manufacturers by Federal Motor Vehicle Safety Standards is preempted."); *Griffith v. Gen. Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002) ("[U]nder *Geier*, when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted."); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 383 (7th Cir. 2000) ("[W]hen a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted."); *Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169, 176 (M.D. Pa. 2001) (concluding that plaintiffs' claim was "attacking one of the specifically permitted passive restraint options [under FMVSS 208]" (alteration in original)); *Hernandez-Gomez v. Volkswagen of Am., Inc.*, 32 P.3d 424, 428–29 (Ariz. Ct. App. 2001) (concluding that plaintiff's state tort claim is preempted by FMVSS 208); *Williamson v. Mazda Motor Co. of Am., Inc.*, 84 Cal. Rptr. 3d 545, 556 (Cal. Ct. App. 2008) (concluding that plaintiffs' claim related to lap-only seatbelt is barred by FMVSS 208), *cert. granted*, 77 U.S.L.W. 3611 (U.S. May 24, 2010) (No. 08-1314); *Roland v. Gen. Motors Corp.*, 881 N.E.2d 722, 728–29 (Ind. Ct. App. 2008) (holding that plaintiffs' common-law tort action is preempted "on the narrow grounds" that it conflicts with FMVSS 208, but refusing to join other courts that find preemption on "broader grounds" when any regulation affords a choice to manufacturers); *Osman v. Ford Motor Co.*, 833 N.E.2d 1011, 1021 (Ind. Ct. App. 2005) (holding that claims asserted in connection with automobile's passive-restraint system were preempted by FMVSS 208); *Heinricher v. Volvo Car Corp.*, 809 N.E.2d 1094, 1097–98 (Mass. App. Ct. 2004) (concluding that plaintiffs' state common law claims are preempted by FMVSS 208); *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 94–95 (W. Va. 2009) ("We therefore find that because the NHTSA gave manufacturers the option to choose to install either tempered glass or laminated glass in side windows of vehicles in FMVSS 205, permitting the plaintiff to proceed with a state tort action would foreclose that choice and would interfere with federal policy."). *But see O'Hara v. Gen. Motors Corp.*, 508 F.3d 753, 759 (5th Cir. 2007) ("When a federal safety standard deliberately leaves manufacturers with a choice among designated design options *in order to further a federal policy*, a common law rule which would force manufacturers to adopt a particular design option is preempted." (emphasis added)).

safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." 529 U.S. at 881 (quotation marks omitted). That is, the *choice itself* furthered the overall goal of safety, allowing manufacturers to experiment with different options and to build the public's confidence in the new technologies. The specific reasons for this mix of safety options phased-in over time is discussed above, and there is no doubt that *Geier*'s choice-with-a-purpose reasoning is securely grounded in FMVSS 208 and its particular history. To the extent that other courts have interpreted *Geier* in the context of FMVSS 208 and NHTSA's decision to phase-in a mix of passive restraint systems, we agree they are correct. But when *Geier*'s reasoning is oversimplified to find preemption based on a choice between two safety options and then exported to other safety standards where the unique text and history of FMVSS 208's passive restraint requirements are not relevant, we must respectfully disagree.[21]

Given our interpretation of *Geier*, we turn to MCI's argument that FMVSS 205 represents NHTSA's deliberate decision to give manufacturers a choice of safety options. That is, MCI seems to contend that NHTSA made a *Geier*-like policy decision to encourage a range of glazing choices. We do not agree. As noted, FMVSS 205 then and now gives manufacturers a choice of materials

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[21] Hinton asks this Court to take judicial notice of the Solicitor General's amicus brief filed in *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314, pending before the United States Supreme Court. We grant Hinton's request. *See supra* note 7. In *Williamson*, the Court granted certiorari to consider whether FMVSS 208 preempts a claim that a 1993 Mazda MPV van should have been equipped with a lap/shoulder belt in the rear middle seat rather than a lap-only belt. *See* 130 S. Ct. 3348 (May 24, 2010) (order granting certiorari); s*ee also* Brief for the United States as Amicus Curiae at 5, 21, *Williamson v. Mazda Motor of Am., Inc.*, No. 08-1314 (U.S. Apr. 23, 2010). The Solicitor General, joined by DOT and NHTSA, rejected the broad reading of *Geier*: "The government's briefs to this Court have consistently explained that NHTSA's decision to allow options, standing alone, does not compel a finding of preemption." Brief for the United States as Amicus Curiae at 18, *Williamson v. Mazda Motor of Am., Inc.*, No. 08-1314. Instead, more is needed: "But without more (such as the emphasis on diversity of solutions discussed in *Geier*), the States are not foreclosed from concluding, through a duty of care applied in common-law tort actions, that one option is superior to the others." *Id.* at 19.

and recognizes that no one type is superior in all circumstances. *See* 49 C.F.R. § 571.205, S3.2(a); ANSI/SAE Z26.1-1996 § 2.2. In the final rule adopting the new ANSI/SAE standards, NHTSA did not state a positive desire to preserve the use of tempered glass in windows by forbidding contrary state regulation. *See* 68 Fed. Reg. 43,964. Rather, NHTSA declined to continue rulemaking regarding advanced glazing materials after completing a ten-year study of the subject because other safety measures, such as side air curtains, also helped to mitigate ejections and NHTSA needed to devote its resources to developing standards for them. *See* 67 Fed. Reg. at 41,366. NHTSA also cited the costs associated with redesigning vehicles to accept advanced glazing materials and noted that use of these materials may increase the risk of neck injuries. *Id.*

In short, NHTSA extensively studied the issue and did not change the safety standard, which still allows manufacturers to choose among several types of glazing materials. FMVSS 205 is unlike FMVSS 208 and its carefully constructed timetable and mix of safety options. *Compare* 49 Fed. Reg. 6732, *and* 68 Fed. Reg. 43,964, *with* Occupant Crash Protection Final Rule, 49 Fed. Reg. 28,962 (July 17, 1984) (to be codified at 49 C.F.R. pt. 571). Neither set of standards is, as MCI argues, a "choice among the best available alternatives." Rather, the former merely narrows the range of manufacturers' choice of glazing materials from potentially unlimited to a short list. The latter emphasizes the choice among options as an important and integral part of the overall safety scheme. We find nothing in the standard's text, history, or NHTSA's comments to indicate that FMVSS 205 is anything other than a minimum standard. As a minimum standard, FMVSS 205 does

not preempt the jury's finding that MCI should have used laminated glass in the motorcoach's windows.[22]

We are not the first court to examine the preemptive effect of FMVSS 205. In *O'Hara v. General Motors Corp.*, the Fifth Circuit addressed the same issue in the context of a sport utility vehicle. 508 F.3d 753, 755 (5th Cir. 2007). The plaintiffs claimed that General Motors should have used advanced glazing materials in the side windows of a 2004 Chevrolet Tahoe instead of tempered glass. *Id.* The Fifth Circuit considered the text and history of FMVSS 205 as well as NHTSA interpretations of the standard and general comments on the subject matter of advanced glazing materials. *See id.* at 759–63. It concluded that FMVSS 205 differs from FMVSS 208 both in text and purpose—specifically that the relevant "factors" of the latter, "detailed implementation timelines, full vehicle testing procedures and 'options' language," that supported preemption—were "conspicuously absent from FMVSS 205." *Id.* at 760. The court found that NHTSA commentary on FMVSS 205 supported "the conclusion that it is a minimum safety standard." *Id.* at 761. Interestingly, the court also considered NHTSA's decision to terminate rulemaking on advanced glazing materials and analogized that choice to the Coast Guard's non-action in *Sprietsma*:

> We find the parallels between NHTSA's Withdrawal of Rulemaking and the Coast Guard's statements in *Sprietsma* to be compelling. NHTSA's 2002 Notice of Withdrawal focused on the need to develop experimental standards for new rollover accident technologies. It did not reject advanced glazing as unsafe (indeed, FMVSS 205 continued to require advanced glazing in vehicle windshields). Like the Coast Guard, the NHTSA Notice of Withdrawal cited cost concerns and minor safety issues to justify the agency's change in course. And also like the Coast Guard, NHTSA has

[22] On this issue, we agree with the Fifth Circuit in *O'Hara*, discussed below, that the presumption against preemption is unnecessary for resolution of the glazing materials claim because the jury's verdict does not actually conflict with FMVSS 205. *See* 508 F.3d at 759 n.4.

> continued to study advanced glazing as part of its rollover protection program. NHTSA's Notice of Withdrawal "does not convey an authoritative message of a federal policy against" advanced glazing in side windows.

Id. at 762–63.[23] Finding FMVSS 205 to be a minimum safety standard, the court held that the plaintiffs' negligence and strict liability claims were not preempted. *Id.* at 763.

The Supreme Court of West Virginia also considered whether FMVSS 205 preempted a claim that a vehicle manufacturer should have used advanced glazing materials rather than tempered glass in the side window of a sport utility vehicle. *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 81 (W. Va. 2009). The court examined *Geier*, *O'Hara*, and *Wyeth* at some length, *see id.* at 88–93, and specifically rejected the interpretation of *Geier* that we adopt, instead holding that a regulation giving a choice between different materials preempts a tort action premised on the superiority of one option, *id.* at 94–95. The court reasoned that "because the NHTSA made a public policy decision to not mandate advanced glazing in side windows because of safety concerns that advanced glazing has a slightly increased risk of neck injuries," it was compelled to find *Geier* directly applicable. *Id.* at 94.[24]

As our analysis makes plain, we agree with *O'Hara*. The *Morgan* court errs by concluding that merely because NHTSA chose not to require something for policy reasons, states may not do so as well. As discussed above, the rule in *Sprietsma* regarding the preemptive force of regulatory

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[23] We do not understand MCI to argue that because NHTSA chose not to change the glazing options in FMVSS 205 after ten years of study, we should interpret this non-action as an affirmative policy decision against advanced glazing materials in side windows. Even if it had, we find persuasive *O'Hara's* comparison to *Sprietsma*.

[24] The Tennessee Court of Appeals followed *Morgan*'s analysis when confronted with the issue. *See Lake*, 2010 WL 891867, at *6–*9. The *Lake* court identified the split between *O'Hara* and *Morgan* and agreed with the latter. The South Carolina Supreme Court also followed *Morgan*'s and *Lake*'s analysis on this issue. *Priester v. Cromer*, 697 S.E.2d 567, 571 (S.C. 2010).

non-action is not so broad, particularly when NHTSA still permits manufacturers to choose what it would not require. There is no evidence that NHTSA intended to disallow states from requiring the use of advanced glazing materials in side windows. Nor do we agree with the *Morgan* court's broad interpretation of *Geier*, that preemption is mandated whenever an agency makes a considered decision to preserve the status quo and its range of choices. As the Solicitor General has said: "Manufacturers always have the 'option' of exceeding a minimum safety standard when NHTSA has decided not to mandate a more stringent alternative because of considerations of cost or feasibility—as NHTSA did in this case and, indeed, often does in considering regulatory alternatives. But if such an 'option' alone were enough to trigger federal preemption under *Geier*, the Safety Act's savings clause would be greatly undermined." Brief for the United States as Amicus Curiae at 15, *Williamson v. Mazda Motor of Am., Inc.*, No. 08-1314. We agree. Attributing preemptive intent to every deliberate agency decision runs afoul of Congress's choice to define the safety standards as minimum standards and its clear decision to allow juries a place in developing common-law rules that exceed the federally defined floor.

We hold that FMVSS 205 is a minimum standard that merely limits the possible glazing materials a manufacturer may choose for incorporation in its vehicles. As such, the jury's finding that MCI should have used a different glazing material in the motorcoach here presents no obstacle to the accomplishment and execution of a federal policy. Thus, we hold that the jury's verdict in favor of the Plaintiffs is not preempted by federal law.

III. Settling Persons

We finally consider whether Central Texas and the bus driver[25] are settling persons under Chapter 33 of the Texas Civil Practice and Remedies Code. The 1995 version of Chapter 33 provided a proportionate responsibility framework for apportioning percentages of responsibility in the calculation of damages.[26] At that time, section 33.003 required a trier of fact to determine the percentage of responsibility for each claimant, each defendant, each settling person, and each responsible third party who had been properly joined. TEX. CIV. PRAC. & REM. CODE § 33.003.[27] Section 33.013 provided, with some exceptions, that a defendant was only liable for the percentage of responsibility found by the trier of fact, unless the percentage exceeded fifty percent. *Id.* § 33.013(a);[28] *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 687 (Tex. 2007). If a defendant's percentage of liability exceeded fifty percent, the defendant was jointly and severally liable for the entirety of the damages recoverable by the claimant. TEX. CIV. PRAC. & REM. CODE § 33.013(b); *Duenez*, 237 S.W.3d at 687.

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[25] Unless otherwise specified, we will refer to Central Texas and the bus driver collectively as "Central Texas" in this section of the opinion.

[26] The 1995 version of Chapter 33 applies to this case because the Plaintiffs filed suit on June 26, 2003. Chapter 33 was amended on June 2, 2003, but those amendments apply only to a cause of action filed on or after July 1, 2003. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.05, 23.02(c), 2003 Tex. Gen. Laws 847, 856–57, 899.

[27] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, 1987 Tex. Gen. Laws 37, 41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 972, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.02, 2003 Tex. Gen. Laws 847, 855 (current version at TEX. CIV. PRAC. & REM. CODE § 33.003).

[28] Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3271, *amended by* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.09, 1987 Tex. Gen. Laws 37, 42, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 974, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.07, 4.10(5), 2003 Tex. Gen. Laws 847, 858–59 (current version at TEX. CIV. PRAC. & REM. CODE § 33.013).

Relevant to our determination of this issue is the definition of a "settling person." While "settle" and "settlement" were not defined in Chapter 33, *see C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 319 (Tex. 1994), "settling person" was. A "settling person" was "a person who at the time of submission has paid or promised to pay money or anything of monetary value to a claimant at any time in consideration of potential liability . . . with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought." TEX. CIV. PRAC. & REM. CODE § 33.011(5).[29] Here, the trial court refused MCI's request to include Central Texas as a "settling person" in a proportionate responsibility question in the jury charge. Whether the trial court erred in this ruling is crucial: a finding by the jury that Central Texas had a percentage of responsibility as a settling person could potentially have reduced MCI's percentage of liability to fifty percent or less, thus limiting the amount of damages MCI would have had to pay.

Our analysis of whether Central Texas is a settling person under Chapter 33 turns on a question of statutory construction. A question of statutory construction is a legal one which we review de novo, "ascertaining and giving effect to the Legislature's intent as expressed by the plain and common meaning of the statute's words." *Duenez*, 237 S.W.3d at 683 (citing *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004)); *see also Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008) (citing *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000)) (observing the necessity of a court determining and giving effect to the Legislature's intent

[29] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 973, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.05, 2003 Tex. Gen. Laws 847, 856–57 (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(5)).

in construing a statute).[30] We first look at "the statute's language to determine that intent, as we consider it 'a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.'" *Brandal*, 257 S.W.3d at 207 (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)). Thus, we consider the statute's plain and common meaning, and do not "look to extraneous matters for an intent the statute does not state." *Allen*, 15 S.W.3d at 527.

As noted, the applicable version of Chapter 33 defined "settling person" as a person who, at the time of submission, has paid or promised to pay *anything* of value to a claimant in consideration of liability. *C & H Nationwide*, 903 S.W.2d at 320. We apply the plain meaning of these words to the facts before us. Here, Central Texas had filed for bankruptcy, but its insurer deposited, on the bankruptcy court's order, the limits of its policy into the court's registry for payment to the Plaintiffs. Central Texas also agreed to pay the claimants $7,000 a year for five years. There is no question that the claimants who chose to obtain funds from the Apportionment Plan "settled" with Central Texas—they received money in exchange for a release of Central Texas's liability. But the Plaintiffs chose to participate in the Litigation Plan, which they claim could not constitute a settlement due to its uncertain and adversarial nature at the time of submission in the trial court.

As the court of appeals observed, all the parties in the bankruptcy court engaged in extensive negotiations over the division of the funds among the litigants, and Central Texas and its insurer did

[30] The court of appeals stated that the appropriate standard of review for the "settling person" inquiry is abuse of discretion. While it is true that we generally review a trial court's refusal to submit a particular instruction under an abuse of discretion standard, *see In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000), an issue of statutory construction is a legal question which we review de novo. *See Duenez*, 237 S.W.3d at 638; *see also Galle v. Pool*, 262 S.W.3d 564, 571 n.3 (Tex. App.—Austin 2008, pet. denied).

not oppose tendering the funds into the court's registry or participating in mediation. Thus, Central Texas definitely paid something of monetary value to the claimants, including the Plaintiffs—$5 million in insurance proceeds, plus $7,000 annually—in respect to its potential liability, and the Plaintiffs negotiated for, and were the ultimate recipients of, some of these proceeds. Central Texas was further discharged from tort liability in the bankruptcy court on approval of its reorganization plan, which the Plaintiffs approved. Although the Litigation Plan was arguably not styled a settlement by the claimants or bankruptcy court, it had all semblances of a settlement. *See Ratcliff v. Fibreboard Corp.*, 819 F. Supp. 584, 588–89 (W.D. Tex. 1992) (concluding that agreement was a final settlement under Chapter 33, despite language in the agreement to the contrary). We hold, under these facts, that Central Texas is a settling person, and the trial court should have submitted a question to the jury concerning Central Texas's proportionate responsibility as such.

The Plaintiffs advance several arguments supporting their position that Central Texas cannot be considered a settling person under the applicable version of Chapter 33. We address each in turn. First, the Plaintiffs contend that the uncertain and adversarial nature of the Litigation Plan renders the Plan a form of litigation. One group of claimants—those who elected to participate in the Apportionment Plan—did immediately collect their proportion of the insurance funds, while those who elected to participate in the Litigation Plan deferred their receipt of the funds. Our inquiry, then, is whether electing to defer the collection of funds permits the Plaintiffs to deny Central Texas's status as a settling person. We conclude it does not. The definition of settling person requires only a promise to pay, not an actual payment, in consideration for a release from liability. *See C & H Nationwide*, 903 S.W.2d at 320. Here, there was, in essence, a promise to pay in consideration for

Central Texas's release from liability. While the Plaintiffs chose to present arguments in a hearing before a special judge, the Litigation Plan also allowed the Plaintiffs to "agree at any time to approve full or partial distribution of the Litigation Funds to any or all participants," even without going before the special judge. There was never a real possibility that the Plaintiffs would not recover some amount of proceeds from the Litigation Fund: the Plaintiffs not only had the option of receiving the proceeds in the Litigation Fund at any time, but the Litigation Plan contained no provision for the return of any nonawarded proceeds to Central Texas or its insurer.

Further, even though the Plaintiffs chose not to approve distribution from the Litigation Fund before the hearing in front of the special judge, the hearing was not adversarial in nature and the end result of the hearing was certain before it began. Central Texas was not present at the hearing and, of course, had no reason to be present since it had irrevocably paid money into the court's registry in exchange for a release from liability. Thus, the hearing lacked the adversarial nature the Plaintiffs contend existed. The Plaintiffs argue that the amount each claimant might have received following the hearing was uncertain. But the Litigation Plan capped the amount of each claimant's recovery at 110% of that determined by the mediator, and each participant in the Litigation Plan received within two percent of the amount determined by the mediator, with one exception. Even if the exact amount each claimant might have received was uncertain, there was little uncertainty that each Plaintiff was going to receive *some* amount. The statute does not require certainty in the actual amount of the money or thing of monetary value—just the promise that the person will receive

something of value. TEX. CIV. PRAC. & REM. CODE § 33.011(5);[31] s*ee also Gilcrease v. Garlock, Inc.*, 211 S.W.3d 448, 455 (Tex. App.—El Paso 2006, no pet.) (holding settlement agreement was not contingent because the defendants made an unconditional promise to pay).

Second, the Plaintiffs contend that Central Texas's release from liability in the bankruptcy court was involuntary under federal bankruptcy law, and thus cannot constitute a settlement. *See In re Arrowmill Dev. Corp.*, 211 B.R. 497, 503 (Bankr. D.N.J. 1997). But to hold that the definition of "settling person" requires a voluntary release of claims would compel us to insert language into the statute that is not there. *See Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 n.41 (Tex. 2007) (noting that courts "should not by judicial fiat insert non-existent language into statutes"). In any event, it is inaccurate to describe Central Texas's release from liability as involuntary. Central Texas and its insurer engaged in negotiations concerning not only the money to be placed in the bankruptcy court's registry and the manner in which funds were to be allocated, but also whether or not Central Texas was to be released from liability. When the Plaintiffs voted in favor of approving Central Texas's reorganization plan, they consented to release Central Texas from liability.

Third, the Plaintiffs contend that there was uncertainty "*at the time of submission*." TEX. CIV. PRAC. & REM. CODE § 33.011(5) (requiring the payment or promise to pay something of monetary value to have occurred "at the time of submission" in order for a person to be considered a "settling

[31] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 973, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.05, 2003 Tex. Gen. Laws 847, 856–57 (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(5)).

person") (emphasis added).[32] But the fact that the Plaintiffs had not actually presented their cases to the special judge at the time of submission does not change whether or not the settlement was certain. At the time of submission in the trial court, Central Texas and its insurer had already deposited funds in the bankruptcy court's registry, the Litigation Plan had been in place for over two years, and the Plaintiffs had the option of requesting disbursement of their proportionate shares of the Fund.

Fourth, the Plaintiffs argue that the proper vehicle for proportioning some share of Central Texas's potential liability would have been through its joinder as a responsible third party. Under the applicable version of Chapter 33, a responsible third party was defined as a person (1) over whom the court can exercise jurisdiction, (2) who was not sued by the claimant, and (3) who is or may be liable for all or part of the damages claimed against the named defendant. TEX. CIV. PRAC. & REM. CODE § 33.011(6).[33] The term specifically excluded "a person or entity that is a debtor in bankruptcy proceedings or a person or entity against whom this claimant's claim has been discharged in bankruptcy, except to the extent that liability insurance or other source of third party funding may be available to pay claims asserted against the debtor." *Id.* The Plaintiffs contend that since a debtor in bankruptcy *without* the availability of liability insurance was excluded from the definition of

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[32] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 973, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.05, 2003 Tex. Gen. Laws 847, 856–57 (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(5)). The current version of section 33.011(5) allows for the settlement to occur "at any time." TEX. CIV. PRAC. & REM. CODE § 33.011(5). The applicable version of the statute, however, was limited to settlements made "at the time of submission."

[33] Act of May 8, 1995, 74th Leg, R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 973, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.05, 2003 Tex. Gen. Laws 847, 856–57 (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(6)).

responsible third party, it follows that a debtor in bankruptcy *with* the availability of liability insurance—like Central Texas—is a responsible third party.[34] Assuming that Central Texas could properly be characterized as a responsible third party, nothing in Chapter 33 suggested that a party's identification as a responsible third party or settling person is an either-or proposition. A person could potentially fall within the definitions of both settling person and responsible third party, and the Legislature included no language in Chapter 33 indicating otherwise. *See Brandal*, 257 S.W.3d at 206 (noting that the Legislature "tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent" (citing *Fitzgerald*, 996 S.W.2d at 866)); *Lee v. City of Houston*, 807 S.W.2d 290, 295 (Tex. 1991) (observing that a court may not "judicially amend a statute and add words that are not implicitly contained in the language of the statute"). The Legislature did not limit the designations of settling person and responsible third party as exclusive, and we will not read such a limitation into the statute. *See C & H Nationwide*, 903 S.W.2d at 320 (concluding that the definition of "settling person" is not limited to those who fully resolve all claims against them and includes those who settle only partially); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 629 (Tex. 2008) (noting that a statute is to be interpreted as written, unless the context requires otherwise or the construction would lead to an absurd result).

Fifth, the Plaintiffs contend that to find Central Texas a settling person will confuse settlement jurisprudence and overbroadly designate a person as settling any time the person deposits

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[34] MCI did attempt to join Central Texas as a responsible third party, but the trial court refused this request. MCI appealed this decision to the court of appeals, which held that the trial court did not abuse its discretion in denying MCI's motion for leave to join Central Texas as a responsible third party. MCI did not brief this issue to this Court; accordingly, we express no opinion on the propriety of the trial court's refusal to submit a responsible third party question to the jury.

funds in a court's registry. We disagree with this assertion. We do not hold that a deposit of funds in a court's registry is always akin to a settlement. Rather, it is so when, as here, the negotiations and terms of an agreement in every way resemble a settlement. When this is the case, we must define it as what it is—a settlement. As discussed before, Central Texas and its insurer did not simply deposit funds in the bankruptcy court's registry. They negotiated the terms of the deposits with the claimants and entered into a mediated agreement where the claimants could either accept the funds immediately or defer acceptance to a later date, and Central Texas was released from liability. Our holding will also have no adverse effect on parties in bankruptcy proceedings or in settlement negotiations. To the contrary, parties in bankruptcy and related litigation will know that if they enter into an agreement that in all respects resembles a settlement, they will be deemed settling persons in related state litigation for purposes of Chapter 33.

Finally, the Plaintiffs point to statements made both in documents in the bankruptcy court[35] and by the bankruptcy court judge suggesting that the Litigation Plan was not a settlement under Chapter 33. In his dissent, CHIEF JUSTICE JEFFERSON also relies on these statements as indication that the Litigation Plan was not a settlement. But these statements were not part of the bankruptcy court's holdings. As the court of appeals observed, these were merely *ipse dixit* statements that, in any event, have no bearing on our interpretation of Texas law. *See Allen*, 15 S.W.3d at 527 (observing that we consider the statute's plain and common meaning and do not "look to extraneous matters for an intent the statute does not state"); *cf. In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984)

[35] For example, the bankruptcy court order approving and describing the Apportionment Plan states that participation of a bus crash claimant in the Litigation Plan "shall not constitute a settlement." As the Plaintiffs note in their brief, the claimants prepared and agreed to the Apportionment Plan.

(per curiam) (holding that appellate court may not accept a trial judge's oral comments as findings of fact or conclusions of law).

CHIEF JUSTICE JEFFERSON asserts that we improperly construe the circumstances under which the Plaintiffs pursued their claims in the bankruptcy court. We respectfully disagree. As discussed above, the portion of the Apportionment Plan concerning the Litigation Plan specifically provided that the Litigation Plan participants could agree *at any time* to distribution of Litigation Funds to any or all participants, provided that it was done in writing by all participants in the Litigation Plan. Although the Plaintiffs did not ultimately exercise this option, it was available to them at the time of submission in the trial court. Thus, at the time of submission, not only had Central Texas unilaterally deposited funds in the bankruptcy court registry for future distribution to the claimants, but the Plaintiffs—and other Litigation Plan participants—had the option of receiving those funds at any time. Moreover, even though the Plaintiffs ultimately decided to pursue the "litigation" option, the record belies a description of the hearing before the special judge as adversarial or contingent. The claimants crafted the Litigation Plan after extensive negotiations and, as previously mentioned, could not individually recover more than 110% of the mediator's allocation. While it is true that the Litigation Plan did not set a floor on each claimant's possible individual recovery, there was never a real possibility that any of the Plaintiffs—all victims of the bus accident and their families—would receive none of the bankruptcy court funds, given that the hearing was uncontested and the Litigation Plan contained no provision for the return of undisbursed funds to Central Texas. This is not a retroactive view of the proceedings: because Central Texas's reorganization plan had previously been approved, Central Texas had no reason to appear at the hearing. Of course, the

dissent correctly notes that the actual results of the hearing before the special judge are not relevant since we must determine settlement "at the time of submission." But the results—with all but one participant receiving within two percent of the amount assigned by the mediator—do highlight the fact that this was not actual, adversarial litigation with an uncertain outcome. There is further no indication in the record that other "potential parties" were entitled to the Litigation Funds in lieu of the Litigation Plan participants. Rather, the bankruptcy judge stated that other parties might be entitled to those funds if the Litigation Plan participants were not for whatever reason. At the time of submission, Central Texas had deposited the limits of its insurance policy in the bankruptcy registry and had been released from liability, and the Litigation Plan participants had the option of either receiving their proportionate shares of the funds or bringing their cases before a special judge in a nonadversarial hearing. Despite how the bankruptcy court or the Plaintiffs might describe these events, we conclude they constitute a settlement under Chapter 33.

Chapter 33 expresses the Legislature's intent to hold defendants responsible for only their own conduct. Its purpose is to hold each person "responsible for [the person's] own conduct causing injury." *Duenez*, 237 S.W.3d at 690. "This is consistent with a fundamental tenet of tort law that an entity's liability arises from its own injury-causing conduct." *Id.* We therefore hold that the trial court erred in refusing to submit a question to the jury concerning Central Texas's proportionate responsibility as a settling person.

IV. Conclusion

For the foregoing reasons, we affirm the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

_____
Eva M. Guzman
Justice

OPINION DELIVERED: December 17, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0048

MCI SALES AND SERVICE, INC., F/K/A HAUSMAN BUS SALES, INC. AND MOTOR COACH INDUSTRIES MEXICO, S.A. DE C.V., F/K/A DINA AUTOBUSES, S.A. DE C.V., PETITIONERS,

v.

JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DOLORES HINTON, DECEASED, ET AL., RESPONDENTS

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

Argued March 24, 2010

CHIEF JUSTICE JEFFERSON, dissenting in part.

At the time this case was submitted to the jury, James Hinton[1] had neither received nor been promised any payments to settle his claims. Because the Court nevertheless concludes that Central Texas' payments to the bankruptcy court's registry rendered it a "settling person," I respectfully dissent in part.

1. The statute requires courts to evaluate settling persons "at the time of submission."

Former section 33.011—the statutory provision applicable here—defined "settling person" as:

[1] James Hinton is one of a number of plaintiffs whose claims are now before us. For ease of reference, I refer to them as "Hinton."

> a person who *at the time of submission* has paid or promised to pay money or anything of monetary value to a claimant at any time in consideration of potential liability . . . with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.

Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41 (amended in 1995 and 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 33.011) (emphasis added). Because the statute stipulated that a settling person was one who, "at the time of submission" of the jury question, had paid or promised to pay, reviewing courts cannot consider a post-submission monetary exchange when determining whether a party was a settling person. *See Knowlton v. U.S. Brass Corp*., 864 S.W.2d 585, 598 (Tex. App.–Houston [1st Dist.] 1993) ("[A] party who settles after objections are made to the charge, after the charge is read to the jury, and after closing arguments, although before the jury begins deliberating, is not a settling person because the settlement had not been effected *at the time of submission*."), *aff'd in part and rev'd in part on other grounds, sub nom. Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644 (Tex. 1996); *Gilcrease v. Garlock, Inc*., 211 S.W.3d 448, 454-55 (Tex. App.–El Paso 2006, no pet.) (holding that settlement agreements cannot be contingent on any other outcome, at the time of submission, in order to satisfy chapter 33).

At the time the proportionate responsibility question was submitted to the jury, and throughout the course of the trial, Hinton had not settled any claims with Central Texas, and the funds that Central Texas placed in an interest-bearing account were never promised to any particular claimant. The bankruptcy court rejected the notion that the funds had a guaranteed trajectory, pointing to various contingencies, including the possibility that "some [of the claims] could be adjusted to zero." As a historical fact, of course, "each participant in the Litigation Plan received

within two percent of the amount determined by the mediator, with one exception," ___S.W.3d at___, and "the Plaintiffs negotiated for and were the ultimate recipients of some of these proceeds," *id*. at___. But those facts chronicle Hinton's status *after* submission, which is irrelevant under the statute. The trial court appropriately viewed Hinton's status at the time of submission, as no one could have known at that point whether Hinton would recover any of the remaining funds.

2. Under Central Texas' bankruptcy reorganization, claimants had two choices: guaranteed payment under the Apportionment Plan or contingent recovery under the Litigation Plan.

The Apportionment and Litigation Plans do, in some ways, bear the marks of a settlement. Central Texas tendered money to the bankruptcy court to satisfy claims against it, and it was released from liability. At the time of submission, however, money had not been paid or promised "to a claimant," as required under the statute, TEX. CIV. PRAC. & REM CODE § 33.011, but rather deposited into a court registry—the ultimate distribution of which remained uncertain.

Central Texas' insurers deposited the $5 million policy limits into the bankruptcy court's registry to set aside costs for the multiple bus crash claimants. Central Texas pledged to pay an additional $7,000 per year for five years, making the total amount available to such claimants around $5,035,000. Claimants were given two options regarding disbursement: (1) they could join the "Apportionment Plan," in which a mediator would delegate a percentage of liability to each defendant, after which participating claimants could either immediately collect funds, or receive an apportionment in future litigation; or (2) claimants could join the "Litigation Plan," in which participants chose a special judge, decided on the form of a proceeding, and ultimately reasserted their claims. As the bankruptcy judge noted, recovery under the Litigation Plan was contingent on

proof that the defendants' negligence "was a proximate cause of [the claimants'] injuries and/or damages. And then they had to prove, if they met that burden, the extent of the damages." Based on the evidence presented, the special judge would make new liability determinations, assign amounts owed, and, if enough funds remained, allot those funds accordingly. Hinton chose the Litigation Plan.

The bankruptcy judge summarized the plans as follows:

> One, it allowed the people that wanted their money now to take it. Those people who disagreed with their claim agreed that other people could take money, which diminished the pool. That's a huge agreement. And number two, it provided that, among themselves, they could re-challenge their numbers, and when it was all done, re-look at their percentage, and they'd only get a percentage of what was left. . . .
>
> They did agree among themselves that, no matter—that they would start with the number they originally had been given in the apportionment plan. . . . And they agreed that, no matter what the new evidence showed, they wouldn't increase their claim by more than ten percent. . . .
>
> . . . So, among themselves, they could go up or down some, but it wouldn't be more than ten percent up; *there was no limit on down*.

(Emphasis added.)

To further complicate matters, the bankruptcy judge recognized that other potential parties later appeared to be "entitled to recover some of the [remaining] two and half million," and that it may "turn[] out, for a number of reasons, that the litigation plan claimants are not entitled to it." As to this potential outcome, the judge noted that Litigation Plan claimants could be left in the cold:

> [T]he initial apportionment agreement, and the information available to whoever would look at that, has grown greatly. And, so, it's certainly possible that the information provided to the special judge could result in one or more or all of the parties here, the litigation fund claimants, having their claims adjusted. It's possible some could be adjusted to zero, just factually, just based on that information.

Consequently, Hinton, as a "litigation fund claimant," could not count on recovering any of the money set aside by Central Texas.

The Court's observation that "Plaintiffs had the option of requesting disbursement of their proportionate shares of the Fund," ___S.W.3d at___, mistakenly lumps members of the Apportionment Plan with members of the Litigation Plan. Hinton, a member of the latter group, elected to try his claims in lieu of immediate receipt of his share of the insurance funds. It is true that the order approving the Apportionment Plan stipulated that

> [t]he parties may agree at any time to approve full or partial distribution of the Litigation Funds to any or all participants. Any agreement to distribute funds, however, must be agreed to in writing by all participants remaining in the Litigation Plan at the time the agreement is entered.

At the time the jury question was submitted, however, no party had attempted to enter into any such agreement, and even if any of them had, there was no guarantee that every other participant in the Litigation Plan would have agreed to such a distribution in writing. The parties rejected this option by refusing to enter into the Apportionment Plan in the first instance.

In fact, the above provision more likely referred to those parties who had not yet decided whether to join the Litigation Plan, and therefore had an option to join the Apportionment Plan before re-litigating their claims under the Litigation Plan. The preceding provision in the order approving the Apportionment Plan supports this interpretation, since it mandates that

> [e]ach participant in the Litigation Plan agrees that *any recovery from the Litigation Fund will necessitate that the claimant prove by a preponderance of the evidence* . . . that the negligence of [the defendants] was a proximate cause of the participant's injuries and/or damages; and . . . the amount of damages suffered by the claimant as a result of that negligence.

(Emphasis added.) The Apportionment Plan gave parties an opportunity to collect full or partial distribution of the funds. By rejecting this option, Hinton and others explicitly chose to re-litigate their claims. As the Court concedes, "the Litigation Plan did not set a floor on each claimant's possible individual recovery." ___S.W.3d at___.

3. Central Texas was not a "settling person" under the plain language of the statute.

While the Court correctly notes that "[t]he statute does not require certainty in the actual *amount* of the money or thing of monetary value," ___S.W.3d at___ (emphasis added), the statute does require certainty as to the *eventual receipt* of money or thing of monetary value. *See* TEX. CIV. PRAC. & REM. CODE § 33.003; *Hall v. White, Getgey, Meyer & Co., LPA*, 347 F.3d 576, 582-83 (5th Cir. 2003) (applying Texas law), *rev'd in part on other grounds*, 465 F.3d 587 (5th Cir. 2006); *Gilcrease*, 211 S.W.3d at 454-55.

The Court cites *Gilcrease v. Garlock* for the proposition that unconditional promises to pay are valid settlements for purposes of chapter 33. *See Gilcrease*, 211 S.W.3d at 455. *Gilcrease* holds that unconditional promises to pay are valid settlements, however, only so long as the promises are not contingent on any outside factors, such as related litigation proceedings. In *Gilcrease*, settling defendants had yet to pay the full amount they had promised claimants, but they *had* made unconditional promises to pay. *Id.* Payment was not contingent on bankruptcy proceedings, or on any other future arrangements between the parties. *Id*. The *Gilcrease* court distinguished the case before it from two other cases that themselves more closely bore a resemblance to the facts before us now, *McNair v. Owens-Corning Fiberglas Corp*., 890 F.2d 753 (5th Cir. 1989), and *Cimino v.*

Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd, in part, on other grounds*, 151 F.3d 297 (5th Cir. 1998).

In *McNair*, the Fifth Circuit held that notes promising payment did not constitute a settlement if their ultimate payment depended on the outcome of insurance litigation. *McNair*, 890 F.2d at 755-56. In that case, asbestos plaintiffs received notes from two defendants who were in the process of litigating claims with their insurers. *Id*. Despite the fact that the notes constituted promises to pay, the court held that because payment was contingent on some future litigation—no matter how likely it was to end in their favor—the promise of payment could not be considered a settlement within the terms of the statute. *Id*.

The *Gilcrease* court next looked to a federal district court case, *Cimino v. Raymark Industries, Inc.*, 751 F. Supp. at 656. In that case, plaintiffs reached a non-cash settlement agreement with an insolvent defendant who promised to pay a specified sum of money over a period of years. *Id*. The court held that, due to the defendant's insolvency, the settlement agreement was more like a promissory note, since "[p]ayment [was] contingent on the outcome of the unstable . . . bankruptcy proceedings and on the continued financial viability of the [defendant]." *Id*.

Like the defendant in *Cimino*, Central Texas (and its insurer) agreed to deposit money in the bankruptcy court. Hinton's receipt of these funds, however, remained contingent on the outcome of the Litigation Plan proceedings, and on the existence of additional claims from outside parties. Despite Central Texas' deposit of insurance funds, and its promise to pay a specified amount over a period of years, Hinton remained at risk of not recovering, and therefore, the agreement was at best akin to the "promissory note" in *Cimino*.

Bankruptcy courts often provide a "settle or litigate" option like the one used here. *See* Georgene Vairo, *Mass Torts Bankruptcies: The Who, The Why and The How*, 78 AM. BANKR. L.J. 93, 102 (2004) ("If a settlement was not reached, the claimant could elect mediation, binding arbitration, or traditional tort litigation."). Courts can distinguish between parties who choose to settle (like those under the Apportionment Plan), and those who choose to litigate (like those under the Litigation Plan). This ready distinction is evidenced by the terms of the bankruptcy court's order approving and describing the two plans:

> All Bus Crash Claimants participating in the Litigation Plan agree to be bound by the terms and conditions of the Litigation Plan. A failure to elect payment . . . constitutes an agreement to be bound by the terms of the Litigation Plan. *The participation of any Bus Crash Claimant in the Litigation Plan . . . shall not constitute a settlement* or compromise of the claimant's claims against the debtors.

(Emphasis added.)

I would hold that the court of appeals erred in reversing the trial court's refusal to submit Central Texas as a "settling person." Because the Court's holding regarding Chapter 33 neither complies with the statute ("at the time of submission"), nor properly construes the circumstances under which Hinton pursued his claims within the bankruptcy proceedings, I respectfully dissent from that part of the Court's judgment.

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Wallace Jefferson
Chief Justice

Opinion Delivered: December 17, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0073

MERCK & CO., INC., PETITIONER,

v.

FELICIA GARZA, ET AL., RESPONDENTS

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

Argued January 20, 2010

JUSTICE HECHT delivered the opinion of the Court.

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

Respondents contend that Vioxx, a prescription drug, caused their decedent's death. In *Merrell Dow Pharmaceuticals, Inc. v. Havner*,[1] we set requirements for determining whether epidemiological evidence is scientifically reliable to prove causation. The parties here dispute what those requirements are, whether they apply in this case, and whether they were satisfied. We hold that *Havner*'s requirements apply and were not met, and that the evidence was therefore legally

[1] 953 S.W.2d 706 (Tex. 1997).

insufficient to prove causation. Accordingly, we reverse the judgment of the court of appeals[2] and render judgment that respondents take nothing.

I

A

Leonel Garza had a long history of heart disease. Twenty years before his death at age 71, he suffered a heart attack and four years later underwent quadruple bypass surgery to alleviate blockages in four of his coronary arteries. In the years that followed, he had one cardiac catheterization procedure that revealed additional blockages in three arteries, followed by a second such procedure that revealed severe recurrent coronary artery disease. He had a stent placed in his left main artery to increase the blood flow into his heart, but two years later was diagnosed with atherosclerotic obstructive disease and chronic venous insufficiency in his legs. He was also diagnosed with an abdominal aortic aneurysm.

Twenty-five days before his death, Garza complained to his cardiologist, Dr. Michael Evans, of intermittent numbness, pain, and weakness in his left arm. After determining that Garza was not having a heart attack, Evans ordered an ultrasound of Garza's neck to check the circulation to his brain and a stress test to check the circulation to his heart. Evans also gave him a week's supply of 25 mg Vioxx for pain relief and scheduled a follow-up visit eight days later.

When Garza returned for his appointment, Evans was out of town, and one of his partners, Dr. Juan Posada, reviewed Garza's test results with him and his wife. The stress test revealed that

[2] 277 S.W.3d 430 (Tex. App.–San Antonio 2008).

Garza had a stable cardiac status, and Posada noted in Garza's record that he thought Garza was on optimal medical management. However, the test did reveal some small areas of apical ischemia, meaning that a part of the tip of Garza's heart was not getting enough blood when stressed. Posada offered the possibility of a cardiac catherization to more fully investigate the cause of the apical ischemia, but Garza declined, opting to discuss the results with Evans a month later. According to Mrs. Garza, Posada gave her husband thirty additional 25 mg Vioxx pills. Seventeen days later, on April 21, 2001, Garza died while alone at his ranch near Rio Grande City, Texas. The autopsy found that the immediate cause of death was a "probable myocardial infarction" initiated at least in part by the underlying cause of "severe coronary artery disease".

Garza's statutory beneficiaries ("the Garzas") sued Merck & Co., Inc., the manufacturer of Vioxx, for products liability, alleging that the drug was defective as designed and as marketed with inadequate warnings. Merck repeatedly challenged the scientific reliability of the Garzas' evidence offered to prove that Vioxx caused Garza's death. The trial court overruled Merck's objections. The jury returned a verdict for the Garzas, awarding $7 million actual damages, plus $25 million in punitive damages, which the trial court reduced to the applicable statutory maximum of $750,000.[3] Merck appealed.

The court of appeals held that the Garzas could not recover on their design-defect claim because they did not present sufficient evidence of a safer alternative design, but that they could recover on their inadequate-warning claim.[4] The court rejected Merck's argument that the Garzas

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[3] *See* TEX. CIV. PRAC. & REM. CODE § 41.008(b)(1) (as noneconomic damages not exceeding $750,000).

[4] 277 S.W.3d at 440 .

had failed to meet *Havner*'s requirements for proving causation because they had not produced two statistically significant epidemiological studies showing that Vioxx at the dose and for the duration taken by Garza more than doubles the risk of heart attack.[5] The court believed that *Havner* did not "establish[] such a bright-line test for causation" but mandated that the sufficiency of the evidence be determined from its totality.[6] An expert witness called by the Garzas testified that clinical trials had "indicated a more than two-fold risk of serious cardiovascular 'adverse experiences' suffered by the people who participated in the studies . . . within twelve weeks or less of taking Vioxx."[7] The expert had opined that there was "a pretty strong case that the risk of Vioxx for heart attacks can occur at any time after the initiation of the medicine."[8] The court concluded that this was sufficient evidence to support general causation.[9] However, the court reversed the Garzas's judgment for juror misconduct and remanded the case for a new trial.[10]

We granted Merck's petition for review complaining that judgment should be rendered against the Garzas.[11]

B

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[5] *Id*. at 434-435.

[6] *Id.* at 435.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 435-436

[10] *Id.* at 441-442.

[11] 53 Tex. Sup. Ct. J. 15 (Oct. 23, 2009).

Vioxx, or rofecoxib, is a non-steroidal anti-inflammatory drug (NSAID). NSAIDs block

> the production of prostaglandins, which are hormone-like chemicals that are released in the body in response to injury. The prostaglandins cause inflammation, redness, swelling, pain, and fever. Reducing the amount of protaglandins reduces inflammation and its symptoms. In order to inhibit production of prostaglandins, the NSAIDs act by blocking the enzyme cyclooxygenase (COX). After further study scientists discovered that the COX enzyme has two isoforms, one associated with inflammation (COX-II) and another thought to protect the lining of the stomach (COX-1).[12]

Early NSAIDS were non-selective, meaning that they restricted both forms of the COX enzyme, but Vioxx and the other selective NSAIDs only restrict COX-2.[13] Scientists theorized that, by restricting only COX-2, a selective NSAID could provide the pain relief afforded by non-selective NSAIDs while avoiding their gastrointestinal complications, such as perforations, ulcers, and bleeding.[14]

After following Food and Drug Administration procedure for seeking approval of a new drug, Merck submitted its application in late 1998. A few months later, the FDA approved Vioxx as "safe and effective" for the treatment of osteoarthritis, acute pain, and menstrual pain. Merck then applied to the FDA for approval to use Vioxx to treat rheumatoid arthritis. As part of its application, Merck commissioned the VIGOR clinical trial, which was "designed to compare the occurrence of [gastrointestinal] toxicity with twenty-five and fifty milligrams per day of Vioxx or one thousand milligrams per day of Naproxen," a non-selective NSAID.[15] In addition to finding a gastrointestinal

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[12] *See* Jason M. Weigand, *Vioxx: How Strong is the Case Against Merck?*, 11 MICH. ST. U. J. MED. & L. 145, 149 (2007).

[13] *Id.*

[14] *See* Richard Epstein, *Regulatory Paternalism in the Market for Drugs: Lessons from Vioxx and Celebrex*, 5 YALE J. HEALTH POL'Y L. & ETHICS 741, 741-742 (2005).

[15] Weigan, *supra* note 12, at 155.

benefit, VIGOR also revealed a secondary finding that patients taking Vioxx had five times the relative risk of adverse cardiovascular events as patients who took Naproxen.[16] But despite the fact that Merck employees had expressed concern since at least 1997 that Vioxx could present cardiovascular risks, Merck argued that the VIGOR results could be explained by a combination of chance and the cardio-protective effects of Naproxen.

Eventually, the FDA approved the use of Vioxx to treat rheumatoid arthritis, and after some negotiation, Merck placed the cardiovascular data from the VIGOR trial on the label for Vioxx, though not in the warnings section. In 2000, Merck again sought approval from the FDA for treatment of yet another condition, colon polyps. To test the efficacy of Vioxx in treating colon polyps Merck commissioned the APPROVe trial. But after APPROVe found that patients taking Vioxx had a statistically significant increased relative risk of adverse cardiovascular events compared to placebo after eighteen months of exposure, Merck announced that it would voluntarily remove Vioxx from the market on September 30, 2004. In 2005, the FDA commissioned an advisory panel to examine the cardiovascular concerns relating to Vioxx and other selective NSAIDs. The panel eventually concluded that the drugs did present cardiovascular risks after prolonged exposure, but it did not find that they presented a risk after only short-term use.

Thousands of lawsuits were filed across the country, alleging that Vioxx caused heart attacks or other adverse cardiovascular events. After a few cases were tried with mixed results, Merck

[16] *Id.*

agreed to pay $4.85 billion into a settlement fund for qualifying claims. The Garzas' claim did not qualify.

II

To prevail on their inadequate-warnings claim, the Garzas were required to prove that Garza's ingestion of Vioxx 25 mg pills over a period of 25 days was the producing cause of his heart attack. As we explained in *Merrell Dow Pharmaceuticals, Inc. v. Havner*,[17] causation, in this context, has two components: general and specific. "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury."[18] The Garzas relied on testimony from two cardiologists who based their opinions on data compiled in Merck-sponsored clinical trials of Vioxx, meta-analyses of those trials, and other observational, epidemiological studies regarding the possible cardiovascular risks presented by Vioxx. Merck contends that the Garzas' evidence did not meet *Havner*'s requirements for scientific reliability. Specifically, Merck argues that *Havner* requires a plaintiff who claims injury from taking a drug to produce two independent epidemiological studies showing a statistically significant doubling of the relative risk of the injury for patients taking the drug under conditions substantially similar to the plaintiff's (dose and duration, for example) as compared to patients taking a placebo. The Garzas argue that *Havner*'s requirements for epidemiological evidence apply only to uncontrolled, observational studies, not to studies from clinical trials, like the ones on which they rely. Or if the requirements do apply to

[17] 953 S.W.2d 706 (Tex. 1997).

[18] *Id*. at 714.

clinical trials, then the Garzas argue that *Havner* does not establish bright-line requirements as argued by Merck, but charges courts with surveying the totality of the evidence regarding causation. In any event, the Garzas contend that evidence failing *Havner*'s requirements may nevertheless be sufficient if accompanied by other reliable evidence of causation.

A

In *Havner*, the plaintiff claimed that taking Bendectin for morning sickness during her pregnancy caused birth defects in her baby.[19] In analyzing whether there was evidence of causation, we started with the general proposition that "a determination of scientific reliability is appropriate in reviewing the legal sufficiency of evidence."[20] We reiterated that courts must look beyond the bare opinions of qualified experts and independently evaluate the foundational data underlying an expert's opinion in order to determine whether the expert's opinion is reliable.[21]

> If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious.

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[19] *Id*. at 708.

[20] *Id*. at 713.

[21] *Id*. at 711-712. *See also E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) (providing that, in a determination of the admissibility of expert testimony, the court should look to: (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 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 that have been made of the theory or technique).

> Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence.[22]

Causation can sometimes be proved directly.

> In some cases, controlled scientific experiments can be carried out to determine if a substance is capable of causing a particular injury or condition, and there will be objective criteria by which it can be determined with reasonable certainty that a particular individual's injury was caused by exposure to a given substance.[23]

Often, however, it can be proved only indirectly, with epidemiological studies.

> In the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue increases the risk of their particular injury. The finder of fact is asked to infer that because the risk is demonstrably greater in the general population due to exposure to the substance, the claimant's injury was more likely than not caused by that substance.[24]

Allowing such proof

> concedes that science cannot tell us what caused a particular plaintiff's injury. It is based on a policy determination that when the incidence of a disease or injury is sufficiently elevated due to exposure to a substance, someone who was exposed to that substance and exhibits the disease or injury can raise a fact question on causation.[25]

The epidemiological evidence on which the experts in *Havner* relied consisted largely of unpublished, retroactive, observational studies. The Garzas argue that their evidence of clinical trials involving Vioxx is more reliable. The difference between the two types of epidemiological evidence is this:

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[22] *Havner*, 953 S.W.2d at 714.

[23] *Id*. at 714-715.

[24] *Id*.

[25] *Id*. (internal citation omitted).

> Epidemiological studies may be characterized as **experimental** or **observational**. The major difference between the two is that in an experimental setting, the epidemiologist *controls the conditions* under which the study is to be conducted; in an observational setting, the epidemiologist is *not able* to control these conditions. In experiments, the epidemiologist controls the method of assigning subjects to either the treatment or the comparison groups. A commonly used means of assignment is to randomly allocate similar persons to the treatment or the comparison group; such an experiment is called a randomized clinical trial . . . .[26]

But while the controlled, experimental, and prospective nature of clinical trials undoubtedly make them more reliable than retroactive, observational studies, both must show a statistically significant doubling of the risk in order to be some evidence that a drug more likely than not caused a particular injury. The superior way in which a study is conducted does not justify taking its conclusion to be anything other than what it is. The purpose of the structure of epidemiological studies and the statistical evaluation of their results is to provide "objective criteria by which it can be determined with reasonable certainty that a particular individual's injury was caused by exposure to a given substance."[27] *Havner*'s requirements necessarily apply to all epidemiological evidence, including the causation evidence the Garzas presented at trial.

B

In *Havner*, we surveyed the opinions of other courts and scholarly commentary and concluded:

> Although we recognize that there is not a precise fit between science and legal burdens of proof, we are persuaded that properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic

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[26] DAVID E. LILIENFELD & PAUL D, STOLLEY, FOUNDATIONS OF EPIDEMIOLOGY 151 (3rd ed. 1994) (internal citation omitted).

[27] *Havner*, 953 S.W.2d at 715.

> tort case and that there is a rational basis for relating the requirement that there be more than a "doubling of the risk" to our no evidence standard of review and to the more likely than not burden of proof.[28]

To demonstrate the thinking behind the doubling of the risk requirement we then used the following admittedly oversimplified example:

> Assume that a condition naturally occurs in six out of 1,000 people even when they are not exposed to a certain drug. If studies of people who did take the drug show that nine out of 1,000 contracted the disease, it is still more likely than not that causes other than the drug were responsible for any given occurrence of the disease since it occurs in six out of 1,000 individuals anyway. Six of the nine incidences would be statistically attributable to causes other than the drug, and therefore, it is not more probable that the drug caused any one incidence of disease. This would only amount to evidence that the drug could have caused the disease. However, if more than twelve out of 1,000 who take the drug contract the disease, then it may be statistically more likely than not that a given individual's disease was caused by the drug.[29]

In essence, we acknowledged that "frequency data, such as the incidence of adverse effects in the general population when exposed, cannot indicate the actual cause of a given individual's disease or condition."[30] However, we found that "[t]he use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science."[31]

The Garzas argue that *Havner* did not ultimately hold that a study had to show a doubling of the risk in order to be found reliable evidence of causation. They point out that *Havner* states:

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[28] *Id*. at 717.

[29] *Id*. (emphasis omitted).

[30] *Id*. at 718.

[31] *Id*.

> We do not hold, however, that a relative risk of more than 2.0 is a litmus test or that a single epidemiological test is legally sufficient evidence of causation. Other factors must be considered. As already noted, epidemiological studies only show an association. There may in fact be no causal relationship even if the relative risk is high. . . . Likewise, even if a particular study reports a low relative risk, there may in fact be a causal relationship. The strong consensus among epidemiologists is that conclusions about causation should not be drawn, if at all, until a number of criteria have been considered.[32]

The opinion further noted that epidemiological studies "are subject to many biases and therefore present formidable problems in design and execution and even greater problems in interpretation."[33] Accordingly, we stated that

> there are a number of reasons why reliance on a relative risk of 2.0 as a bright-line boundary would not be in accordance with sound scientific methodology in some cases. Careful exploration and explication of what is reliable scientific methodology in a given context is necessary.[34]

But these statements must be read in context. Our concern was that statistically reliable studies showing a doubling of the risk might nevertheless be insufficient to prove causation, not that they would ever be unnecessary. We noted that "[a] few courts that have embraced the more-than-double-the-risk standard have indicated in dicta that in some instances, epidemiological studies with relative risks of less than 2.0 might suffice if there were other evidence of causation."[35] We declined to join those courts, leaving undecided "whether epidemiological evidence with a

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[32] *Id*.

[33] *Id.* at 719 (quoting Marcia Angell, *The Interpretation of Epidemiologic Studies*, 323 NEW ENG. L. REV. 823, 824 (1996)).

[34] *Id*.

[35] *Id*.

relative risk less than 2.0, coupled with other credible and reliable evidence, may be legally sufficient to support causation."[36]

We concluded that the studies in *Havner* were unreliable when they did not show a doubling of the risk that was statistically significant at the 95% confidence level. After analyzing and adopting the "methodology that is at present generally accepted among epidemiologists"[37] — namely, that studies finding a doubling of the risk are statistically significant at the 95% confidence level — we considered each of the studies that served as the foundation for the opinions of the Havners' experts. We concluded that any study that did not find a doubling of the risk that was statistically significant at the 95% confidence level was unreliable.[38] Also, we indicated that an expert's opinion that relied on a combined analysis of several studies was unreliable because the studies did not show a doubling of the risk.[39]

Havner holds, and we reiterate, that when parties attempt to prove general causation using epidemiological evidence, a threshold requirement of reliability is that the evidence demonstrate a statistically significant doubling of the risk. In addition, *Havner* requires that a plaintiff show "that he or she is similar to [the subjects] in the studies" and that "other plausible causes of the injury or

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[36] *Id*.

[37] *Id*. at 712.

[38] Id. at 724-726.

[39] *Id*. at 725 ("[The expert] also said that these studies were consistent with a relative risk that was between 0.7 and 1.8. That is not a doubling of the risk. It may support her opinion that it is more probable than not that there is an *association* between Bendectin and limb reduction defects, but the *magnitude* of the association she gleaned from these studies is not more than 2.0, based on her own testimony.").

condition that could be negated [are excluded] with reasonable certainty."[40] *Havner* also requires that even if studies meet the threshold requirements of reliability, sound methodology still necessitates that courts examine the design and execution of epidemiological studies using factors like the Bradford Hill criteria[41] to reveal any biases that might have skewed the results of a study,[42] and to ensure that the standards of reliability are met in at least two properly designed studies.[43] Thus, a plaintiff must first pass the primary reliability inquiry by meeting *Havner*'s threshold requirements of general causation. Then, courts must conduct the secondary reliability inquiry that examines the soundness of a study's findings using the totality of the evidence test. As we concluded in *Havner*:

> In sum, we emphasize that courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors affecting the reliability of particular studies, whether there is legally sufficient evidence to support a judgment.[44]

C

The Garzas contend that they presented more than two studies showing a statistically significant doubling of the risk of heart attack from taking Vioxx, thereby satisfying *Havner*'s

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[40] *Id*. at 720.

[41] *Havner*, 953 S.W.2d 706, 718 n.2. Those criteria, published by Sir Austin Bradford Hill in 1965 and widely used by epidemiologists, are more fully described in *Havner*. The criteria are grouped in nine categories: strength of association, consistency, specificity, temporality, biological gradient, plausibility, coherence, experiment, and analogy.

[42] *Id*. at 718-719.

[43] *Id*. at 727.

[44] *Id*. at 720.

requirements. First, they point to the VIGOR study. Although the results of VIGOR indicate statistically significant results showing five times as many heart attacks for the patients on Vioxx compared to the patients on Naproxyn, that study involved a dosage of 50 mg and a median duration of 9 months—double the dosage Mr. Garza took (25 mg) and a much longer duration than Mr. Garza's 25 days. The Garzas argue, and we agree, that this finding of an increased risk does not necessarily mean that there is no increased risk at a lower dose and smaller duration. But the point is not that the VIGOR study suggests that a lesser exposure to Vioxx is less risky, but that the study suggests nothing at all about significantly lesser exposure. The usage involved in a study need not match the claimant's usage exactly, but the conditions of the the study should be substantially similar to the claimant's circumstances. The Garzas simply cannot argue that the VIGOR study showed a statistically significant doubling of the relative risk for a person like Garza, who took a much smaller dosage of Vioxx for much less time.[45]

Another study presented, the Shapiro meta-analysis, also falls short. The Shapiro meta-analysis, performed in 2000 by Merck employee Deborah Shapiro, combined and analyzed much of the cardiovascular data that the company had gathered up to that point. In one arm of the analysis, Shapiro compared the relative risks of heart attack of people who had taken Vioxx to the risks of people who had taken other NSAIDs. This analysis found that patients who had taken Vioxx had a relative risk of 2.02 compared to the users of other NSAIDs. The results were significant at the 95% confidence level with a confidence interval from 1.14 to 3.55. However, as meta-analysis, it

[45] The Graham study is similarly unreliable because the statistically significant finding applied only to 50 mg dosages.

combines the results of a number of different studies, with differing dosages, durations, and comparison drugs. This is especially problematic given the influence of the VIGOR results on the analysis. VIGOR, as we have said, used double Garza's dose of Vioxx with patients for a median period of nine months. When the VIGOR results were removed from the meta-analysis, Shapiro found the relative risk of heart attack of Vioxx patients to other NSAID recipients dropped to 1.19 at the 95% level with an interval from 0.60 to 2.35. And even those remaining results are skewed by differences in dose and duration compared to Garza's exposure.

The Garzas also rely on the APPROVe study. That study found an overall relative risk greater than 2 for APTC (Antiplatelet Trialists' Collaboration criteria) events, a category of events which includes "the combined incidence of death from cardiovascular, hemorrhagic, and unknown causes; of nonfatal myocardial infarction; and of nonfatal ischemic and hemorrhagic stroke." However, the other category studied, Cardiovascular Thrombotic Events, a narrower category still containing Mr. Garza's injury, found an overall risk of 1.92. Moreover, the study took place over a three-year period and did not show statistically significant differences until after eighteen months, a much longer duration than Mr. Garza's use.

Finally,[46] the Garzas presented the VICTOR study, a clinical trial designed to measure the efficacy of Vioxx in treating patients with colorectal cancer. At trial, the only evidence of VICTOR was an e-mail containing two charts of preliminary results and cursory testimony regarding

[46] The Garzas presented a total of six other studies throughout the course of litigation. Two of the studies (ADVANTAGE and Protocol 090) contain a relative risk factor greater than 2.0, but neither of these studies contain sufficient data to achieve statistical significance. The Garzas do not contend that any one of the remaining four studies (the Juni paper, the Solomon study, the Ingenix study, and the Protocol 010 study) sufficiently indicate a statistically significant doubling of the risk of heart attack.

VICTOR's protocol and findings. However, although the VICTOR study was discontinued after two years, it does appear that these preliminary findings achieve statistically significant results for confirmed "thrombotic events" with a relative risk of over 3.0. But even if VICTOR qualifies under *Havner*'s test, it cannot do so alone. Another study is still necessary, but lacking here.

Thus, the two cited by the Garzas do not meet *Havner*'s standards of reliability.

D

While we have held that epidemiological evidence used to prove general causation must meet *Havner*'s requirements for scientific reliability, we return briefly to the Garzas' argument that the totality of the evidence in this case shows general causation. They point to evidence that Merck largely excluded patients with a history of cardiovascular disease from its studies. They argue that the trials suffer from selection bias in that they excluded a subset of people who were at an elevated risk of suffering a Vioxx-induced heart attack. But several of the studies did include patients who had some history of cardiovascular disease, and in any event, the absence of evidence cannot substitute for evidence. The Garzas argue that the risk doubling for Garza required by *Havner* can be extrapolated from studies finding a doubling of the risk at much higher doses and longer durations. But the Garzas cannot point to any scientific basis for such an extrapolation.

The totality of the evidence cannot prove general causation if it does not meet the standards for scientific reliability established by *Havner*. A plaintiff cannot prove causation by presenting different types of unreliable evidence. Thus, we are constrained to hold that the Garzas did not present reliable evidence of general causation and are therefore not entitled to recover against Merck.

* * *

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

Nathan L. Hecht
Justice

Opinion delivered: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0100

TRAVIS CENTRAL APPRAISAL DISTRICT, PETITIONER,

v.

DIANE LEE NORMAN, RESPONDENT

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

Argued December 16, 2009

JUSTICE MEDINA delivered the opinion of the Court.

The Texas Anti-Retaliation Law, found in Chapter 451 of the Texas Labor Code, prohibits a person from discharging or discriminating against an employee, who in good faith files a workers' compensation claim. *See* TEX. LAB. CODE § 451.001(1). This law applies to private employers. We have also held it to apply to the state's political subdivisions through Chapter 504 of the Labor Code. *See City of LaPorte v. Barfield,* 898 S.W.2d 288, 298–99 (Tex. 1995) (holding that Chapter 504 waives the governmental immunity of political subdivisions for retaliatory discharge claims under Chapter 451).

In this interlocutory appeal, a political subdivision of the state argues that Chapter 504 has been amended since our decision in *Barfield* and no longer waives a political subdivision's immunity

for retaliatory discharge claims under Chapter 451. We agree and conclude that our analysis of an earlier version of the Anti-Retaliation Law in *Barfield* is therefore not controlling. Because the court of appeals permitted the plaintiff's claim to proceed, as *Barfield* would have, we must under the current law reverse the court of appeals' judgment and dismiss the case.

I

Diane Lee Norman went to work for the Travis Central Appraisal District ("TCAD") as a probationary employee in January of 2006. She was terminated about six months later, shortly after filing a workers' compensation claim. Norman claimed that she was terminated for seeking workers' compensation benefits and sued TCAD for retaliatory discharge under Chapter 451 of the Labor Code. *See* TEX. LAB. CODE § 451.001(1).

TCAD generally denied Norman's allegations and subsequently filed a plea to the jurisdiction, urging that Norman was required to exhaust her administrative remedies under TCAD's grievance procedures before filing suit. In support of its plea, TCAD attached part of its personnel policy handbook outlining its internal grievance procedures and an affidavit from Norman's supervisor, Mark Price, who also testified at the hearing on the plea.

Norman contended at this hearing that TCAD's grievance policy did not apply to her retaliatory discharge claim. She argued that Chapter 451 does not mention exhaustion of remedies as a jurisdictional prerequisite and that exhaustion is not required unless the Legislature has vested an administrative agency with exclusive jurisdiction over a controversy. She further cross-examined Price concerning his statements that the personnel manual did not apply to probationary employees

in its entirety, calling into question whether the grievance process was available to her as a probationary employee.

The trial court denied TCAD's plea to the jurisdiction, and TCAD appealed.[1] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) (permitting interlocutory appeal from order that "grants or denies a plea to the jurisdiction by a governmental unit"). In the court of appeals, TCAD repeated its exhaustion-of-administrative-remedies argument but also argued that governmental immunity had not been waived for Norman's retaliatory discharge claim, notwithstanding our decision in *City of LaPorte v. Barfield* to the contrary. Rejecting both arguments, the court of appeals affirmed the trial court's order denying TCAD's plea. 274 S.W.3d 902, 912 (Tex. App.—Austin 2008).

II

Chapter 451 of the Labor Code, also known as the Anti-Retaliation Law, creates a cause of action against a "person" who "discharge[s] or in any other manner discriminate[s] against an employee because the employee has: (1) filed a workers' compensation claim in good faith; (2) hired a lawyer to represent the employee in a claim; (3) instituted or caused to be instituted in good faith a proceeding under [the Texas Workers' Compensation Act]; or (4) testified or is about to testify in a proceeding under [the Act]." TEX. LAB. CODE § 451.001. The statute does not define the word "person." One issue in *Barfield* was whether a political subdivision of the state might be a "person" within the statute's meaning, making it possible to bring this type of claim against the government. Because sovereign or governmental immunity generally protects the government from liability for

[1] Although this is an interlocutory appeal over which our jurisdiction is limited, *see* TEX. GOV'T CODE § 22.225(b)(3), we have jurisdiction to determine whether the court of appeals correctly applied its jurisdiction. *Klein v. Hernandez*, 315 S.W.3d 1, 3 (Tex. 2010).

the performance of governmental functions, such as the hiring and firing of its employees, the claim's viability depended on finding a waiver of the government's immunity for this particular claim. *Barfield*, 898 S.W.2d at 291. Although we could not find a clear and unambiguous waiver of immunity in the Anti-Retaliation Law itself, we did conclude ultimately that governmental immunity had been waived for such claims through subsequent amendments to the Political Subdivisions Law. *Id*. at 298–99.

Before reaching that conclusion, we examined the Anti-Retaliation Law and the circumstances surrounding its enactment in 1971. At that time, political subdivisions of the state were not required to provide workers compensation benefits, although that changed a couple of years later. But because governmental entities were not obligated to provide these benefits in 1971, we considered it unlikely that the Legislature would have intended to include them under this new law. *Id*. at 293–94. And the Legislature did not amend the Anti-Retaliation Law after the government became obligated to provide such benefits, so no clarification on the subject of waiver was ever added to the statute itself.

Finding no express waiver in the Anti-Retaliation Law, we next considered the Code Construction Act for its guidance on the issue. The Code Construction Act, adopted by the Legislature in 1985, provides that in codes adopted by the 60th or a subsequent Legislature, the word "person" includes governmental entities. TEX. GOV'T CODE §§ 311.002, 311.005(2). We concluded that the definition could not be applied to the Anti-Retaliation Law even though the law had been recodified in the Labor Code. As we explained, limitations imposed under the recodification process prevented this use of the definition:

> This provision does not affect the construction of the Anti-Retaliation Law prior to 1993 because it was not part of a code to which the Code Construction Act applies, but in 1993 the Anti-Retaliation Law was recodified in the Labor Code, to which the Code Construction Act does apply. This recodification, however, was intended by the Legislature to be "without substantive change." TEX. LABOR CODE § 1.001(a) (footnote omitted). Construing the recodification of the Anti-Retaliation Law to waive governmental immunity would be not only a substantive but a very significant change. Given the Legislature's express intent not to make such changes, we conclude that the Anti-Retaliation Law as recodified does not waive governmental immunity.

Barfield, 898 S.W.2d at 294.

Finally, we considered the Political Subdivisions Law. *See* TEX. LAB. CODE ch. 504. Enacted two years after the Anti-Retaliation Law, this statute required political subdivisions of the state for the first time to provide compensation benefits to their employees.[2] The original enactment "adopted" various parts of the Workers' Compensation Act but did not include the Anti-Retaliation Law among them. In 1981, however, the Anti-Retaliation Law was added to the Political Subdivisions Law's list of "adopted" statutes.[3] The Legislature amended the Political Subdivisions Law again in 1989, and recodified the 1989 version as Chapter 504 of the Labor Code in 1993.[4]

In *Barfield*, we focused on the 1981 and 1989 versions of the Political Subdivisions Law, the first versions to "adopt" the Anti-Retaliation Law, and we ultimately found in their text a clear waiver of immunity for retaliatory discharge claims brought under the Anti-Retaliation Law, which

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[2] Act of May 10, 1973, 63rd Leg., R.S., ch. 88, § 17, 1973 Tex. Gen. Laws 187, 198–200 (formerly codified as TEX. REV. CIV. STAT. art. 8309h).

[3] Act of May 31, 1981, 67th Leg., R.S., ch. 352, § 3, 1981 Tex. Gen. Laws 937, 937–938.

[4] *See* Act of December 12, 1989, 71st Leg., 2d C.S., ch. 1, § 15.47, 1989 Tex. Gen. Laws 1, 113 (formerly codified as TEX. REV. CIV. STAT. art. 8309h, § 3); Act of May 12, 1993, 73rd Leg., R.S., ch. 269, 1993 Tex. Gen. Laws 987, 1250.

by the time of our decision had been codified in Chapter 451 of the Labor Code. The 1981 version, we said, authorized "at least a minimal remedy for wrongful discharge," and the 1989 version, we concluded, also expressed a clear and unambiguous waiver of immunity. *Barfield*, 898 S.W.2d at 296, 298. The 1989 version added an election-of-remedies provision, which prohibited a plaintiff from suing under both the Anti-Retaliation Law and the Whistleblower Act. TEX. LAB. CODE § 504.003. We reasoned that this provision would have been unnecessary had the Legislature not intended to waive immunity for retaliatory discharge claims. *See Barfield*, 898 S.W.2d at 298 (noting that immunity had clearly been waived for Whistleblower claims and that "it would make little sense to require an employee to elect between an action barred by immunity and one not barred").

Although the Anti-Retaliation Law has never been amended, the Legislature has continuously tinkered with the Political Subdivisions Law. Since its recodification as Chapter 504 and our decision in *Barfield*, the law has been amended four times.[5] One of these amendments provides the basis for TCAD's argument that *Barfield* is no longer controlling authority. TCAD submits that the Political Subdivisions Law has not waived governmental immunity for retaliatory discharge claims since its amendment in 2005.

In 2005, the Legislature made a number of changes to the Workers Compensation Act designed to improve the delivery of medical care and the efficiency of the workers' compensation system. The Political Subdivisions Law was one of several Labor Code chapters affected by the

[5] *See* Act of June 18,1999, 76th Leg., R.S., ch. 954, § 6, 1999 Tex. Gen. Laws 3694, 3695; Act of June 20, 2003, 78th Leg., R.S., ch. 939, § 2, 2003 Tex. Gen. Laws 2803; Act of June 1, 2005, 79th Leg., R.S., ch. 265, § 3.318, 2005 Tex. Gen. Laws 469, 570; Act of June 13, 2007, 80th Leg., R.S., ch. 266 § 5, 2007 Tex. Gen. Laws 485, 497.

changes. Among the many amendments was the addition of a new section in Chapter 504, regarding political subdivisions that elect to self-insure. *See* TEX. LAB. CODE § 504.053. Included in this new section was a broadly-worded provision, stating that "[n]othing in this chapter waives sovereign immunity or creates a new cause of action." *Id.* § 504.053(e). Why this provision was included in that particular section is not apparent from its context, but as TCAD points out, the provision plainly purports to apply to the entire chapter, which, of course, includes the part that *Barfield* interpreted to waive the government's immunity for retaliatory discharge claims.

At oral argument, Norman's counsel suggested that the no-waiver provision did not affect *Barfield* because it spoke to sovereign immunity rather than governmental immunity. Sovereign immunity protects the state and its various divisions, such as agencies and boards, from suit and liability, whereas governmental immunity provides similar protection to the political subdivisions of the state, such as counties, cities, and school districts. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). Sovereign and governmental immunity are therefore related common law concepts that differ only in scope. Their similarity sometimes causes the two terms to be used interchangeably. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 101.025; TEX. GOV'T CODE § 2007.004; *see also* 19 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 293.01[1] (2011). Because Chapter 504 applies specifically to political subdivisions of the state rather than the state itself, we have no doubt that the immunity referenced in the 2005 no-waiver provision refers to the immunity applicable to such subdivisions. We conclude then that the no-waiver provision does implicate our decision in *Barfield*.

III

Sovereign immunity and governmental immunity are common law doctrines, but we have traditionally deferred their waiver to the Legislature, assuming it to be "better suited to balance the conflicting policy issues associated with waving immunity." *Wichita Falls State Hosp.*, 106 S.W.3d at 695. When dealing with these immunities, we have further required the Legislature to express its intent clearly and unambiguously. *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994); *see also* TEX. GOV'T CODE § 311.034 (codifying the clear and unambiguous standard). We have not always insisted on perfect clarity, however, when the statute left no doubt about the Legislature's intentions. Legislative intent, we have said, "remains the polestar of statutory construction," *Barfield*, 898 S.W.2d at 292, and so we never apply the clear and unambiguous standard mechanically to defeat the law's purpose or the Legislature's intent. *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 3 (Tex. 2000). Therefore when a waiver of immunity has been necessary to make sense of a statute, we have held it to be clear and unambiguous. *Barfield*, 898 S.W.2d at 291–92.

In 1973, when the Political Subdivisions Law was first enacted, it did not waive immunity for retaliatory discharge claims. *Id*. at 294–95. This changed in 1981, when the Legislature amended the law, adopting the Anti-Retaliation Law and authorizing a minimal remedy for wrongful discharge. *Id*. at 295. The statute did "not expressly authorize, as it might, actions against governmental entities for violations of the Anti-Retaliation Law," but it was clear enough. *Id*. In 1989, that remedy was expanded further. *See id.* at 298 (concluding "that the Legislature intended

by the 1989 statute to waive immunity completely"). But what was clear and unambiguous in 1995, when we decided *Barfield*, is less so today.

The 2005 amendment to the Political Subdivisions Law says that Chapter 504 does not waive immunity. TEX. LAB. CODE § 504.053(e). This no-waiver provision considerably clouds the chapter's former clarity regarding retaliatory discharge claims. Although the Political Subdivisions Law incorporates a number of chapters pertaining to workers' compensation, including the Anti-Retaliation Law, it does so only to the extent of consistency with Chapter 504. TEX. LAB. CODE § 504.002(a). We concluded in *Barfield* that this incorporation was, without more, an insufficient expression of the government's intent to waive immunity. *Barfield*, 898 S.W.2d at 295–96 (citing *Duhart v. State*, 610 S.W.2d 740 (Tex. 1980)). And although the election-of-remedies provision added in 1989 clarified the Legislature's intent regarding immunity in the 1989 version, the no-waiver provision has since muddled the issue. *See* TEX. LAB. CODE § 504.053(e).

The waiver of governmental immunity must be clear and unambiguous, TEX. GOV'T CODE § 311.034, and the current version of the Political Subdivisions Law is too internally inconsistent to satisfy that standard. We conclude then that the Political Subdivisions Law no longer waives immunity for retaliatory discharge claims under Chapter 451. Because a retaliatory discharge claim may not be brought against the government without its consent and the Political Subdivisions Law no longer provides such consent by waiving the government's immunity, the underlying claim in this case must be dismissed.

* * *

The court of appeals' judgment is accordingly reversed, and the case is dismissed.

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David M. Medina
Justice

Opinion Delivered: April 29, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0257

CITY OF DALLAS, PETITIONER,

v.

HEATHER STEWART, RESPONDENT

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

Argued February 16, 2010

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE MEDINA, JUSTICE WILLETT, and JUSTICE LEHRMANN.

JUSTICE JOHNSON delivered a dissenting opinion, joined by JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE GUZMAN.

JUSTICE GUZMAN delivered a dissenting opinion, joined by JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE JOHNSON.

Urban blight threatens neighborhoods. Either as a risk to public health or as a base for illicit activity, dilapidated structures harm property values far more than their numbers suggest. Cities must be able to abate[1] these nuisances to avoid disease and deter crime. But when the government

[1] In the context of nuisance law, "abate" means to "eliminat[e] or nullify[]." BLACK'S LAW DICTIONARY 3 (9th ed. 2009). Municipalities have, within their police powers, authority to abate nuisances, including the power to do so permanently through demolition. *See Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 286-87 (Tex. 2004).

sets up a mechanism to deal with this very real problem, it must nonetheless comply with constitutional mandates that protect a citizen's right to her property.

Today we hold that a system that permits constitutional issues of this importance to be decided by an administrative board, whose decisions are essentially conclusive, does not correctly balance the need to abate nuisances against the rights accorded to property owners under our constitution. Independent court review is a constitutional necessity. We affirm the court of appeals' judgment, but on different grounds.

I. Background

Heather Stewart bought a home in Dallas. Between 1991, when Stewart abandoned her house, and 2002, when the City demolished it, the Stewart home was a regular stop for Dallas Code Enforcement officials. Although utilities were disconnected and windows boarded up, the home suffered a break-in in 1997 and was occasionally occupied by vagrants. Stewart did little to improve the property, apart from building a fence to impede access, and she consistently ignored notices from the City. Inspectors returning to the home often found old notices left on the door.

In September 2001, the Dallas Urban Rehabilitation Standards Board ("URSB" or "Board"), a thirty-member administrative body that enforces municipal zoning ordinances, met to decide whether Stewart's property was an urban nuisance that should be abated. Stewart's neighbor, who had registered complaints on six prior occasions, testified that a fallen tree on Stewart's property had done $8,000 damage to her home and threatened to do $30,000 more. The Board reviewed prior complaints about the property and its general disrepair, found the Stewart house to be an urban

nuisance, and ordered its demolition. In September 2002, the Board denied Stewart's request for rehearing and affirmed its order.

On October 17, 2002, a City inspector found that Stewart had not repaired the property, and on October 28, the City obtained a judicial demolition warrant. The City demolished the house four days later.

Before the demolition, Stewart appealed the Board's decision to district court, but the appeal did not stay the demolition order. *See* TEX. LOC. GOV'T CODE § 54.039(e). After the demolition, Stewart amended her complaint to include a due process claim and a claim for an unconstitutional taking. The trial court, on substantial evidence review, affirmed the Board's finding that Stewart's home was an urban nuisance and awarded the city $2,266.28 in attorneys fees. It then severed Stewart's constitutional claims and tried them to a jury. At the close of trial, the City moved unsuccessfully for a directed verdict on the grounds that the Board's nuisance determination was res judicata, precluding Stewart's takings claim. The jury rejected the City's contention that Stewart's home was a public nuisance and awarded her $75,707.67 for the destruction of her house.[2] The trial court denied the City's post-verdict motions and signed a judgment in conformance with the verdict.

The court of appeals affirmed but held that the Board's nuisance finding could not be preclusive because of the brief delay between the nuisance finding and the house's demolition. ___ S.W.3d at ___.[3] The City petitioned this Court for review, arguing that the lower courts erred in

[2] The trial court instructed the jury that, in determining whether Stewart's property was a nuisance in the context of her takings claim, it could consider prior administrative and judicial findings.

[3] This holding was based on *City of Houston v. Crabb*, 905 S.W.2d 669, 674 (Tex.App.—Houston [14th Dist.] 1995, no writ), which held that in order to demolish a building as a nuisance, a City must prove that it was a nuisance on the day of demolition.

failing to give the Board's nuisance determination preclusive effect in Stewart's taking claim. We granted the petition for review.[4] 53 Tex. Sup. Ct. J. 115 (Nov. 20, 2009).

II. Analysis

Texas law permits municipalities to establish commissions to consider violations of ordinances related to public safety. *See* TEX. LOC. GOV'T CODE §§ 54.032-.041; *see also id.* §§ 214.001-.012.[5] The City of Dallas created the now-defunct Urban Rehabilitation Standards Board for that purpose. *See* DALLAS, TEX., CODE §§ 27-6 to -9, *repealed by* Dallas, Tex., Ordinance 26455 (Sept. 27, 2006).[6] The Board evaluated alleged violations of municipal ordinances. DALLAS, TEX., CODE §§ 27-6(a), 27-7, 27-8. Before issuing a demolition order, the Board was required to give property owners notice and a hearing. *See id.* §§ 27-9, 27-13. Property owners were also entitled to an appeal in district court, but judicial review was limited to deciding whether substantial evidence supported the Board's decision. *Id.* § 27-9(e).

The Local Government Code authorizes substantial evidence review of standards commissions' decisions. TEX. LOC. GOV'T CODE §§ 54.039(f), 214.0012(f). The same standard governs review of State agency determinations under the Texas Administrative Procedure Act. *See*

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[4] The cities of Houston and San Antonio submitted a brief as amicus curiae in support of the City, as did the cities of Aledo, Granbury, Haltom City, Kennedale, Lake Worth, North Richland Hills, River Oaks, Saginaw, and Southlake. We also called for the views of the Solicitor General, who submitted a brief on behalf of the State of Texas as amicus curiae.

[5] Chapters 54 and 214 of the Local Government Code provide substantially similar authority to municipalities with regard to the regulation and abatement of urban nuisances.

[6] This repealing ordinance abolished the URSB, replacing it with a system wherein municipal judges make the initial nuisance determination subject to substantial evidence review in district court. *See* DALLAS, TEX., CODE §§ 27-16.3, 27-16.10. However, the Dallas Code still contains language permitting administrative nuisance determinations reviewable only under a substantial evidence standard. *Id.* § 27-16.20.

TEX. GOV'T CODE §§ 2001.174-.175 ("If the law authorizes review of a decision in a contested case under the substantial evidence rule *or if the law does not define the scope of judicial review,* a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence . . . ." (emphasis added)). Substantial evidence review is limited in that it requires "'only more than a mere scintilla,' to support an agency's determination." *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 566 (Tex. 2000) (quoting *R.R. Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792-93 (Tex. 1995)); *see also* W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 290-92 (2006) (describing substantial evidence review as applied to Texas administrative agencies). Substantial evidence review "gives significant deference to the agency" and "does not allow a court to substitute its judgment for that of the agency." *Torch Operating*, 912 S.W.2d at 792. As such, "the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence." *Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984).

As a general matter, we have held that some agency determinations are entitled to preclusive effect in subsequent litigation. *See, e.g., Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78 (Tex. 2007) (applying res judicata to orders of the Texas Workforce Commission). Today, we must decide whether the Board's determination that Stewart's house was an urban nuisance,[7] and the affirmance of that decision on substantial evidence review, precludes a takings claim based on the

[7] The Dallas Municipal Code defines an urban nuisance as "a premises or structure that is dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare." DALLAS, TEX., CODE § 27-3(24). This language comes directly from statute. *See* TEX. LOC. GOV'T CODE § 214.001(a)(1); *see also id.* § 54.012 ("A municipality may bring a civil action for the enforcement of an ordinance . . . for the preservation of public safety . . . [or] relating to the preservation of public health . . . .").

demolition of that property. Because substantial evidence review of a nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights under Article I, Section 17 of the Texas Constitution, we hold that the determination was not preclusive.

A. Eminent Domain and Inverse Condemnation

A city may not take a person's property without first paying just compensation. TEX. CONST. art. I, § 17(d).[8] Typically, when the government takes a person's property, it does so through condemnation proceedings. For more than 150 years, the Legislature has prescribed a thorough and consistent condemnation procedure. A district court appoints a board of commissioners to hear evidence about the public's need for the land and its value.[9] The board's decision is then subject to de novo review by the district court. An early statute, passed before the ratification of the present constitution, provided that

> if either party be dissatisfied with the decision of said Commissioners, he or they shall have the right to file a petition in the District Court, as in ordinary cases, reciting the cause of action and the failure to agree, and *such suit shall proceed to judgment as in ordinary cases.*

Act approved Feb. 8, 1860, 8th Leg., R.S., ch. 51, § 2, 1860 Tex. Gen. Laws 60, 61, *reprinted in 4 H.P.N. Gammel, The Laws of Texas 1822-1897,* at 1422, 1423 (Austin, Gammel Book Co. 1898)

[8] Takings without just compensation are also prohibited by the United States Constitution. *See* U.S. CONST. amends. V, XIV. However, that constitution has no requirement of prepayment of compensation. *See Ruckelshaus v. Monsanto*, 467 U.S. 986, 1016 (1984) ("The Fifth Amendment does not require that compensation precede the taking.").

[9] Like building standards commissions, the board of commissioners in a condemnation suit need not be made up of lawyers. *See* TEX. PROP. CODE § 21.014 (requiring that the commissioners in a condemnation suit need only be "disinterested freeholders who reside in the county"); TEX. LOC. GOV'T CODE § 54.033 (setting no requirements for members of building standards commissions).

(emphasis added).[10] An almost identical judicial review provision appeared in the first Revised Civil Statutes. *See* TEX. REV. CIV. STAT. art. 4202 (1879). Today, condemnation proceedings are governed by chapter 21 of the Property Code, which retains the right to de novo review of the lay board's valuation decision. *See* TEX. PROP. CODE § 21.018 (If there is objection to the commissioners' decision, the district court shall "try the case in the same manner as other civil cases.").

Frequently, however, the government takes property without first following eminent domain procedures. In these cases, Texas law permits inverse condemnation suits, which are actions commenced by the landowner seeking compensation for the government's taking or damaging of his or her property through means other than formal condemnation. *See, e.g.*, *City of Houston v. Trail Enters., Inc.*, 300 S.W.3d 736 (Tex. 2009). While these cases are initiated by the landowner rather than the State, they are substantially similar to condemnation suits in most other ways. *See* John T. Cabaniss, *Inverse Condemnation in Texas—Exploring the Serbonian Bog*, 44 TEX. L. REV. 1584, 1585 n.3 (1966) (While the parties are reversed, "[t]he rules of evidence and measure of damages . . . are much the same.").

[10] This statute, however, did not govern all early condemnation cases. The State frequently gave railroad companies eminent domain powers. *See* Eugene O. Porter, *Railroad Enterprises in the Republic of Texas*, 59 SW. HIST. Q. 363 (1956) (describing the charters and eminent domain powers of early Texas railroad companies); Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232, 237 (1973) ("Devolution of the eminent-domain power upon . . . railroad companies was done in every state."). In some cases, the charters of these individual railroad companies prescribed somewhat different procedures than were found in the general statutes. *See, e.g.*, *Buffalo Bayou, Brazos & Colo. R.R. Co. v. Ferris*, 26 Tex. 588 (1863); *see also Sabine River Auth. v. McNatt*, 342 S.W.2d 741, 746 (Tex. 1961) (upholding, against a constitutional challenge, a condemnation statute that permitted only judicial review de novo without a jury).

Our earliest cases gave the Legislature extensive leeway in defining the remedies for a taking. In *Buffalo Bayou*, we held that

> [i]t cannot . . . be maintained, as is insisted, that the manner of ascertaining and assessing the amount of compensation . . . , as prescribed by the act of the legislature granting appellants their charter, is unconstitutional, because it does not require or authorize such compensation to be determined by the findings of a jury. . . . [T]he constitution does not prescribe a rule for determining what constitutes adequate compensation. It may be done in any manner that the legislature in its discretion may prescribe . . . .

26 Tex. at 599. This decision, however, came at a time when sovereign immunity was thought to apply even to takings claims. *See Ex parte Towles*, 48 Tex. 413, 447-48 (1878) (Gould, J., dissenting) (noting that the Legislature had assumed, and the Court had recognized, the State's sovereign immunity from inverse condemnation suits). Moreover, at the time of *Buffalo Bayou*, the Takings Clause of the Texas Constitution was generally thought not to be self-executing. *See* Cabaniss, 44 TEX. L. REV. at 1586-87 & n.16.

Our decision in *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980), brought significant change to this area of law. In *Steele*, the Houston Police Department, attempting to apprehend escaped fugitives who had taken refuge in Steele's property without his knowledge, destroyed his property. *Steele*, 603 S.W.2d at 789. When Steele sued the City under the Takings Clause, the City moved for summary judgment on the basis of its immunity from suit. *Id.* at 788. The trial court granted summary judgment and the court of civil appeals affirmed. *Id.* Reversing, we wrote:

> It is our opinion that plaintiffs' pleadings and their claim in contesting the motion for summary judgment established a lawful cause of action under [the Takings Clause]. That claim was made *under the authority of the Constitution* and was not grounded upon proof of either tort or a nuisance. It was a claim for the destruction of property,

> and governmental immunity does not shield the City of Houston. *The Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use.*

Id. at 791 (emphasis added). *Steele* recognized that the Takings Clause is self-executing—that it alone authorizes suit, regardless of whether the Legislature has statutorily provided for it. *See id.* Takings suits are thus, fundamentally, *constitutional* suits and must ultimately be decided by a court rather than an agency. Agencies, we have held, lack the power of constitutional construction. *See Central Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex. 1997) (holding that constitutional claims need not be brought before an agency because "the agency lacks the authority to decide [those] issue[s]"); 1 RONALD L. BEAL, TEXAS ADMINISTRATIVE PROCEDURE & PRACTICE § 9.3.1[c] (2011) ("No Texas agency has been granted the power to engage in constitutional construction, and any such attempt by the legislature to vest such power would raise serious and grave issues of a separation of powers violation."). *But cf.* TEX. CONST. art. XVI, § 50(u).

Texas has generally recognized this rule. Agency findings in eminent domain cases are subject to de novo trial court review, and inverse condemnation plaintiffs bring their cases in the same manner as any other civil case. The City and the dissents urge us to insulate one type of takings claim from the protections of *Steele*: those in which an agency has first declared the property a nuisance. We do not believe, however, that a matter of constitutional right may finally rest with a panel of citizens untrained in constitutional law.

B. The Police Power and Nuisance Abatement

A maxim of takings jurisprudence holds that "all property is held subject to the valid exercise of the police power." *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984) (citing *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478 (Tex. 1934)). Based on this principle, we have long held that the government commits no taking when it abates what is, in fact, a public nuisance. *See City of Texarkana v. Reagan*, 247 S.W. 816, 817 (Tex. 1923). Nuisance determinations are typically dispositive in takings cases.[11] Indeed, that was the case here: except for damages, the only relevant question for the jury was whether Stewart's home constituted a public nuisance.

Our precedents make clear that nuisance determinations must ultimately be made by a court, not an administrative body. *See City of Houston v. Lurie*, 224 S.W.2d 871 (Tex. 1949); *City of Texarkana v. Reagan*, 247 S.W.816 (Tex. 1923); *Crossman v. City of Galveseton*, 247 S.W. 810 (Tex. 1923); *Stockwell v. State*, 221 S.W. 932 (Tex. 1920).[12] In *Stockwell*, a statute empowered the

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[11] *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (noting that a claimant cannot recover under a regulatory takings theory if state law would have deemed the claimant's activities a public nuisance); *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 893-94 (5th Cir. 2004) (finding that the *Lucas* rule applies under Texas law); *RBIII, L.P. v. City of San Antonio*, No. SA-09-CV-119-XR, 2010 U.S. Dist. LEXIS 91751, at *42 (W.D. Tex. Sept. 3, 2010) (applying *Vulcan* and *Lucas*); *City of Texarkana v. Reagan*, 247 S.W. 816, 817 (Tex. 1923) (noting that a showing that a structure was in fact a nuisance would be a valid defense to a suit for damages based on an allegedly improper demolition of the structure); *City of Dallas v. Wilson*, 602 S.W.2d 113, 115 (Tex.App.—Dallas 1980, no writ) (same); *Jones v. City of Odessa*, 574 S.W.2d 850, 853 (Tex.App—El Paso 1978, writ ref'd n.r.e.) (same).

[12] JUSTICE GUZMAN casts these opinions narrowly to create a "general rule" that would never apply in practice. She would hold that de novo review is required only where the agency acts without a statutory nuisance definition or a statute requiring substantial evidence review. The Legislature has defined nuisance, *see* TEX. LOC. GOV'T CODE § 214.001, and it has required substantial evidence review for boards like the URSB specifically, *id.* § 214.0012(f), and for review of agency decisions generally, *see* TEX. GOV'T CODE § 2001.175(a). The Legislature has, therefore, evaded JUSTICE GUZMAN's "general rule," which would be unlikely ever to apply again.

Moreover, these cases stand for a broader proposition. In each case, there was statutory authorization for the nuisance finding, and substantial evidence review was already considered the default standard. What these cases in fact stand for, then, is that a court, not an administrative agency, must apply statutory nuisance standards to the facts of a particular case.

Commissioner of Agriculture to abate as nuisances any trees infested with an "injurious insect" or a "contagious disease of citrus fruits." *See Stockwell*, 221 S.W. at 934. The Commissioner exercised this legislatively granted discretion and ordered Stockwell's hedges destroyed because they were infested with citrus canker, which the Commissioner determined fit the statutory definition. *Id.* We held that a court must ultimately pass on that determination, noting that "whether something not defined as a public nuisance by the statute is such under its general terms, is undoubtedly a judicial question." *Id.* at 934.

Stewart's home was declared an urban nuisance according to similarly broad terms. The Local Government Code's nuisance definition prohibits buildings that are "dilapidated," "substandard," or "unfit for human habitation." TEX. LOC. GOV'T CODE § 214.001(a)(1). Like the application of the phrase "contagious disease of citrus fruits," these terms require more than rote application by an agency; they require an assessment of whether the particular conditions—citrus canker in one case, foundation damage in another—meet the general statutory terms. Judicial review in nuisance cases requires the application of general statutes to specific facts.[13] *See Stockwell*, 221 S.W. at 935 (quoting COOLEY'S CONSTITUTIONAL LIMITATIONS 742 ("Whether any particular thing or act is or is not permitted by the law of the State must always be a judicial

[13] The statute at issue in *Stockwell* did specifically permit the abatement of trees infected with, e.g., "nematode galls" or "crown galls." *See Stockwell v. State*, 221 S.W. 932, 934 (Tex. 1920). Implicit in the opinion is a suggestion that, had the Commissioner abated trees infected with such diseases, judicial review would be unnecessary because there would have been no application of law to fact—merely rote application of statutory command. But, where the statutory term was more general, and the agency therefore had discretionary power, review was necessary. There is, of course, no suggestion that this is based on either the lack of a statutory definition—there is one—or the failure to prescribe a standard of review.

question, and therefore the question of what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to the local legislative or administrative boards.")).

We adopted this view of *Stockwell* in *Crossman*, writing that *Stockwell* refused to "sustain the validity of [a] statute, in so far as its effect was to deny a hearing before the courts on the question as to whether or not the particular trees involved constituted a nuisance which ought to be summarily destroyed." *Crossman*, 247 S.W. at 813. That is, judicial review was necessary in *Stockwell* because a general statutory term had to be applied to specific facts. We wrote:

> A wooden building . . . is not a nuisance per se. It can only become a nuisance by the use to which it is put or the state of repair in which it is maintained; but as to whether or not it is, even in these events, a nuisance *is a justiciable question, determinable only by a court of competent jurisdiction.*

Id. (emphasis added). To read this as requiring anything other than full judicial review is to reject the opinion's clear language.

Reagan is particularly on point. There, a statute in the form of the City's charter gave the City the power to abate "dilapidated" buildings as nuisances, and the City destroyed Reagan's property pursuant to this authority. The district court concluded that the City's determination was res judicata. We disagreed, holding that *a court* must determine whether a building is "in fact" a nuisance:

> [N]either the Legislature nor the City Council can by a declaration make that a nuisance which is not in fact a nuisance; and *the question as to whether or not the building here involved was a nuisance was a justiciable question, determinable alone by the court or jury trying the case*.

Reagan, 247 S.W. at 817 (emphasis added). JUSTICE GUZMAN suggests that the problem in *Reagan* was that the statute was not "circumscribed to specific conditions that constitute a nuisance in fact"

but rather authorized abatement of buildings for merely being dilapidated. ___ S.W.3d at ___ & n.7. But the statute at issue in this case *also* authorizes abatement of buildings for merely being dilapidated. *See* TEX. LOC. GOV'T CODE § 214.001(a)(1) (providing that a "municipality may, by ordinance, require the . . . demolition of a building that is . . . dilapidated"). Thus, the standards for demolition are the same,[14] and, as in *Reagan*, judicial review is required.

Finally, in *Lurie*, we stated that "[i]t has been repeatedly held that the question whether property is a public nuisance and may be condemned as such is a justiciable question to be determined by a court." *Lurie*, 224 S.W.2d at 874. We referred to the "important principle" announced by *Stockwell*, *Crossman*, and *Reagan* that "the property owner is not to be deprived of his right to a judicial determination of the question whether his property is a public nuisance to be abated by demolition." *Id.* at 875. Rather than give *Lurie* and its antecedents a needlessly narrow cast, we should take their broad statements of principle at face value.[15]

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[14] Cities are by statute permitted to demolish buildings that are, *inter alia*, "dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare." TEX. LOC. GOV'T CODE § 214.001(a)(1). JUSTICE GUZMAN contends that the phrase "hazard to the public health, safety, and welfare" limits the word "dilapidated" and that, therefore, the statute only permits the demolition of nuisances in fact. This reading strain's the sentence's grammar and apparent meaning. The language after the word "or" constitutes a single phrase permitting abatement of buildings that are "unfit for human habitation and a hazard to the public health, safety, and welfare." Dilapidation and failure to comply with building standards are separate bases for abatement. This reading comports with the doctrine of last antecedent, which suggests that in most cases, a qualifying phrase should be applied only to the portion of the sentence "immediately preceding it." *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000).

Moreover, even if the final phrase did modify "dilapidated," that would not transform all URSB findings into findings that a property was, in fact, a nuisance "in fact." The Local Government Code's "hazard" language is exactly the same sort of "general term" that we said in *Stockwell* must be found by a court.

[15] We should also recognize *Lurie*'s language about the lack of statutory authorization for substantial evidence review for what it was: bolstering. *See City of Houston v. Lurie*, 224 S.W.2d 871, 876 (Tex. 1949) ("Certainly we would not be justified in applying the substantial evidence rule to this case when there is nothing in the statutes . . . expressing an intention that the suit be tried under [the substantial evidence] rule."). Earlier in the opinion, we noted that in other circumstances substantial evidence was the default standard in the absence of express legislative guidance. *Id.* at 874. But, because of the special nature of the right in question, we refused to apply that default presumption. *Id.* Nothing in *Lurie* suggests that our conclusion would have been different had the Legislature expressly required substantial

The City doubts *Lurie*'s continuing validity, relying on two cases from this Court which, it says, undermine the notion that a claim under the Takings Clause necessitates de novo trial court review. In *Brazosport Savings & Loan Ass'n v. American Savings & Loan Ass'n*, we held that substantial evidence review was appropriate where the plaintiff asserted that the State's issuance of a charter to a third party infringed on the plaintiff's due process property rights. 342 S.W.2d 747, 752 (Tex. 1961). Then, in *City of Houston v. Blackbird*, we held that there was no right to a de novo trial after the city council had levied assessments against landowners' property for the costs of paving improvements. 394 S.W.2d 159, 162-63 (Tex. 1965). Both cases are distinguishable.

Neither *Brazosport* nor *Blackbird* concerns nuisance determinations, and thus each says little about *Lurie*'s specific holding. Moreover, both predate our decision in *Steele*, which recognized an implied constitutional right of action for takings claims. *Steele*, then, undermined their vitality insofar as they give broad deference to the Legislature's determinations of remedial schemes for property rights violations. Finally, and most fundamentally, *Blackbird* and *Brazosport* do not concern agency decisions that directly determine substantive constitutional rights. Rather, they are due process cases alleging improper agency actions implicating property interests. *See Blackbird*, 394 S.W.2d at 161 (petitioners arguing that Houston did not follow the law in levying assessments against their property); *Brazosport*, 342 S.W.2d at 749 (respondent arguing that the agency acted "contrary to law and . . . rules"). *Blackbird* and *Brazosport* hold that in such cases, due process requires a right of appeal but note that substantial evidence review will usually be sufficient. *See Blackbird*, 394 S.W.2d at 163 (holding that agency action levying property assessments may only

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evidence review. To the contrary, the opinion's other language—its language of principle—suggests the opposite result.

be overturned because it is "arbitrary or [is] the result of fraud"); *Brazosport*, 342 S.W.2d at 751 (holding that due process requires "a right of judicial review" where agency action affects property rights). So long as the agency complies with the requirements of due process, its substantive decision does not directly adjudicate a constitutional claim.

In *Blackbird*, for example, the Court made clear that a city has the power to assess property owners for improvements to their properties, but noted that an improperly supported assessment may run afoul of the Texas Constitution. *Blackbird*, 394 S.W.2d at 162. To the extent the Court held that the case implicated the Takings Clause, it was because of a belief that an improper assessment might constitute a taking. *Id.* The suit in *Blackbird* was thus not a takings suit but, instead, was a statutory suit contesting the assessments' grounds. *See id.* at 160. It alleged that the agency failed to follow the law, a violation of due process. *See, e.g.*, *Bennett v. Reynolds*, 315 S.W.3d 867, 873 (Tex. 2010) (noting that arbitrary deprivations of property are violations of due process); *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 446 (Tex. 2007) ("Due process requires that the application of Texas law be neither arbitrary nor fundamentally unfair."). This differs significantly from Stewart's takings suit, which deals with whether her property was taken without just compensation. For these reasons, the cases cited by the City do not displace our holding in *Lurie*. *See Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex. 2004) ("Prior decisions need not be reaffirmed periodically to retain authority.").

The City also relies on two federal cases for the proposition that *Lurie* has been undermined by the rise of the administrative state. *See Freeman v. City of Dallas*, 242 F.3d 642, 649 (5th Cir. 2001) (en banc) (suggesting that plenary court review of nuisance determinations is "fundamentally

at odds with the development of governmental administrative agencies"); *Traylor v. City of Amarillo*, 492 F.2d 1156, 1158 (5th Cir. 1974) (suggesting that *Crossman* was "decided at a time when the constitutional basis for public regulatory powers was more primitive" (internal quotations omitted)). However, neither of these cases squarely addresses the issue currently before us, and neither directly addresses *Lurie* at all. *Traylor* was a case about whether a judicial nuisance determination must precede a property's demolition, not about judicial review of such determinations.

Freeman, too, is not directly on point. In *Freeman*, the petitioners, whose property was demolished, did not seek judicial review of the URSB's decision, and so the scope of that review was not at issue. *Freeman*, 242 F.3d at 646-47. Rather, *Freeman* considered whether the Fourth Amendment requires that a judicial warrant precede the permanent abatement of a nuisance. *Id.* at 647. *Freeman* cited our cases only to reject an analogy, apparently raised by the petitioners, between warrant requirements and judicial review of nuisance determinations. *Id.* at 649 (noting that the Texas judicial review cases "say nothing about employing the Warrant Clause" in this context). We do not believe the Circuit intended to decide the specific question before us today.

Moreover, neither *Traylor* nor *Freeman* addresses the Texas Constitution, under which we decide today's case. *See Freeman*, 242 F.3d at 654 (reaching its holding under the Fourth Amendment alone); *Traylor*, 492 F.2d at 1159 n.4 ("We intend no reflection on the continuing validity under state law of the Texas decisions cited by appellants . . . ."). Indeed, the *Freeman* dissent notes that "judicial oversight of public nuisance abatement . . . is required by Texas jurisprudence." 242 F.3d at 665 (Dennis, J., dissenting) (citing *Lurie*, 224 S.W.2d at 874).

We consider today not only our Takings and Due Process Clauses, which are generally regarded as functionally similar to their federal counterparts, but also our Separation of Powers Clause, which has no explicit federal analogue. *See* TEX. CONST. art. II, § 1 ("The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy . . . ."). As in most states, separation of powers principles are explicitly ingrained in the Texas Constitution, while they are merely implied in the United States Constitution. *See* Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1340 (1990); *see also* Neil C. McCabe, *Four Faces of State Constitutional Separation of Powers: Challenges to Speedy Trial and Speedy Disposition Provisions*, 62 TEMP. L. REV. 177, 185 (1989) ("The principle of separation of powers has evolved along parallel but distinctly different paths on the state and federal levels." (internal quotations omitted)). The scope of separation of powers is a function of governmental structure, and because of the differences between Texas and federal government, its requirements at the state level are different. This is especially true given its explicit treatment in our constitution. *See* Bruff, 68 TEX. L. REV. at 1348 (noting that the "prominence of Texas's constitutional command has given the separation-of-powers doctrine a special vigor in a number of respects"). In particular, the fragmentation of Texas's executive branch "attenuates" the accountability of our administrative agencies. *Id.* at 1346 ("The structure of Texas government permits the ties between a particular agency and each of the three branches of the state government to be weaker—sometimes far weaker—than they would be in the federal government."). Accountability is especially weak with regard to municipal-level agencies such as the URSB, which are created by cities that "typically lack

the separation of powers of the state and federal governments."[16] *Id.* at 1355. For these reasons, the Fifth Circuit cases cited by the City have little relevance to our decision today, which must rely on the Texas Constitution and our precedent.[17]

C. Agencies and Constitutional Construction

JUSTICE GUZMAN laments that we "miss[] the crux of the constitutional issue" before us. *See* ___ S.W.3d at ___. We agree that the "correct inquiry" is whether Stewart was afforded due process, *id.* at ___, but we cannot accept that the centrality of personal property rights, explicitly protected by two provisions of our constitution, has no bearing on the procedural requirements placed on an administrative agency when it adjudicates a question of direct constitutional import. Our opinion emphasizes the importance of an individual property owner's rights when aligned against an agency appointed by a City to represent the City's interests.[18] The character of the substantive rights protected, especially substantive constitutional rights, *must* be considered by a court determining what procedure is due. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

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[16] Individuals often have fewer statutory procedural protections before municipal agencies than they do before State agencies. *Compare* TEX. GOV'T CODE ch. 2001 (enumerating the procedural protections required for contested case hearings conducted by State agencies), *with* TEX. LOC. GOV'T CODE ch. 54, subch. C (permitting the creation of municipal building and standards commissions and defining the scope of their powers).

[17] It is also worth noting that *Traylor*, on which *Freeman* relies, predates both our decision in *Steele* as well as the reinvigoration by the Supreme Court of the constitutional fact cases, discussed below.

[18] Abatement actions are often motivated, at least in part, by a city's bottom line. *See* Nicole Stella Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 12-13 (2004) ("Blighted properties contribute to a city's economic problems by discouraging neighborhood investment, depriving the city of tax revenue, lowering the market value of neighborhood property, and increasing the cost of business and homeowner insurance." (footnotes omitted)); *see also Freeman v. City of Dallas*, 242 F.3d 642, 667 (5th Cir. 2001) (en banc) (Dennis, J., dissenting) ("The City of Dallas has pecuniary interests in the outcome of [abatement] proceedings, e.g., justification for federal and state urban renewal grants; enhancement of the municipal tax base by promoting the replacement of old buildings with new ones."); *id.* at 664 ("The URSB is an agency of the City of Dallas charged with the remediation—including the demolition—of structures deemed by it to constitute urban nuisances. The URSB's job is to eliminate unsightly conditions adversely affecting the economic value of neighboring property and the City's tax base.").

(noting that, in determining what process is due, courts must pay close attention to the nature of "the private interest that will be affected by the official action"); *see also Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (noting, with regard to the important relationship between procedural due process and substantive rights, that "the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures").

In a takings case, a nuisance finding generally precludes compensation for the government's destruction of property. That is so because due compensation is typically a matter "determined by whether the conduct of the sovereign is classified as a noncompensable exercise of the police power or a deprivation of property through eminent domain." Cabaniss, 44 TEX. L. REV. at 1584 n.1. The nuisance determination, therefore, cannot be characterized as somehow apart from the takings claim, because the only sense in which such a determination is significant—its only meaning—is that it gives the government the authority to take and destroy a person's property *without compensation*. Nuisance findings are "determination[s]—in constitutional terms—that the structure has no value at all." D.R. Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers Over Slum Housing*, 67 MICH. L. REV. 635, 639 (1969). Specifically, the issue before us is whether, *in Stewart's takings claim*, the URSB's nuisance determination is res judicata. That is, should it have been a dispositive affirmative defense to her claim?[19] The nuisance finding is thus a value determination, like the value determination made by

[19] For this reason, JUSTICE GUZMAN's suggestion that, as an initial matter, this case falls outside the Takings Clause is peculiar. This case is outside the Takings Clause only if the property was *in fact* a nuisance and properly found as such. If the jury's failure to find that Stewart's property was a nuisance controls, then there was a taking. This case

the board of commissioners in an eminent domain case. The board of commissioner's value determination, of course, is subject to de novo review in a trial court;[20] so, too, is the URSB's value determination in this case.[21]

Moreover, though the value determination that the board of commissioners makes in an eminent domain suit is wholly factual, based on market conditions and similar factors, it is given no weight on appeal to the trial court. The value determination the URSB made here, however, was largely a determination of law based on the application of statutory standards to historical facts. Such a determination is less, not more, appropriate for deferential agency review.

This is especially true because of the constitutional nature of the nuisance inquiry. In *Steele*, we observed that the law had "moved beyond the earlier notion that the government's duty to pay for taking property rights is excused by labeling the taking as an exercise of the police powers," *Steele*, 603 S.W.2d at 789, because the line between police power and takings is "illusory" and requires "a careful analysis of the facts . . . in each case of this kind." *Turtle Rock*, 680 S.W.2d at

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must therefore be analyzed with Takings Clause in mind.

[20] TEX. PROP. CODE § 21.018(b) (requiring that appeals from the board of commissioners' findings be tried "in the same manner as other civil causes").

[21] JUSTICE GUZMAN fails to articulate any logical reason for treating review of these two types of administrative valuation differently. We agree with JUSTICE GUZMAN that proper abatement has always required that the property be a nuisance in fact. But if this standard applies to all governmental action with respect to nuisances, why does the scope of review turn on whether the Legislature told the agency about the standard? The nuisance in fact requirement is a common law norm limiting all governmental exercise of the police power. Statute or no, the question is the same. So must be the standard of review.

The differing treatment of decisions of the URSB and condemnation commissioners is particularly notable considering that the board of commissioners in an eminent domain case is appointed by the trial court, TEX. PROP. CODE § 21.014(a) (requiring that the commissioners be appointed by the "judge of a court in which a condemnation petition is filed or to which an eminent domain case is assigned"), and therefore could be considered its agent. *Cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 (1982) (approving of the use of magistrate judges as adjuncts to Article III courts). The agency here, though, is appointed by the City that is taking the property. DALLAS, TEX., CODE § 27-6, *repealed by* Dallas, Tex., Ordinance 26455 (Sept. 27, 2006).

804; *see also Parking Ass'n v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting) (referring to the "fact-specific nature of takings claims"). Because a nuisance determination is an exercise of the police power, it, *like any other determination regarding the police power*, "is a question of law and not fact" that must be answered based upon a "fact-sensitive test of reasonableness." *Turtle Rock*, 680 S.W.2d at 804; *see also Sheffield*, 140 S.W.3d at 671 ("[T]he Supreme Court has admitted, '[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law.'" (quoting *Eastern Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (alteration in original)). We have even refused to give substantial deference to our lower courts when they make similar determinations. In *Mayhew v. Town of Sunnyvale*, we noted that while "determining whether a property regulation is unconstitutional requires the consideration of a number of factual issues," we do not grant deference because, "[w]hile we depend on the district court to resolve disputed facts regarding the extent of governmental intrusion on the property, the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law." *Mayhew*, 964 S.W.2d 922, 932-33 (Tex. 1998) (citation omitted). Thus, in the takings context, we may grant deference to findings of historical fact, but mixed questions of law and constitutionally relevant fact—like the nuisance determination here—must be reviewed de novo.

Cases from the United States Supreme Court provide further guidance. In a recent line of cases, that Court has reinvigorated the constitutional fact doctrine,[22] especially as it relates to

[22] The original "constitutional fact" cases dealt with review of administrative decisions implicating constitutional claims. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 247-63 (1985). In an especially relevant case involving a confiscation challenge to a public utility rate order, the Supreme Court required plenary court review of constitutionally relevant facts. *See Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). Central to the dispute in *Ben Avon* was the question of the value of the utility's property. *See id.* at 288. The Supreme Court held that the utility was entitled to independent judicial judgment on a question, such as this, which

appellate review of state and lower federal court decisions. *See, e.g.*, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984) (holding, as "a rule of federal constitutional law," that appellate courts must give independent, de novo review to lower court determinations of actual malice in defamation cases, despite contrary statute). The reasoning of these cases applies with even greater force to agency decisions because while state and lower federal courts are presumed competent to handle constitutional matters, administrative agencies, for all the deference they are typically given, occupy a subordinate status in our system of government. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 239 (1985) (noting that in the context of administrative agencies, "a strong argument can be made that enforcement tribunals *must* undertake constitutional fact review" for reasons "rooted in the 'legitimacy deficit' inherent in administrative adjudication."); *see also* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV.

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implicated the Takings Clause. *Id.* at 290-91. *Ben Avon* itself supports for our holding today. Though it has not been recently cited for its original holding, it has also never been overruled. *See Sheffield*, 140 S.W.3d at 660 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of its own decisions.") (citation omitted) (alterations in original)). We decide today's case under the Texas Constitution, and, thus, Supreme Court precedent does not control, but because of the similarities between the United States Constitution and that of our state, it is authority of the utmost persuasiveness. *See id.* (noting that even where a takings decision is made under the Texas Constitution, "we do look to federal takings cases for guidance in applying our own constitution").

The constitutional fact doctrine was affirmed in *Crowell v. Benson*, 285 U.S. 22, 56-58 (1932), where the Court held that constitutional facts must be found by a court. *See also* Monaghan, 85 COLUM. L. REV. at 253 (noting that in *Crowell*, the Court "confirmed and generalized the constitutional fact doctrine in strong terms"). After *Crowell*, though, the constitutional fact doctrine fell into relative desuetude. *See* Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1449 (2001); *see also N. Pipeline*, 458 U.S. at 82 n.34 ("*Crowell*'s precise holding, with respect to 'jurisdictional' and 'constitutional' facts that arise within ordinary administrative proceedings, has been undermined by later cases."). *But see Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (approvingly citing *Crowell* for the proposition that the Supreme Court "retains an independent constitutional duty to review factual findings where constitutional rights are at stake").

1787, 1842-47 (2005) (noting that administrative agencies can be thought to suffer from problems of legal, sociological, and moral illegitimacy).[23]

The Supreme Court has required constitutional fact review primarily in the context of the First and Fourth Amendments. In those areas, facts tend to be deeply intertwined with legal issues, necessitating independent review. In *Miller v. Fenton*, 474 U.S. 104, 114 (1985), the Supreme Court noted that where "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case," it is "reluctant to give the trier of fact's conclusions presumptive force . . . ." The *Miller* Court considered whether it was required to defer to a trial court's determination that a confession was voluntary. *Id.* at 105-06. The Court rejected that approach, holding that voluntariness was a fact-specific, but nonetheless legal, determination. *Id.* at 116 ("[T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne."). Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995), the Court held that determinations of whether an

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[23] Indeed, according to Professor Monaghan,

> [i]n terms of the constitutional design, the whole process of substituting administrative for judicial adjudication may be thought to suffer from a serious "legitimacy deficit." The constitutional fact doctrine is an effort to overcome this problem, to reconcile the imperatives of the twentieth century administrative state with the constitutional preference for adjudication by the regular courts. It does so by requiring, at a minimum, that a court asked to enforce an administrative order must engage in constitutional fact review.

Monaghan, 85 COLUM. L. REV. at 262 (footnote omitted); *see also* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1844 (2005) (noting that the sociological legitimacy deficit of administrative agencies is "serious, even alarming").

activity constitutes free speech, protected by the First Amendment, carry with them "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." This independent review is required because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," and so a reviewing court "must thus decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* And in *Ornelas v. United States*, 517 U.S. 690, 695-97 (1996), the Supreme Court held that appellate courts must independently determine what constitutes "reasonable suspicion" and "probable cause." Again, the mixed nature of questions of law and findings of constitutional fact were controlling:

> Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. . . . They are . . . . fluid concepts that take their substantive content from the particular context in which the standards are being assessed. The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. *The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact . . . .*

Id. at 695-96 (citations omitted) (emphasis added).

Takings claims also typically involve mixed questions of fact and law. *See Mayhew*, 964 S.W.2d at 932-33. An analysis of whether a structure is a nuisance requires fairly subtle consideration. There are initial questions of historical fact—whether or not the structure had foundation damage, for example. These questions are within the competence of the administrative agency and are accorded deference. But the second-order analysis, which applies those historical

facts to the legal standards,[24] are questions of law that determine the constitutionality of a property's demolition. *See id.* These legal-factual determinations are outside the competence of administrative agencies.[25]

Indeed, we have held that an agency's adjudicative power is strongest where it decides purely statutory claims and weakest where it decides claims derived from the common law. *Compare Emps. Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 910 (Tex. 2009) (refusing to construe a statute to permit an agency to decide subrogation claims because those claims "existed at common law long before [the agency] was created"), *with Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 227 (Tex. 2002) (permitting an agency to decide claims arising "from a statute and not the common law"). The protections we have previously provided to common law claims should apply with special force to claims founded in our constitution, because the power of constitutional construction is inherent in, and exclusive to, the judiciary. *See Firemen's & Policemen's Civil Serv.*

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[24] E.g., did the damage to the structure make it a threat to public health or safety such that the government may deprive a citizen of her ownership of the structure?

[25] Our holding today is restricted to judicial review of agency decisions of substantive constitutional rights, and thus, despite JUSTICE GUZMAN's assertions to the contrary, ___ S.W.3d at ___, it does no violence to the general rule that trial court decisions on mixed questions of fact and law are reviewed for abuse of discretion. *See State v. $217,590 in U.S. Currency*, 18 S.W.3d 631, 633 (Tex. 2000). We note, however, that we have already recognized the existence of exceptions to that rule on the basis of the constitutional concerns. For example, Texas appellate courts follow *Bose*'s requirement that they independently review trial court findings of actual malice in defamation cases. *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 623-24 (Tex. 2004); *Turner v. KTRK TV, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000) ("Federal constitutional law dictates our standard of review on the actual malice issue, which is much higher than our typical 'no evidence' standard of review."). Likewise, we have repeatedly left open the question of whether the constitution requires de novo review in parental termination cases. *See In re J.F.C.*, 96 S.W.3d 256, 267-68 (Tex. 2002); *In re C.H.*, 89 S.W.3d 17, 29 (Tex. 2002) (Hecht, J., concurring). And in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932-33 (Tex. 1998), we refused to defer to the trial court's determination of factual issues in a regulatory takings case because "the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law." *See also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 307-08 & n.34 (Tex. 2006) (noting that the constitution requires de novo review of the constitutionality of punitive damage awards).

Comm'n v. Kennedy, 514 S.W.2d 237, 239 (Tex. 1974) (holding that courts may consider the constitutionality of agency action even where judicial review is not provided for by statute).

Many agencies make decisions that affect property interests—such as licensure and rate setting—but in so doing they do not actually engage in constitutional construction. *See* 1 BEAL, TEXAS ADMINISTRATIVE PROCEDURE & PRACTICE § 9.3.1[c]. Rather, constitutional challenges to agency decisions typically deal not with the substance of the agency's decision but, rather, with the procedures that the agency followed in making it. *See, e.g.*, *Blackbird*, 394 S.W.2d 159; *Brazosport*, 342 S.W.2d 747. The rules governing such procedural challenges are already well established. *Kennedy*, 514 S.W.2d at 239. Thus, all that is before the us today is agency authority to *actually decide* substantive constitutional claims.

III. Conclusion

That the URSB's nuisance determination cannot be accorded preclusive effect in a takings suit is compelled by the constitution and *Steele*, by *Lurie* and its antecedents, by the nature of the question and the nature of the right. The protection of property rights, central to the functioning of our society,[26] should not—indeed, cannot—be charged to the same people who seek to take those rights away.

Because we believe that unelected municipal agencies cannot be effective bulwarks against constitutional violations, we hold that the URSB's nuisance determination, and the trial court's

[26] *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 133 (2004) ("The reason why men enter into society is the preservation of their property . . . .").

affirmance of that determination under a substantial evidence standard, were not entitled to preclusive effect in Stewart's takings case, and the trial court correctly considered the issue de novo.

We affirm the court of appeals judgment. TEX. R. APP. P. 60.2(a).

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0257

CITY OF DALLAS, PETITIONER,

v.

HEATHER STEWART, RESPONDENT

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

Argued February 16, 2010

JUSTICE JOHNSON, joined by JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE GUZMAN, dissenting.

The finding by Dallas's Urban Rehabilitation Standards Board (URSB) that Heather Stewart's property was a nuisance, when affirmed by the trial court, should have determined the nuisance question and precluded its relitigation. Because the Court holds otherwise, I respectfully dissent.

I. General

Statutory requirements afford significant safeguards to property owners whose property a city seeks to abate as a public nuisance. *See* TEX. LOC. GOV'T CODE chs. 54, 214. Stewart does not claim that Dallas's ordinances failed to comply with those requirements; neither does the Court. Stewart simply claims that she is constitutionally entitled to an entirely new consideration of

whether her property was a nuisance—a trial de novo—instead of the consideration by the URSB with judicial review under the substantial evidence standard. The Court agrees; I do not.

A. Law

The statutory framework providing abatement of public nuisances is detailed and comprehensive. The Local Government Code specifies that municipalities may provide for abatement of certain types of buildings:

> (a) A municipality may, by ordinance, require the vacation, relocation of occupants, securing, repair, removal, or demolition of a building that is:
>
> (1) dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare;
>
> (2) regardless of its structural condition, unoccupied by its owners, lessees, or other invitees and is unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of harborage or could be entered or used by children; or
>
> (3) boarded up, fenced, or otherwise secured in any manner if:
>
> (A) the building constitutes a danger to the public even though secured from entry; or
>
> (B) the means used to secure the building are inadequate to prevent unauthorized entry or use of the building in the manner described by Subdivision (2).

Id. § 214.001(a). A city governing body is authorized to appoint a building and standards commission to hear cases concerning alleged violations of ordinances. *Id.* § 54.033(a). The commission is afforded independence in fulfilling its functions: members are removable only for cause on written charge and the member is entitled to a public hearing on the removal issue. *Id.* § 544.033(c). The commission must adopt rules and procedures for use in hearings and provide "ample opportunity for presentation of evidence and testimony by respondents or persons opposing charges brought by the municipality or its building officials." *Id.* § 54.034(b), (d). Further, the chair

of the reviewing panel has the authority to administer oaths and compel attendance of witnesses. *Id.* A city may provide that if property is determined by the commission to be in violation of city ordinances and the property is not timely brought into compliance or demolished by the owner, then the property is subject to abatement by the municipality. *Id.* §§ 214.001(d), (h), (i), (j), (m). As relevant to this matter, Dallas's ordinances conformed to the statutory provisions. *E.g.*, DALLAS TEX. CODE §§ 27-6 to -9.[1]

B. The Hearings

Pursuant to the Local Government Code and Dallas's ordinances, the URSB gave Stewart notice of the alleged code violations regarding her property. The URSB then held an evidentiary hearing concerning the allegations that Stewart's house was an urban nuisance.

Dallas's ordinance defined "urban nuisance" as follows:

> URBAN NUISANCE means a premises or structure that is dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare.

DALLAS TEX. CODE § 27-3(24). *See* TEX. LOC. GOV'T CODE § 214.001(a)(1). After hearing evidence on September 24, 2001, the commission found based on a preponderance of the evidence that Stewart's house was an urban nuisance as defined in section 27-3(24) of the Dallas City Code. Stewart did not appear at the hearing, but after the order was entered she requested a rehearing and filed a plan for repairing the house to remedy the specified code violations. The URSB held another hearing on September 23, 2002. The transcript of the second hearing shows that Stewart and her mother appeared and gave testimony contesting the nuisance allegations. The City presented

[1] Some provisions of the Code have been amended. References will be to code language applicable to this matter.

evidence that no substantial repairs had been made to Stewart's property since the first hearing. As a result of the second hearing the URSB affirmed its September 24, 2001 order.

C. The Lawsuits

As she was authorized to do by statute and Dallas's ordinances, Stewart timely appealed to the district court. She made several arguments before the district court, but she did not, at that time, argue review of the URSB's determination under the substantial evidence standard violated her constitutional rights. She alleged that (1) the URSB's decision was not reasonably supported by substantial evidence; (2) the URSB actions denied her "due process of law and the right to equal protection of the law, as guaranteed by the Constitutions of the United States and the State of Texas *in that [Stewart] has not been served an order specifying in detail the findings of the Board*" (emphasis added); (3) the URSB exceeded its statutory authority because it did not apply the correct standards in making its ruling; (4) the procedures of the URSB were unlawful in that Stewart was denied the right to cross-examine a city expert witness and a third party witness; and (5) the URSB ignored the evidence and its decision was arbitrary, capricious, and an abuse of discretion.

After the City demolished the property, Stewart amended her pleadings to allege that (1) the URSB's decision was not reasonably supported by substantial evidence; (2) there were "Errors in Procedure and Due Process as to Order and Demolition" because the URSB did not follow the notice procedures in section 27-13 of Dallas's ordinances before demolishing her property; (3) demolition of her property was wrongful because there was not substantial evidence to support the URSB's order; and (4) the demolition of her property was an unlawful government action, comprising a

"taking" of her property under the Fifth and Fourteenth Amendments of the federal constitution and article 1 of the Texas Constitution, and was "without due process of law."

After the trial court severed the administrative appeal from her other claims, Stewart pled that she was entitled to damages for the wrongful destruction of her property based on "constitutional claims associated with" the City's destruction of her home. As the basis for damages, she alleged generally that demolition of the property as a public nuisance was wrongful, and her claims were brought under "the Texas Constitution, Article 1, Sections 17 and 19." She specified that the bases for her general claim of unconstitutionality were (1) the property was not a nuisance in fact and its destruction "violated the protections afforded Plaintiff by the Texas Constitution and Texas Government Code"; (2) whether her property was a nuisance was a justiciable question to be determined only by the district court or jury trying the case; and (3) Dallas did not give proper notice before demolishing the property, which violated her right to due process. She sought damages for value of the property and mental anguish.

The district court was authorized by statute to conduct a substantial evidence review, and to "reverse or affirm, in whole or in part, or . . . modify the decision brought up for review." TEX. LOC. GOV'T CODE § 214.0012(f). After severing Stewart's appeal of the URSB's order from her constitutional claims, the court affirmed the URSB order without altering or modifying it. Stewart did not appeal that ruling.

In this severed matter the trial court submitted two liability questions and damages questions contingent on "Yes" answers to the liability questions. The first liability question, question one, charged the jury to find from a preponderance of the evidence if Stewart's property constituted a

public nuisance at the time it was demolished by the City. The second liability question, question three, asked if the city failed to comply with section 27-13 of its ordinances in proceeding with the demolition of Stewart's property. Stewart's only objection to the charge was to request that the court define "public nuisance" in question one according to the definition in Dallas's ordinance. The jury answered question one "No" and found the market value of the structure was $75,707.67 at the time it was demolished. Regarding Stewart's due process claim, the jury answered question three "No." Stewart moved the trial court to render judgment in her favor on the verdict of the jury, which it did. Thus, as to the nuisance issue the jury charge submitted the same question to the jury that the URSB previously answered, and the jury made its findings by a preponderance of the evidence—the same standard by which the URSB made its findings.

III. The Court's Holding

The Court recognizes and agrees that the government does not commit a taking when it abates a public nuisance. ___ S.W.3d ___. But the Court allows Stewart to circumvent the URSB's determination that her house was a nuisance and the trial court's affirmation of that determination pursuant to its substantial evidence review despite the fact that Stewart has never directly attacked the validity of either the statutes involved or Dallas's ordinances that (1) define a nuisance, (2) allow determination of the factual nuisance issue by the URSB pursuant to specified procedures and the definition of nuisance prescribed by the Legislature, and (3) provide for substantial evidence review by a trial court that is authorized to reverse or modify the URSB's order in whole or in part. Nevertheless, her position clearly is that they are invalid: "The question as to whether or not [Stewart's] home was a nuisance is a justiciable question to be determined alone by a court or jury

trying the case." Put differently, she maintains that she is entitled to a de novo determination of the nuisance question despite not having challenged the substance of either the statutes or Dallas's ordinances providing procedural and substantive safeguards for persons whose property is alleged to be a nuisance, define the term nuisance, authorize judicial review of the URSB's quasi-judicial nuisance finding and judicial modification of the URSB order.

Stewart and the Court mainly base their positions on *City of Houston v. Lurie*, 224 S.W.2d 871 (Tex. 1949) and several cases preceding *Lurie*: *City of Texarkana v. Reagan*, 247 S.W. 816 (Tex. 1923), *Crossman v. City of Galveston*, 247 S.W. 810 (Tex. 1923), *Stockwell v. State*, 221 S.W. 932 (Tex. 1920). Based on these cases the Court holds that the URSB's determination that Stewart's house was an urban nuisance as defined by the City ordinance—which reflects the statutory definition—could not stand absent "full judicial review." ___ S.W.3d at ___.

In *Lurie*, Aneeth Lurie refused to tear down two buildings she owned after the city council determined the buildings were nuisances. *Lurie*, 224 S.W.2d at 873. An ordinance provided that if an owner failed to comply with an order of the city council, "the city attorney 'shall file suit in the proper court against such owner and obtain the necessary orders and process of said court to enforce the orders of the city council.'" *Id.* The ordinance did not provide for judicial review of the council's determination that a property was a nuisance. Pursuant to the ordinance, the city attorney sued Lurie to enforce the council's order. *Id.* The trial court submitted the issue to the jury, which found only one of the two buildings was a nuisance. *Id.* The trial court granted a JNOV, rendered judgment that both buildings were nuisances, and ordered their demolition. *Id*. The court of appeals reversed for jury charge error. *Id.* In this Court, the City argued that the trial court should not have

even submitted the issues to the jury. *Id.* at 873-74. Rather, it argued the trial court should have rendered judgment for the City, or alternatively, instructed a verdict for the City because it had introduced substantial evidence reasonably supporting the council's findings. *Id.* Relying on *Crossman* and *Reagan*, this Court rejected the City's argument for application of the substantial evidence rule:

> The authority to decide such a question involves the exercise of judicial discretion, and ordinarily includes the authority to weigh evidence, to make findings of fact, and to apply rules of law. It may well be doubted that a limited review of the facts, as under the substantial evidence rule, would amount to a judicial determination of the justiciable question here involved. Trial under that rule would not establish whether or not the buildings are nuisances, "in the same manner as any other fact." *Certainly we would not be justified in applying the substantial evidence rule to this case when there is nothing in the statutes, including the home rule enabling act, or in the city's charter or in the city's ordinance, expressing an intention that the suit be tried under that rule.*

Lurie, 224 S.W.2d at 876 (emphasis added). Thus, the Court's refusal to afford preclusive effect to the council's determination that a property was a nuisance, or to afford substantial evidence review of the council's determination, occurred in the absence of a statute or ordinance providing for substantial evidence review. *Id.*

Similarly, in the cases upon which *Lurie* relied—*Stockwell*, *Crossman*, and *Reagan*—there was no statute or ordinance providing for judicial review. *See Stockwell*, 221 S.W. at 934; *Crossman*, 247 S.W. at 811; *Reagan*, 247 S.W. at 816-17. *Lurie* and its predecessor cases stemmed from the Court's refusal to recognize a non-judicial nuisance finding as conclusive. *See Lurie*, 224 S.W.2d at 875; *see also Reagan*, 247 S.W. at 817 (refusing to uphold an ordinance that "makes final the determination of the city council on the question as to whether or not the building under investigation is a nuisance"); *Crossman*, 247 S.W. at 813 ("Another vice of this ordinance is that

it purports to make the action of the city commissioners, in declaring the building a nuisance, final."). These cases expressed the Court's position that such an approach subjected property rights to disposition by officials "exercising, not judicial powers, but purely executive powers." *Stockwell*, 221 S.W. at 934.

Since those cases were decided, however, the Legislature has enacted statutes authorizing substantial evidence judicial review of similar types of decisions. *See* TEX. LOC. GOV'T CODE § 54.039(f) ("The district court's review shall be limited to a hearing under the substantial evidence rule."); *id.* § 214.0012(f) ("Appeal in the district court shall be limited to a hearing under the substantial evidence rule."). The City of Dallas has incorporated the statutory standard into its ordinance. *See* DALLAS TEX. CODE § 27-9(e). Thus, in the matter before us, unlike the situations in *Lurie*, *Stockwell*, *Crossman*, and *Reagan*, statutes and an ordinance provide a definition of nuisance, procedures for giving notice of and determining whether property falls within the definition of nuisance, judicial review of the nuisance determination, and the standard to be used in any judicial review. *See Cedar Crest # 10, Inc. v. City of Dallas*, 754 S.W.2d 351, 353 (Tex. App.—Eastland 1988, writ denied) (distinguishing *Lurie* on these grounds).

Although the Court recognizes that *Lurie* involved the absence of a statutory basis for substantial evidence review, in a footnote of its opinion the Court concludes that the basis of the Court's holding was not statutory; instead, *Lurie* focused on the special nature of the right being protected. ___ S.W.3d ___ n.15. I agree that the right involved in *Lurie* was special: it was the constitutional right of a private property owner to be secure from governmental taking of private

property without compensation. *See Lurie*, 224 S.W.2d at 874. But the Court subsequently squarely held substantial evidence review valid as applied to this same right.

In *City of Houston v. Blackbird*, 394 S.W.2d 159 (Tex. 1965), the City of Houston passed an ordinance that levied assessments against property owners for improvements made to streets abutting their properties. *Id*. at 161. The amount of the assessments were based on the city council's determination that the property owners would receive special benefits from the proposed improvements. *Id.* The property owners filed suit in district court seeking de novo review of the council's determination that their property would be especially benefitted by the improvements. *Id.* On appeal, this Court concluded that the validity of the amount of the assessments involved the takings clause of the Texas Constitution, yet the property owners were not entitled to de novo review of the council's determinations:

> An assessment against property and its owner for paving improvements on any basis other than for benefits conferred and in an amount materially greater than the benefits conferred, violates Sec. 17 of Article 1 of the Constitution of Texas, which prohibits the taking of private property for public use without just compensation. The right to judicial review of acts of legislative and administrative bodies affecting constitutional or property rights is axiomatic. The City of Houston does not question the verity or soundness of this proposition. *What the City does question is the right of respondents in this case to a full-blown de novo trial of the question of benefits. We agree with the City that respondents had no such right; and, accordingly, we agree with the City that respondents were not entitled to a jury trial of the issues in this case* and that the jury's answers to the special issues submitted to them should have been disregarded.

Id. at 162-63 (emphasis added) (citations omitted). As the Court noted, the Legislature "precluded judicial review of such acts to the extent of its constitutional power" and the Legislature did not intend to provide "dissatisfied property owners a de novo review thereof." *Id.* at 163. The Court

upheld that choice by the Legislature, even though the takings clause was the basis for the property owners' challenge, just as it underlies Stewart's challenge.

Similarly, the Court held in *Brazosport Savings and Loan Ass'n v. American Savings and Loan Ass'n* that parties claiming an agency's decision infringed their vested property rights in franchises had a right to judicial review, but the right was limited to "prov[ing] their allegations that the Commissioner's action was illegal or without support in substantial evidence." 342 S.W.2d 747, 752 (Tex. 1961).

The Court discounts the holdings of *Blackbird* and *Brazosport* by reading them as "due process cases alleging improper agency actions implicating property interests." ___ S.W.3d ___. But in *Blackbird* the Court squarely addressed the issue as one involving the takings clause of the Texas Constitution. *Id.* at 163. The only real distinction between *Blackbird* and *Lurie* is that *Lurie* involved the taking of real property, whereas *Blackbird* involved the taking of money by means of requiring payment of an assessment. But they are both property takings claims, nonetheless. And the result in *Blackbird* depended on the city council's fact-based finding that the abutting landowners' property was especially benefitted by the paving. The Court nevertheless holds that findings of the URSB cannot survive because review was by the substantial evidence standard even though the URSB's decision did not entail interpretation of law or the constitution. And the Court does so despite Stewart's failure to challenge any part of the process provided in Dallas's ordinances as being unconstitutional or violating statutes. Her specific complaint was about the post-hearing, pre-demolition notice required by section 27-13 of Dallas's ordinances, and the jury found against her on that question. She neither complains of how the due process question was submitted to the

jury nor challenges the jury's finding on it. To the contrary, she moved for judgment on the verdict without excepting or excluding the due process finding from her motion.

The Court also states that *Blackbird* and *Brazosport* "both predate our decision in [*Steele v. City of Houston*, 603 S.W.2d 786], which recognized an implied constitutional right of action for takings claims." ___ S.W.3d ___. The Court concludes "*Steele* [] undermined their vitality insofar as they give broad deference to the Legislature's determination of remedial schemes for property rights violations." ___ S.W.3d ___. This statement implies that *Steele* overruled *Brazosport* and *Blackbird*. But *Steele* does not address *Brazosport* and *Blackbird*, nor does it address the Legislature's authorization and establishment of a quasi-judicial process to address public nuisances.

In *Steele*, police sought to flush and capture fugitive prisoners by starting a fire in the house where the fugitives were hiding. 603 S.W.2d at 789. The house burned and the owners sought compensation from the city. *Id.* The case did not involve the propriety of an administrative process involving a limited definition of what comprised a public nuisance and provisions for notice, presentment of evidence, opportunity for rehearing, judicial review of findings and determinations, and even judicial authority to modify the administrative order. *See id.* at 792. Rather, it involved whether the police's burning of the property came within the doctrine of great public necessity. *See id.* ("The defendant City of Houston may defend its actions by proof of a great public necessity."). That doctrine recognizes that a governmental entity may destroy property "[i]n the case of fire, flood, pestilence or other great public calamity, when immediate action is necessary to save human life or to avert an overwhelming destruction of property." *Id.* at 792 n.2.

In contrast to *Steele*, where the question was whether an emergency existed and property was destroyed without prior proceedings to determine the public nuisance question, statutorily authorized abatement proceedings involve quasi-judicial determinations occurring before destruction of the property and affording procedural and substantive safeguards to property owners. *See* TEX. LOC. GOV'T CODE § 54.034. Situations involving determining whether property was previously destroyed because of great public necessity are different from situations involving destruction of property following proceedings pursuant to statutes and ordinances requiring advance notice, a hearing with the opportunity to challenge the public nuisance determination before destruction, and review by a court empowered to set aside or modify the final order. In my view *Steele* is inapposite. *See, e.g.*, *Crossman*, 247 S.W. at 814; *Stockwell,* 221 S.W. at 935. The Court simply displaces a permissible Legislative decision to prescribe a particular type of judicial review and oversight of the determination that property was a nuisance and the administrative remedy.[2] *See* TEX. LOC. GOV'T CODE §§ 54.039(f), 214.0012(f); *Blackbird,* 394 S.W.2d at 162-63; ___ S.W.3d at ___ (Guzman, J., dissenting).

IV. Issue Preclusion

Citing *City of Houston v. Crabb,* 905 S.W.2d 669 (Tex. App.—Houston [14th Dist.] 1995, no writ), the court of appeals held that Stewart was not precluded from asserting a takings claim because the nuisance issues underlying the URSB proceeding and Stewart's takings suit were not

[2] In an effort to undercut the legitimacy of the URSB's determinations, the Court states that abatement proceedings are necessarily motivated in part by the City's bottom line because the URSB's job is to eliminate unsightly conditions adversely affecting the economic value of neighboring property and the City's tax base. ___ S.W.3d ___ n.18. But, to be clear, there is no evidence in the record of any impropriety by the URSB.

identical: the City's nuisance defense required proof "that the demolished structure was a nuisance *on the day* it was demolished," but the URSB "made its nuisance finding over a year before Stewart's house was actually demolished." ___ S.W.3d ___, ___ (emphasis added). But the facts in *Crabb* differ significantly from those before us. In *Crabb* the City of Houston notified Crabb that a building he owned was dangerous and that the City intended to demolish it. *See Crabb*, 905 S.W.2d at 671. Crabb attended a hearing where he maintained that he intended to repair the building and sell the property. *Id.* The City nevertheless issued an order stating that he had to demolish the building or the City would do so. *Id.* One year after the City sent the order to Crabb, a city inspector visited the property and determined that the City should not destroy the structure. *Id.* Crabb then spent $13,000 for repairs to the building, including a new roof, all new walls, and all new fixtures. *Id.* Over a year and a half after the city had first notified Crabb of its intent to do so and after the structure had been repaired, the City unexpectedly demolished it. *Id.* Crabb brought a takings claim and the City argued that its nuisance determination barred his suit. The court of appeals agreed that under the facts Crabb could assert his claim.

Unlike the situation in *Crabb*, the URSB found Stewart's property to be a nuisance in two evidentiary hearings that took place a year apart—the second being a rehearing pursuant to her request. Stewart has never denied adequate notice of both hearings. The transcript of the second hearing shows that Stewart appeared, took part, and even brought a witness who testified on her behalf.

Following its September 2001 hearing, the URSB found by a preponderance of the evidence that Stewart's property was a public nuisance as defined by Dallas's ordinances and the Local

Government Code and rendered an order to that effect. The Board specifically reaffirmed the 2001 findings and order on September 23, 2002—again specifically by a preponderance of the evidence—after hearing evidence from the city inspectors, Stewart, Stewart's mother, and the same neighbor who testified in September 2001. At the second hearing, Stewart did not claim that repairs had been made to the property since the first hearing or that she did not have notice of the specific problems that resulted in the determination that the property was a nuisance. She claimed that she had always intended to repair the property, but the extent to which she carried out that intent was to install a fence that she maintained restricted entry to the property. On September 26, 2002, Stewart received written notice that the City intended to demolish the property; on October 17, 2002, a city inspector re-inspected the property and determined that the code violations had not been corrected; and a week later the City's special-projects manager inspected the property and determined that no repairs had been made. On October 28, 2002, a City magistrate signed a judicial warrant authorizing demolition of the property and the demolition took place on November 1, 2002.

As previously noted, Stewart disputed the City's contention that her property was a nuisance, but she did not claim or offer evidence that there had been a substantial change in her property between the time of the URSB's September 23, 2002 finding that the property continued to be a public nuisance and the property's demolition on November 1, 2002. Nor did she seek a court order—which she could have—directing the City to defer any action until after her appeal was complete.

I would hold that under this record, Stewart's takings claim was barred by the URSB's nuisance finding and the trial court's affirming of it. *See, e.g.*, *Igal v. Brightstar Info. Tech. Grp.*,

Inc., 250 S.W.3d 78, 87 (Tex. 2007) (holding that when the Texas Workforce Commission acted in a judicial capacity in deciding a wage claim, the parties had adequate opportunity to litigate their claims through an adversarial process, and the Commission then decided disputed issues of fact, res judicata will generally apply to the Commission's final orders and bar relitigation of the matters decided); *Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721-22 (Tex. 1990) (stating that the doctrine of issue preclusion bars "the relitigation of identical issues of fact or law which were actually litigated and essential to the prior judgment"); *Humble Oil & Ref. Co. v. Fisher*, 253 S.W.2d 656, 661 (Tex. 1952) (holding that even errors in a previous decision do not "detract from or lessen the conclusive and binding effect of the judgment").

V. Conclusion

I would hold that the process provided to Stewart by the URSB proceedings and appellate review of those proceedings and the URSB's order by the substantial evidence standard was sufficient. In this regard I join Justice Guzman's dissent.

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

Phil Johnson
Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0257

CITY OF DALLAS, PETITIONER,

v.

HEATHER STEWART, RESPONDENT

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

Argued February 16, 2010

JUSTICE GUZMAN, joined by JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE JOHNSON, dissenting.

The upsurge of abandoned buildings caused by the subprime mortgage debacle and the recent recession is well known, as are the difficulties it has caused for cities.[1] Abandoned, vandalized, dangerous buildings constitute a major threat to the safety and vitality of entire neighborhoods.[2] The Legislature has enacted a comprehensive statutory scheme enabling cities to address this complex

[1] *See, e.g.*, Kristin M. Pinkston, *In the Weeds: Homeowners Falling Behind on Their Mortgages, Lenders Playing the Foreclosure Game, and Cities Left Paying the Price*, 34 S. ILL. U. L.J. 621, 627–33 (2010).

[2] Melissa C. King, *Recouping Costs for Repairing "Broken Windows": The Use of Public Nuisance by Cities to Hold Banks Liable for the Costs of Mass Foreclosures*, 45 TORT TRIAL & INS. PRAC. L.J. 97, 98–101 (2009); *see generally* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

problem. Central to that scheme, summary nuisance abatement is a crucial, front-line tool for cities to deal with an otherwise overwhelming crisis.[3]

Today, the Court holds that "substantial evidence review of a nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights under Article I, Section 17 of the Texas Constitution," and thus concludes that a party whose real property has been determined a nuisance is entitled to an absolute right to de novo judicial review of the underlying nuisance determination made by an administrative board when the person alleges a taking. By doing so, the Court misses the crux of the constitutional issue here: do the procedures created by the Legislature for abatement of urban nuisances violate the due process rights of property owners? Our nuisance precedents establish that due process does not necessitate a de novo judicial determination that a condition is a nuisance if the Legislature has both (1) properly declared that the condition in question is a nuisance and provided for its summary abatement, and (2) specified a different standard of review of such an abatement. Here, the Legislature has done both. Moreover, the Court's justifications for requiring de novo review are founded on misinterpretations of the precedents of both this Court and the United States Supreme Court. Accordingly, I would reverse the court of appeals' judgment, and give preclusive effect over the property owner's takings claim to the administrative board's finding that the house was a nuisance, as confirmed on substantial evidence review by the trial court. I therefore respectfully dissent.

I. Proper Abatement of a Public Nuisance Does Not Constitute a Taking

[3] *See, e.g.*, King, *supra* note 2, at 99; Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 129–30 (2009).

A. Due Process

Although the Court rushes to apply the Takings Clause, the correct inquiry is whether there was proper abatement of a public nuisance, consonant with due process. As the Supreme Court has explained, proper abatement of a public nuisance does not constitute a taking. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992); *Samuels v. McCurdy*, 267 U.S. 188, 196 (1925) ("The exercise of the police power by the destruction of property which is itself a public nuisance . . . is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."). Due process distinguishes proper abatement of a nuisance from the improper deprivation of property. *See Samuels*, 267 U.S. at 196; *Crossman v. City of Galveston*, 247 S.W. 810, 813 (Tex. 1923) (invalidating on due process grounds an ordinance that made city commissioners' nuisance finding final); *Stockwell v. State*, 221 S.W. 932, 935 (Tex. 1920) (concluding that judicial review of administrative determination of what constitutes a nuisance is required because "nothing less would amount to due process of law, without which the Bill of Rights declares no citizen shall be deprived of his property"); *Bielecki v. City of Port Arthur*, 12 S.W.2d 976, 978 (Tex. Comm'n App. 1929, judgm't adopted) (reasoning, on review of an ordinance declaring that all dance halls located within 150 feet of residences were nuisances, that "denial of the right of a citizen to so use his property is a deprivation of the property itself, hence falls within the protection afforded by the due process clauses of both State and Federal Constitutions").

Due process is a flexible concept, and its precise requirements depend on the particular situation in question.[4] *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). In weighing a due process question, we must determine whether the claimant has a property interest requiring protection, and, if so, what process is due. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). Here, Heather Stewart had a property interest requiring protection—the demolished house. The only remaining issue under these facts is what process did she have a right to—if the procedure utilized to find that Stewart's house was a nuisance afforded her due process, then as a matter of law there cannot have been a taking. *See Samuels*, 267 U.S. at 196. In this case, the only part of the process afforded to Stewart that she challenges is the Legislature's determination that review of the Dallas Urban Rehabilitation Standards Board's (the Board) nuisance finding is governed by the substantial evidence rule. *See* TEX. LOC. GOV'T CODE § 214.0012(f).

B. The Legislature's Authority to Abate Nuisances

For over a century, this Court has recognized the Legislature's authority to determine that a condition is a nuisance, and to provide for its summary abatement. As far back as 1876, we explained that the Legislature could declare that wooden buildings are nuisances under certain circumstances, and could so authorize their abatement. *See Pye v. Peterson*, 45 Tex. 312, 313–14 (1876) (holding that a city could not treat wooden buildings as nuisances absent a specific grant of such authority from the Legislature). This understanding is consistently echoed in our subsequent

[4] The Court asserts that I present no "logical reason" for treating this nuisance case differently from an eminent domain case. __ S.W.3d __ n. 21. To the contrary, the distinction is not only logical, it is followed by the Supreme Court. *See Samuels*, 267 U.S. at 196. The exercise of eminent domain is not the same thing as nuisance abatement. *Compare generally* 54 TEX. JUR. 3D *Nuisances* (2010), *with* 32 TEX. JUR. 3D *Eminent Domain* (2008).

decisions. *See Crossman*, 247 S.W. at 812; *Stockwell*, 221 S.W. at 934 ("The State, in the exercise of its public power, may denominate certain things to be public nuisances, and because of their having that character provide for their summary abatement.").

Consequently, we have long recognized that the Legislature, pursuant to its authority to declare and abate nuisances, can confer to agencies or municipalities (by statute or grant of authority, as in a municipal charter) the ability to abate a specified nuisance, as defined by the legislative grant. *See Crossman*, 247 S.W. at 812; *Pye*, 45 Tex. at 314 (noting that the Legislature has the power to authorize municipalities to prohibit wooden buildings as nuisances). There are, however, limits to the Legislature's authority.

First, the Legislature cannot declare something a nuisance that is not so in fact. *City of Houston v. Lurie*, 224 S.W.2d 871, 874 (Tex. 1949) ("'This power is limited to declaring only those things to be such nuisances which are so in fact, since *even the State may not denounce that as a nuisance which is not in fact.*'" (quoting *Crossman*, 247 S.W. at 814)); *Crossman*, 247 S.W. at 812 ("Not even the Legislature can declare that a nuisance which is not so in fact."). A "nuisance in fact" is a condition that "endangers the public health, public safety, public welfare, or offends the public morals." *State v. Spartan's Indus., Inc.*, 447 S.W.2d 407, 413 (Tex. 1969). It is an otherwise unoffending condition that becomes a nuisance "by reason of its circumstances or surroundings." 54 TEX. JUR. 3D *Nuisances* § 5 (2010). In other words, the Legislature may not declare a condition to be a nuisance that, by reason of its circumstances, does not endanger public health, safety, welfare, or morals.

Second, the Legislature cannot delegate an open-ended authority to define nuisances to agencies or municipalities; rather, in authorizing abatement, the Legislature itself must define the nuisance in question. *See City of Texarkana v. Reagan*, 247 S.W. 816, 817 (Tex. 1923); *Stockwell*, 221 S.W. at 934. That grant is further subject to a due process requirement of judicial appeal when an agency or municipality acts under such legislative authorization. *See Crossman*, 247 S.W. at 813; *Stockwell*, 221 S.W. at 935; *see also Brazosport Sav. & Loan Ass'n v. Am. Sav. & Loan Ass'n*, 342 S.W.2d 747, 750–51 (Tex. 1961).

The Court concludes that only a court is competent to ultimately determine whether a building is a nuisance, and that any such determination by an agency is always subject to de novo review, despite a legislative determination that the substantial evidence rule should apply. Though I agree with the Court that a nuisance determination is *generally* "a justiciable question," *Crossman*, 247 S.W. at 813, our precedents do not require de novo judicial determination in every case of this nature in order to satisfy due process. A survey of our precedents in this area instead demonstrates that de novo review is *not* required if the Legislature has *both* (1) properly defined the nuisance and authorized its abatement, and (2) provided for a different standard of review of such an abatement.

In *Stockwell*, the commissioner of agriculture did not merely determine that the particular hedge in question was a nuisance; instead, he determined that the *type* of citrus disease infecting the region was a nuisance under the general, catch-all provision of the statute in question. *See Stockwell*, 221 S.W. at 934. In other words, the commissioner effectively set the boundaries of his own authority by defining for himself what constituted a nuisance. *See id.* We held that Stockwell had a right to a judicial determination of whether citrus canker was a nuisance because the

Legislature had not defined it as one, not because that right exists always and in every circumstance.[5] *See id.* at 935.

Similar issues confronted this Court in *Crossman*. The principal due process defect in that case was that the municipality lacked authorization from the Legislature to abate the type of nuisance in question. *See Crossman*, 247 S.W. at 811–12. Specifically, the Legislature, through the city's charter, had defined and authorized the abatement of wooden buildings constituting a fire hazard, but had not authorized the abatement of buildings that were merely dilapidated. *Id.* Accordingly, we held that a city ordinance, purporting to authorize the abatement of dilapidated buildings, was invalid for exceeding the authority given to the city by the Legislature. *Id.* at 812.

In *Reagan*, we invalidated another city ordinance, holding that "this ordinance, in so far as it makes final the orders of the city council declaring the building a nuisance . . . is void." *Reagan*, 247 S.W. at 817. Once again, the municipality in question lacked proper legislative authorization *defining* the nuisance in question. *See id.* at 816 (noting that the city council was purportedly "authorized by its charter to *define* and abate nuisances," and questioning the validity of the charter accordingly) (emphasis added).

Finally, in *Lurie*, we twice recognized the Legislature's authority to declare a condition to be a nuisance. *Lurie*, 224 S.W.2d at 875 (noting that judicial determination that a condition is a

[5] The *Stockwell* opinion clearly distinguished between (1) the commissioner's determination that citrus canker was a nuisance generally, and (2) the particular finding that Stockwell's hedge should be destroyed as a result. *See Stockwell*, 221 S.W. at 935 ("Viewing the powers given the Commissioner by this statute and his attempted exercise of them here, the inquiry naturally arises as to what are the rights of the defendant if the Commissioner was mistaken in his judgment that citrus canker was a contagious plant disease, destructive of citrus fruits, *or* as to its being necessary to destroy . . . all of the trees in the defendant's hedge.") (emphasis added).

nuisance is required unless it is "property . . . within the class designated and condemned by statute . . . as a nuisance"); *id.* at 877 ("*[U]nless* property is of the class *condemned by statute* . . . as a nuisance, the question whether it is in fact a nuisance is for judicial determination.") (emphasis added). We also construed—without any doubts as to its validity—the specific statute the Legislature had enacted pursuant to that power, authorizing the abatement of defined nuisances: "dangerous or dilapidated buildings or buildings [constituting a] fire hazard." *Id.* at 874. We observed: "'The State, in the exercise of its public power, may denominate certain things to be public nuisances, and because of their having that character provide for their summary abatement.'" *Id.* (quoting *Crossman*, 247 S.W. at 814).

Thus, although *Lurie* goes on to state there is a right to judicial determination of whether a property is a nuisance, that right only arises when the Legislature or common law has not already defined the class of things in question as a nuisance. *Id.* at 875, 877. Of course, where the Legislature has made such a determination, due process still guarantees a qualified judicial review, but does not require that the review be de novo. *Cf. City of Houston v. Blackbird*, 394 S.W.2d 159, 160–61 (Tex. 1965). Nor did *Lurie* announce any general right to de novo appeal. Instead, it simply declined the city's invitation in that case to limit appeal to substantial evidence review without guidance from the Legislature, based *in part* on the importance of the rights in question, but equally on the lack of legislative authorization. *See Lurie*, 224 S.W.2d at 875–76. Therefore, under *Lurie*, due process does not require that the judicial review be de novo, if the Legislature, in its grant of authority to abate a defined nuisance, has provided for a lesser standard of review. *See id.* at 876 (declining to apply substantial evidence review because no statute authorized doing so).

Here, the Legislature has authorized cities to abate a particular nuisance, and has specifically defined it as:

> [A] building that is: (1) dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare; (2) regardless of its structural condition, unoccupied by its owners, lessees, or other invitees and is unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of haborage or could be entered or used by children; or (3) boarded up, fenced, or otherwise secured in any manner if (a) the building constitutes a danger to the public even though secured from entry; or (b) the means used to secure the building are inadequate to prevent unauthorized entry or use of the building in the manner described in Subdivision (2).

TEX. LOC. GOV'T CODE § 214.001(a)(1)–(3). This definition of what constitutes a nuisance is specific, and constitutes a nuisance in fact. *See Spartan's Indus.*, 447 S.W.2d at 413 (observing that a nuisance in fact is a condition that "endangers the public health, public safety, public welfare, or offends the public morals"). Thus, unlike the statute in *Stockwell*,[6] or the charter in *Reagan*,[7] the

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[6] The Court inappropriately reasons that the statutes in *Stockwell* and in this case are equivalently broad, *see* __ S.W.3d __, but they are not. The relevant statute in *Stockwell* was a general, catch-all provision: "'*or other injurious insect pests or contagious diseases of citrus fruits*.'" *Stockwell*, 221 S.W. at 934 (quoting former TEX. CIV. STAT. art. 4459). By contrast, as discussed above, the statute here (1) specifically defines the nuisance, (2) is limited by its terms to nuisances in fact, and (3) contains no catch-all provision such as the one in *Stockwell*. *See* TEX. LOC. GOV'T CODE § 214.001(a)(1)–(3). Thus, unlike the statute in *Stockwell*, the statute here would not permit the Board to determine that a building is a "nuisance" when that building is not a nuisance in fact, nor does the statute purport to give the Board authority to determine what kind of condition is a nuisance.

[7] The Court's comparison of the charter in *Reagan* and the instant statute also fails. The charter in *Reagan* was not limited to nuisances in fact because *any* dilapidated building could purportedly be demolished pursuant to the charter, and the *Reagan* Court accordingly suggested that the charter was invalid on this point because not even the Legislature can declare something a nuisance that is not so in fact. *See Reagan*, 247 S.W. at 817; *Stockwell*, 221 S.W. at 934. But here, section 214.001 *is* limited to conditions that are nuisances in fact.

The Court attempts to explain away this distinction by invoking the last antecedent rule to misconstrue section 214.001 as allowing demolition of homes for merely being "dilapidated" or "substandard," and reasons that the definition is thus not limited to nuisances in fact. __ S.W.3d __ n.14. However, that canon of construction is "'neither controlling nor inflexible.'" *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (quoting *City of Corsicana v. Willmann*, 216 S.W.2d 175, 176 (Tex. 1949)). Moreover, the Legislature is presumed to know existing law when it enacts a statute, *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990), and when the Legislature enacted section 214.001 in its current form, it was already established that being dilapidated alone does not make a building a

grant in question here is circumscribed to specific conditions that constitute a nuisance in fact, and the municipality or agency is not allowed to define the nuisance. Further, the authorization specifies that judicial review is limited by the substantial evidence rule, TEX. LOC. GOV'T CODE § 214.0012(f), which stands in stark contrast to the situation in *Lurie*, where the statute was silent as to the standard of review, *see Lurie*, 224 S.W.2d at 874, 876.

As Justice Johnson notes in his dissent, the Court effectively overturns the statutory system created by the Legislature to facilitate nuisance abatement. This is especially troubling because the Legislature appears to have made every reasonable effort to draft these statutes in accordance with the relevant standards pronounced by Texas courts, including other due process requirements not at issue here. In particular, the statutes provide for: (1) notice and hearing, *compare* TEX. LOC. GOV'T CODE § 214.001(b)(2)–(3), *with Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001), (2) a chance to remedy the nuisance, *compare* TEX. LOC. GOV'T CODE § 214.001(d), *with Crossman*, 247 S.W. at 812, (3) notice to mortgagees and lienholders, *compare* TEX. LOC. GOV'T CODE § 214.001(h), *with State Bank of Omaha v. Means*, 746 S.W.2d 269, 270 (Tex. App.—Texarkana 1988, writ denied), (4) a right to judicial appeal, *compare* TEX. LOC. GOV'T CODE § 214.0012, *with Blackbird*, 394 S.W.2d at 161; *Crossman*, 247 S.W. at 813; *Stockwell*, 221 S.W. at 934–35, and (5) a clear

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nuisance in fact, *Crossman*, 247 S.W. at 812. Thus, the Court, by construing the statute to authorize abatement of buildings merely for being substandard or dilapidated, imputes to the Legislature an intent it is presumed not to have. When read fairly and as a whole, Local Government Code section 214.001 displays a clear intent by the Legislature to only authorize abatement of nuisances in fact, that is, conditions that are actually dangerous to public health, safety, and welfare.

definition of what constitutes a nuisance in this context, *compare* TEX. LOC. GOV'T CODE § 214.001(a)(1)–(3), *with Stockwell*, 221 S.W. at 934–95.

In addition, there is no need for the novel course the Court embarks on today. Although there are important *substantive* rights behind the procedural issue in this case—i.e., rights under the Takings Clause—creating a new *procedural* entitlement to protect such rights is unnecessary. The right to compensation for takings of private property is a vital one, as evidenced by its enshrinement in both the Federal and Texas Constitutions. Without reservation, I share the Court's laudable concern with preventing uncompensated takings. As such, I note that even under substantial evidence review, it is still possible to prove that an agency's or municipality's action is illegal, *see Brazosport Sav. & Loan Ass'n*, 342 S.W.2d at 752, which might well be relevant if an agency or municipality acts outside of its authority, as by using the nuisance procedures to actually take title to a piece of real property, or by violating the procedures in Local Government Code chapters 54 and 214, or other statutes. Accordingly, our system already provides adequate safeguards for property owners, without thwarting the intent of the Legislature as the Court does.

In summary, the Legislature has both (1) validly defined the nuisance in question and authorized its abatement, TEX. LOC. GOV'T CODE § 214.001, and (2) specified what standard of review applies, *id.* § 214.0012(f). As a result, I would conclude that the urban nuisance statutes at issue comport with our nuisance precedents, and therefore afforded Stewart due process, and thus should have precluded Stewart's takings claim.[8]

[8] The Court asserts that the general rule of de novo determination or review of nuisance findings is "unlikely ever to apply again" under my approach. __ S.W.3d __ n.12. But there are many types of nuisance beyond the narrow scope of the Legislature's authorization of abatement of certain urban nuisances at issue here. For example, there are

II. The Court's Reasons for Disregarding our Nuisance Jurisprudence Fall Short

The Court circumvents our due process nuisance jurisprudence discussed above in favor of a takings inquiry. Its justifications for doing so are (1) a misreading of the extent of our holding in *Steele v. City of Houston*, and (2) an entirely novel application of the constitutional fact doctrine. Both of these justifications fail.

A. Misplaced Reliance on *Steele*

The Court argues that the *Stockwell–Lurie* line of cases described above is no longer valid in light of *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980). This exaggerates the scope of *Steele*. The Court cogently describes *Steele*'s actual effect, which was to make clear that the Takings Clause is self-executing, thereby reversing the prior assumption that the State enjoyed sovereign immunity from takings claims. But the Court then extrapolates that *Steele* also precluded the Legislature from summarily abating nuisances in fact. The problem with that assumption is that *Steele* in no way modified or curtailed the State's police power; instead, it merely removed the shield of sovereign immunity from the exercise of that power. *See id.* at 791 ("The Constitution itself is

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such traditional nuisance actions as abatement of extremely loud noises, *see, e.g.*, *Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217, 218 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.), or smells from a cattle feed lot, *see, e.g.*, *Meat Producers, Inc. v. McFarland*, 476 S.W.2d 406, 409 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.), neither of which fall within the definition of urban nuisance found in section 214.001 of the Local Government Code. Such suits are real and recurring, and will continue to be governed by the general rule—that whether the condition is a nuisance is a judicial question. This is because *Stockwell* and its progeny make clear that the Legislature must specifically define the nuisance in order to provide for its summary abatement. *See Stockwell*, 221 S.W. at 934. The Legislature has done so here, and it is precisely because the definition is *specific* that the statutory scheme does not cover vast areas of nuisance law—leaving the general rule intact in most instances.

the authorization for compensation for the destruction of property and *is a waiver of governmental immunity* for the taking . . . of property for public use.") (emphasis added).

In fact, *Steele* says very little about the question in this case—in *Steele*, there was no due process at all, because the Houston police summarily set fire to the plaintiff's home in an attempt to flush out fugitives, *id.* at 789, nor was the city claiming to abate a nuisance, *see generally id.* *Steele* simply stands for the proposition that the Takings Clause is self-executing, and that sovereign immunity is waived for takings claims. *See id.* at 789. An important point, to be sure, but one that is not relevant where, as here, the Takings Clause is inapplicable because there was a proper nuisance abatement, rather than a taking. *See Samuels*, 267 U.S. at 196.

B. The Constitutional Fact Doctrine

The Court further reaches its conclusion by a novel adoption and application of the constitutional fact doctrine. But there are two important reasons that I would decline to import that doctrine from its proper, federal context.

First, the doctrine is generally applied in the context of the First and Fourth Amendments, not to nuisance or takings questions, as the Court itself admits. __ S.W.3d __; *see, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 697 (1996); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). The common thread in those cases is that the "fact" in question is of highly subjective intent—such as whether an alleged defamer acted with actual malice, or whether the police had probable cause. *See Bose Corp.*, 466 U.S. at 515 (Rehnquist, J., dissenting) (noting that the constitutional fact issue in a First Amendment case is "no more than findings about the *mens rea* of

an author"). Also, such cases involve the *development* and application of complicated, constitutional legal standards. *See Ornelas,* 517 U.S. at 697 (explaining that "the legal rules for probable cause and reasonable suspicion acquire content only through application," thus requiring independent review "if appellate courts are to maintain control of, and to clarify, the legal principles"). By contrast, whether a building is so dilapidated as to constitute a danger to health and safety is not a legal rule that "acquires content" only through independent judicial review. Rather, it is a rule that derives its content from the specific statute in question. *See* TEX. LOC. GOV'T CODE § 214.001(a)(1)–(3). Indeed, a major concern of our nuisance precedents, such as *Stockwell*, was to ensure that cities and agencies only act under a specific statutory definition, limited to nuisances in fact, thus rendering inapplicable here the concerns that motivated the Supreme Court to "reinvigorate" the constitutional fact doctrine.

Second, the Court's reason for applying the doctrine is disquieting, both for its unsound basis, and for the breadth of its potential application in future cases. The Court applies the doctrine merely because "[t]akings claims also typically involve mixed questions of fact and law." __ S.W.3d __. But mixed questions of fact and law abound in our legal system. *See, e.g.*, *Intercont'l Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 666 (Tex. 2009) (Brister, J., dissenting) ("Whether a party prevailed in litigation is a mixed question of law and fact."); *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 518 (Tex. 1997) (explaining that probable cause is "a mixed question of law and fact" in malicious prosecution cases when the parties dispute the underlying facts). Under the Court's reasoning, it appears that every mixed question of fact and law that is even alleged to touch on a constitutional right is now a "question of constitutional fact." Further, it is

unclear how the Court's decision can be squared with our rule that "[w]e review a trial court's decision on a mixed question of law and fact for an abuse of discretion."[9] *State v. $217,590.00 in U.S. Currency*, 18 S.W.3d 631, 633 (Tex. 2000). What is particularly worrisome is that, while the Supreme Court takes pains to cabin both its reasons for applying the doctrine and the doctrine's scope, this Court today provides no such limiting guidance.[10] *See, e.g.*, *Bose Corp.*, 466 U.S. at 510–11; *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 272–73 (1985).[11]

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[9] Although the Court asserts that its holding is limited to "review of agency decisions of substantive constitutional rights," and thus "does no violence" to the general rule, __ S.W.3d __ n.25, that assertion alone does not suffice to cabin the Court's holding, nor does it explicate the relationship between today's opinion and the general rule. The cases cited by the Court on this point, *see id.*, are disparate examples of heightened review in various contexts, and generally do not address the proper framework for review of mixed questions of law and fact in light of the Court's opinion.

[10] As a particularly relevant example, the Court's decision today is contrary to *Crowell v. Benson*, 285 U.S. 22 (1932). In that case, the Supreme Court *limited* the scope of the closely related jurisdictional fact doctrine by noting:

> And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation.

Id. at 58. *Crowell* thus confined its holding to specifically exclude cases just like this one, where the Legislature has provided for administrative bodies to make quasi-judicial determinations as to nonjurisdictional and nonconstitutional facts, and has specified the appropriate scope of review: that of substantial evidence.

The limitation found in *Crowell* is germane here because, although the Supreme Court was addressing the jurisdictional fact doctrine, that doctrine is an English antecedent of the constitutional fact doctrine, Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 249 (1985), and by applying the jurisdictional fact doctrine in the American, constitutional context, the Supreme Court "both confirmed and generalized the constitutional fact doctrine in strong terms," *id.* at 253. "While conceding that *ordinary facts could be established in the administrative process*, the Court held that constitutional facts must be found by the courts." *Id.* (emphasis added).

[11] It is further worth noting that as part of its justification for ignoring the long-established distinction between nuisance abatement and takings, and for invoking the constitutional fact doctrine, the Court relies on *regulatory* takings cases such as *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) and *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984). However, the Court fails to properly distinguish between regulatory and conventional takings. Although this is not a takings case, if it were it would be a conventional taking, not a regulatory taking; Stewart's property was destroyed outright, rather than having its value marginally impaired by a regulation. *See Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 672 (Tex. 2004).

III. Conclusion

The Court's decision opens the door to a host of takings challenges to agency determinations of every sort, and in every such challenge a right to trial de novo will be claimed. Judges at every level of our court system are invited by today's decision to substitute their own factual determinations for that of an agency or even a lower court. The consequences of the Court's decision will not be limited to the courtroom. As discussed above, cities are faced with complex challenges posed by a crisis level of abandoned and dangerous buildings, and one of the most important weapons provided by the Legislature to combat this problem is summary nuisance abatement. It is therefore unsurprising that the Attorney General and almost a dozen cities have rallied in support of the statutes by appearing as amici curiae.[12]

Because the Legislature has both (1) validly defined the nuisance in question and authorized its abatement, TEX. LOC. GOV'T CODE § 214.001, and (2) specified what standard of review applies, *id.* § 214.0012(f), due process does not require de novo review under our precedents. The Board's finding, pursuant to that authority, as affirmed by the trial court on substantial evidence review,

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Because of the differences between regulatory and conventional takings cases, it is generally inappropriate to treat regulatory takings cases as controlling precedent for conventional takings. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002); *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 801–02 (Tex. 2005) (per curiam). The Court errs when it relies on such cases here.

[12] *See* Brief of the State of Texas as Amicus Curiae, City of Dallas v. Stewart, No. 09-0257 (Tex. Feb. 3, 2010); Brief of Amici Curiae City of San Antonio, Texas, City of Houston, Texas, In Support of Petitioner City of Dallas, *Stewart*, No. 09-0257 (Tex. Sep. 17, 2009); Brief of Amici Curiae the Cities of Aledo, Granbury, Haltom City, Kennedale, Lake Worth, North Richland Hills, River Oaks, Saginaw and Southlake, Texas, *Stewart*, No. 09-0257 (Tex. May 11, 2009).

should have precluded Stewart's takings claim. Accordingly, I would reverse the court of appeals and render judgment that Stewart take nothing.

Eva M. Guzman
Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0300

THE UNIVERSITY OF TEXAS AT AUSTIN, PETITIONER,

v.

ROBERT HAYES, RESPONDENT

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

PER CURIAM

In this premises-liability suit, the plaintiff claims that a metal chain blocking a driveway at the University of Texas at Austin (the University) caused him to have a bicycle accident and constituted a premises defect for which the Texas Tort Claims Act waives sovereign immunity. *See* TEX. CIV. PRAC. & REM. CODE § 101.022(a),(b). Because we conclude that the condition of the location was not a special defect as a matter of law and that the plaintiff failed to establish a premises-defect element, we reverse the court of appeals' judgment and dismiss the case for lack of jurisdiction.

On September 12, 2003, the University began to close campus areas to configure parking for the next day's football game. As part of its preparation, the University closed a service driveway that ran behind the Alumni Center and connected Winship Circle to Gregory Gymnasium. To prevent

vehicle access on the service driveway, the University placed an eight-foot-wide orange and white barricade in front of a metal chain that stretched across the entrance.

Around 8:30 that evening, Robert Hayes rode his bicycle, with a headlamp and reflectors, onto the University campus. Hayes pedaled past a University security station, continued south on San Jacinto Boulevard, and then turned right into Winship Circle. He proceeded toward the service driveway and admits that he "saw a barricade placed in the middle of the road . . . [and] without braking, without slowing down significantly, . . . veered to the left-hand side of that barricade and then was stopped short by the chain." He struck the chain and suffered injuries as a result.

Hayes sued the University, alleging the chain was a defect of which the University failed to warn. The University filed a plea to the jurisdiction, arguing that Hayes's allegations failed to state claims that establish a waiver of sovereign immunity under the Texas Tort Claims Act. The trial court denied the University's amended plea to the jurisdiction and granted Hayes's motion for partial summary judgment, concluding the University's sovereign immunity had been waived. The University filed an interlocutory appeal, *id.* § 51.014(a)(8), and a divided court of appeals affirmed. 279 S.W.3d 877, 892. We have jurisdiction over this interlocutory appeal because there is a dissent in the court of appeals. TEX. GOV'T CODE § 22.225(c).

In general, the State of Texas retains sovereign immunity from suit, *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004), and can only be sued if the Legislature waives immunity in "clear and unambiguous language," TEX. GOV'T CODE § 311.034. However, the Texas Tort Claims Act provides a limited immunity waiver for tort claims arising from either premises defects or special defects. TEX. CIV. PRAC. & REM. CODE § 101.022(a), (b). The

Act applies different standards of care depending upon whether the condition was a premises defect, *id.* § 101.022(a) (same duty as licensee), or a special defect, *id.* § 101.022(b) (same duty as invitee).

When a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court must review the relevant evidence to determine whether a fact issue exists. *Miranda*, 133 S.W.3d at 226. The plaintiff bears the burden to allege facts demonstrating jurisdiction, and we construe the pleadings liberally in the plaintiff's favor. *Id.* If the evidence raises a fact question on jurisdiction, the trial court cannot grant the plea, and the issue must be resolved by the trier of fact. *Id.* at 227-28. On the other hand, if the evidence is undisputed or fails to raise a fact question, the trial court must rule on the plea as a matter of law. *Id.* at 228.

We first examine whether the condition constituted a special defect. The Legislature does not define special defect but likens it to conditions "such as excavations or obstructions on highways, roads, or streets." TEX. CIV. PRAC. & REM. CODE § 101.022(b); *see also County of Harris v. Eaton*, 573 S.W.2d 177, 178-80 (Tex. 1978) (construing "special defect" as including those defects of the same kind or class as those expressly mentioned in the statute). In *Denton County v. Beynon***,** we reaffirmed that conditions can be special defects "only if they pose a threat to the ordinary users of a particular roadway." 283 S.W.3d 329, 331 (Tex. 2009) (citing *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 238 n.3 (Tex. 1992)). Whether a condition is a special defect is a question of law. *City of El Paso v. Bernal*, 986 S.W.2d 610, 611 (Tex. 1999) (per curiam). In deciding this question, we have previously considered characteristics of the class of special defect, such as (1) the size of the condition, (2) whether the condition unexpectedly and physically impairs a vehicle's ability to travel on the road, (3) whether the condition presents some unusual quality apart

from the ordinary course of events, and (4) whether the condition presents an unexpected and unusual danger to the ordinary users of the roadway. *See Tex. Dep't of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009) (per curiam).

The class of special defects contemplated by the statute is narrow. For example, this Court has concluded that a condition was a special defect where a large, oval-shaped pothole covered ninety percent of the highway and measured six to ten inches in depth like "a ditch across the highway." *See Eaton*, 573 S.W.2d at 178-80. In that case, no signs or barricade warned of the ditch. *See id.* at 178. While something like "a ditch across the highway" is a special defect, we have also determined that a two-inch drop in the roadway is not. *City of Dallas v. Reed*, 258 S.W.3d 620, 623 (Tex. 2008).

Our special-defect jurisprudence turns on the objective expectations of an "ordinary user" who follows the "normal course of travel." *Beynon*, 283 S.W.3d at 332. In *Beynon*, the motorist struck a floodgate arm that was three feet off the roadway after the motorist lost control of his car. *Id.* at 330-31. We held that an "ordinary user" would not have left the roadway in this manner, and that the "normal course of travel" would be on the actual road. *Id.* at 332. Similarly, here, Hayes did not take the normal course of travel. Road users in the normal course of travel should turn back or take an alternate route when a barricade is erected to alert them of a closed roadway. This location—a chain across a barricaded and closed driveway—would not pose a threat to an ordinary user in the normal course of travel because an ordinary user would not have traveled beyond the barricade, as Hayes did. We therefore cannot place it within the "narrow" class of special defects. *Id.*; *see also Payne*, 838 S.W.2d at 239 n.3.

Accordingly, because the chain across the University's driveway was not a special defect, we hold that § 101.022(b) of the Texas Tort Claims Act does not waive the University's immunity from suit.[1]

We must now decide whether the chain in this location is a premises defect. To establish a waiver of immunity for a premises-defect claim, the plaintiff must show that the landowner failed to either (1) use ordinary care to warn a licensee of a condition that presented an unreasonable risk of harm of which the landowner is actually aware and the licensee is not, or (2) make the condition reasonably safe. *See County of Cameron v. Brown*, 80 S.W.3d 549, 554-55 (Tex. 2002).

To prove the actual-knowledge element, the licensee must show that the owner actually knew of a "dangerous condition at the time of the accident." *City of Corsicana v. Stewart*, 249 S.W.3d 412, 413-14 (Tex. 2008) (per curiam) (quoting *City of Dallas v. Thompson*, 210 S.W.3d 601, 603 (Tex. 2006) (per curiam)). Here, at the time of the accident, the University knew about—and indeed, had erected—the chain. But the University had also placed a large barricade in front of the chain in order to prevent road users from entering the driveway and ultimately encountering the chain. The fact that the University had placed a barricade to close the driveway negates arguments that the University had actual knowledge of a dangerous condition: the University had no reason to know that the chain was dangerous to a user of the road at the time of the accident because it had closed the roadway to road users.

[1] In the court of appeals, the University argued that the driveway was not a highway, road, or street under the special defects statute. The University does not raise this issue in this Court, and so we assume, without deciding, that the driveway was a highway, road, or street.

But Hayes offered deposition testimony of a University parking representative who said "the chain is rarely up," and he "would imagine that people on bicycles would go around the barricade." In discussing the chain itself, the University parking representative said, "I believe if there were no warning that [the chain] was there, that it's possible a bicycle would hit it without seeing it." These statements, taken after the accident, merely suggest what one University employee "would imagine" about bicyclists approaching the barricade, or that it would be "possible" to hit the chain if there were "no warning." But actual knowledge requires the landowner to know "that the dangerous condition existed at the time of the accident, not merely of the possibility that a dangerous condition c[ould] develop over time." *City of Corsicana*, 249 S.W.3d at 414-15. The representative's testimony contemplates the hypothetical knowledge of a dangerous condition, not actual knowledge of a dangerous condition.

The University parking representative also explained that the University would "typically" place orange cones on each side of the barricade, and it also possessed reflective tape and metal reflectors that it could affix directly to the chains. Hayes merely infers that the University had actual knowledge of a defect because it "typically" puts reflectors or cones near the barricade and chain. But Hayes's suggestion that the University could have done more to warn him is not direct evidence to show that the University had actual knowledge of a dangerous condition.

Hayes also offered evidence that the responding police officer wrote: "[i]t should be noted that this officer observed that the lighting in this area is extremely poor making it difficult to see the chain." Again, the police officer's report, written after the incident, is not evidence of what the University knew at the time of the accident. *See id.*, 249 S.W.3d at 415 (noting that a police officer's

report "describe[s] the City's knowledge of the weather and road conditions after the accident occurred, not before").

Additionally, Hayes failed to demonstrate that the University had ever received prior reports of injuries or accidents at this location. The absence of reports is just one factor to consider, but when determining whether a premises owner had actual knowledge of a dangerous condition, "courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger represented by the condition." *Univ. of Tex.-Pan Am. v. Aguilar*, 251 S.W.3d 511, 513 (Tex. 2008) (per curiam). Because there is no evidence showing that the University had actual knowledge of a dangerous condition at the time of the accident, Hayes failed to establish a premises-defect claim.[2]

Accordingly, we grant the petition for review, and without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and dismiss the case for lack of jurisdiction.

OPINION DELIVERED: December 3, 2010

[2] The University also argues that (1) the University discharged any duty it could have owed Hayes because it warned of the chain, and (2) Hayes was a trespasser. Because we hold that the condition was not a special defect or premises defect on other grounds, we do not reach these issues.

IN THE SUPREME COURT OF TEXAS

NO. 09-0306

BETTY YVON LESLEY, ET AL., PETITIONERS,

v.

VETERANS LAND BOARD
OF THE STATE OF TEXAS, ET AL., RESPONDENTS

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

Argued September 15, 2010

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

CHIEF JUSTICE JEFFERSON did not participate in the decision.

The right to lease minerals — the executive right — is one "stick" in the bundle of five real property rights that comprise a mineral estate.[1] We held long ago that the executive owes other

[1] *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986) ("There are five essential attributes of a severed mineral estate: (1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, (5) the right to receive royalty payments." (citation omitted)), cited in *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 (Tex. 1995) ; *see alsoDay & Co., Inc. v. Texland Petroleum, Inc.* 786 S.W.2d 667, 669 (Tex. 1990) ("[T]he executive right is an interest in property, an incident and part of the mineral estate like the other attributes such as bonus, royalty and delay rentals.").

owners of the mineral interest a duty of "utmost fair dealing",[2] but we have seldom had occasion to elaborate. In this case, a land developer, who also owned part of the mineral estate and all of the executive right, imposed restrictive covenants on a subdivision, limiting oil and gas development in order to protect lot owners from intrusive exploratory, drilling, and production activities. The non-participating mineral interest owners complain that the developer, as the executive, breached its duty to them. The court of appeals held that the developer, never having undertaken to lease the minerals, had not exercised the executive right and therefore owed no duty to the other mineral interest owners.[3] We disagree, and accordingly, reverse and remand the case to the trial court.

I

In 1998, Bluegreen Southwest One, L.P. acquired about 4,100 acres of land southwest of Fort Worth, which Betty Yvon Lesley and others (collectively, "Lesley")[4] had conveyed to its predecessor.[5] Lesley's deeds[6] reserved part of her undivided half interest in the minerals. The other half is owned by the successors of Wyatt and Mildred Hedrick (collectively, "Hedrick"),[7] the couple

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[2] *Schlittler v. Smith*, 101 S.W.2d 543, 545 (Tex. 1937).

[3] 281 S.W.3d 602 (Tex. App.–Eastland 2009).

[4] The others were Lesley's husband, Kenneth, and her brother, Bobby John Foster. Foster died shortly before this suit was filed. The Lesleys and the independent executors of Foster's estate are petitioners here.

[5] At the time Bluegreen acquired the property, its name was Properties of the Southwest, L.P. Its predecessor was Bluff Dale Development Corporation.

[6] There were two deeds conveying the property in two separate tracts, both containing the same reservation. Our description of the conveyances that have led to the present controversy is greatly simplified so as not to distract from the issues before us. More detail is provided in the court of appeals' opinion. *See* 281 S.W.2d at 608-610.

[7] The successors, also petitioners here, are Richard H. Coffey, Sr., Singin' Hills Minerals, Ltd., and JP Morgan Chase Bank, N.A., as trustee of several trusts.

who once owned all the property. Bluegreen also acquired from Lesley the executive right in the entire 4,100-acre mineral estate — that is, in the words of Hedrick's original deed, the "full, complete and sole right to execute oil, gas and mineral leases covering all the oil, gas and other minerals in the following described land".

Bluegreen developed the property into "Mountain Lakes," a subdivision of over 1,200 lots, adding restrictive covenants to "enhance[] and protect[] the value, desirability and attractiveness" of the subdivision. These included a provision forbidding "commercial oil drilling, oil development operations, oil refining, quarrying or mining operation". The covenants provide that they can be modified or abrogated "by the written agreement or signed ballot of two-thirds . . . of the Owners (including the Developer) entitled to vote." Bluegreen's deeds conveying the lots to some 1,700 owners included the mineral interest, excepting only the restrictive covenants and the mineral interests previously reserved to Hedrick and Lesley. The deeds did not mention the executive right.

While Mountain Lakes was being developed, so was the Barnett Shale, a hydrocarbon-producing geological formation underlying this part of North Texas and possibly this subdivision. Almost all the surrounding area came under lease for oil and gas production. There is evidence that Mountain Lakes is sitting on $610 million worth of minerals that, in large part, cannot be reached from outside the subdivision.

In 2005, Hedrick and Lesley sued Bluegreen and the Mountain Lakes lot owners, one of whom is the Texas Veterans Land Board,[8] complaining under various theories of the restrictive

[8] Plaintiffs also sued the Property Owners' Association of Mountain Lakes Ranch. The trial court granted summary judgment in its favor. It is not a party on appeal.

covenants limiting mineral development. On the parties' multiple motions for summary judgment and the VLB's plea to the jurisdiction, the trial court issued an order making declarations which we organize and summarize as follows:

- **Conveyances:**
  - Lesley's deeds should be reformed to reserve a one-fourth mineral interest in the entire 4,100-acre tract as the parties undisputedly intended, rather than only one-fourth of Lesley's one-half interest (one-eighth of the entire minerals) as stated in the deeds. Reformation will not affect the reasonable expectations of the lot owners, who will receive all they bargained for.
  - Bluegreen's deeds to the lot owners did not convey the executive right, and it remains the sole and exclusive owner of the executive right.
- **The executive right:**
  - Bluegreen, as owner of the executive right, breached its duty to Hedrick and Lesley by imposing restrictive covenants limiting oil and gas development and by failing to lease the minerals. Bluegreen also breached a requirement in the Lesley deeds by failing to give notice of its filing of the restrictive covenants. For these reasons, the covenants are unenforceable.
  - Irrespective of the executive right, Hedrick and Lesley have the right to develop their mineral interests themselves.
- **Immunity:** The VLB is not immune from Hedrick and Lesley's suit.

The trial court severed its order from other claims in the case to make it final and appealable. Bluegreen and some, but not all, of the individual lot owners (about 460 altogether), including the VLB, appealed.[9]

The court of appeals reversed the trial court's order in its entirety. Specifically, it held:

[9] 281 S.W.3d at 608.

- **Conveyances:**
    - The Lesley deeds were so clear, Lesley should have known of the asserted mistake when she executed them, and because she did not sue within four years, her claim for reformation is barred by limitations.[10]
    - Bluegreen's deeds to the lot owners did not expressly reserve the executive right, and it could not be excepted by implication with the restrictive covenant, so it passed to the lot owners.[11]
- **The executive right:**
    - The owner of an executive right owes a mineral interest owner no duty until the right is exercised by leasing the minerals, and then its duty is only to acquire for the mineral interest owner every benefit it acquires for itself. An executive has no duty to lease minerals. Because Bluegreen never exercised the executive right, it had no duty to Hedrick and Lesley.[12] Bluegreen was not bound by the notice requirement in the Lesley deeds because Bluegreen was not in privity with Lesley and the requirement did not run with the land.[13]
    - Hedrick and Lesley's right to develop their minerals passed to Bluegreen with the executive right, leaving them no right to develop their minerals themselves.[14]
- **Immunity:** The VLB is immune from Hedrick and Lesley's suit.[15]

The court of appeals remanded the case for further proceedings.[16]

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[10] *Id*. at 623-625.

[11] *Id*. at 616-617.

[12] *Id*. at 618-619.

[13] *Id*. at 621-622.

[14] *Id*. at 620.

[15] *Id*. at 625-629.

[16] *Id*. at 629.

We granted the petitions for review of Bluegreen, the lot owners, and the VLB.[17] We begin with the issue of the VLB's immunity, because it is jurisdictional, and then turn to the deed construction issues, before coming finally to the issues concerning the executive right. We refer to Hedrick and Lesley collectively as petitioners.

II

The Veterans Land Board was created by the Texas Constitution to administer programs providing assistance to veterans, including the purchase of land for sale to veterans.[18] Petitioners sued the VLB as the owner of lots in the Mountain Lakes subdivision.

As a state agency,[19] the VLB generally has immunity from certain suits to which the Legislature has not consented.[20] Petitioners acknowledge that they sued the VLB and other lot owners for damages, but only for breaching the executive right in the minerals. Petitioners contend that because they also sought and obtained a declaration that Bluegreen owned the executive right, their damage claims against the lot owners no longer have merit and should therefore be irrelevant

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[17] 53 Tex. Sup. Ct. J. 911 (July 2, 2010).

[18] TEX. CONST. art. III, § 49-b(g)-(h); *see also* TEX. NAT. RES. CODE §§ 161.001-.515, 162.001-.019, & 164.001-.019.

[19] *Id.* § 161.011 ("The Veterans Land Board is a state agency designated to perform the governmental functions authorized in Article III, Section 49-b of the Texas Constitution.").

[20] *Fed. Sign v. Tex. S. Univ.,* 951 S.W.2d 401, 405 (Tex. 1997) ("This Court has long recognized that sovereign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue the State."); *State v. Lain*, 349 S.W.2d 579, 582 (Tex. 1961) ("When in this state the sovereign is made a party defendant to a suit for land, without legislative consent, its plea to the jurisdiction of the court based on sovereign immunity should be sustained in limine."); *but see* TEX. NAT. RES. CODE §164.019 ("A writ of mandamus and all other legal and equitable remedies are available to a party in interest to require the board and any other party to carry out agreements and to perform functions and duties under this chapter, the Texas Constitution, or the board's bond resolutions or orders.").

in determining VLB's immunity. Petitioners argue that by asserting Bluegreen's ownership of the executive right, they asserted the VLB's *non*-liability for breach of that right: "the declaratory judgment ultimately sought and obtained", petitioners insist, "is the opposite of attempting to impose liability".[21]

Petitioners' argument amounts to this: a suit against a state agency for a declaration that it does not own an interest in property is barred only if the agency prevails on the merits of the claim. If it turns out, after a full hearing, that the plaintiff is correct and the agency does not own the interest, the suit is not barred. The agency is not entitled to dismissal unless it wins on the merits. This is not immunity from suit; it is immunity from victory.

Petitioners also argue that the VLB should not be immune from their suit because they do not seek the executive right for themselves. But petitioners do seek to establish that the VLB and other lot owners do not have the executive right,[22] that restrictive covenants imposed for the lot owners' benefit are unenforceable, and that petitioners have a right to develop their own mineral interests irrespective of the executive right. By each of these claims, petitioners have sued to determine the VLB's real property interests. This is clearly a "suit for land" from which the VLB is immune.[23]

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[21] Petitioners' Brief on the Merits 41; *see also* Petitioners' Reply Brief to Veterans Land Board 8 (citing *Tex. Parks & Wildlife Dept. v. Sawyer Trust*, No. 07-06-0487-CV, 2007 Tex. App. LEXIS 8165, 2007 WL 2390434 (Tex. App.–Amarillo, August 22, 2007, pet. granted).

[22] The VLB has asserted only its immunity from suit and has not taken a position on the merits of petitioners' claims.

[23] *See Lain*, 349 S.W.2d at 582. Petitioners do not argue that they could maintain their suit against the VLB's officers or that they have some other action not barred by immunity, and therefore we do not address these issues.

III

Next, we consider the conveyance issues regarding the mineral interest reserved by the Lesley deeds and whether the executive right was conveyed by Bluegreen's deeds to the lot owners.

A

When Lesley conveyed the 4,100-acre tract to Bluegreen's predecessor, she owned an undivided half interest in the minerals, the other half having been previously reserved to Hedrick. Besides reserving the Hedrick interest, the Lesley deeds contained the following provision:

> **Grantors will be reserving** unto themselves, their heirs and assigns, **one-fourth (1/4) of the** oil, gas, sulphur and other **minerals to which Grantors are now entitled to in all of the lands covered by this conveyance. It is understood and agreed, however, that Grantee**, his heirs, successors and assigns, shall have full rights to execute all future oil, gas, sulphur and other mineral leases for such bonuses, such delay rentals and for such terms as Buyers may think proper, but Grantors shall not be required to execute any such leases, but **shall be entitled to receive one-fourth (1/4) of all bonuses and delay rentals**, whether the same be paid in cash, by overriding royalties, production payments or in any other manner.

(Emphasis added.) Lesley concedes that since she owned one-half of the minerals in the 4,100 acres "covered by [the] conveyance", the reservation of one-fourth of the "minerals to which [she was] entitled" amounted to only one-eighth of the entire mineral estate. But she argues that this misstated the parties' agreement, as shown by the inconsistent reservation of "one-fourth (1/4) of *all* bonuses and delay rentals" (emphasis added), not just one-eighth. And she points out that Bluegreen itself appears to have shared her understanding, reserving in many of its own deeds to lot owners the

"undivided one-fourth of *all* . . . minerals . . . reserved by [the Lesley deed]" (emphasis added). Lesley contends that the deeds should be reformed because of mutual mistake.[24]

In *Brown v. Havard*, we held that "a suit for reformation of a deed is governed by the four year statute of limitations" which runs from the date "the mistake was or, in the exercise of reasonable diligence, should have been discovered."[25] Lesley contends that she did not realize the mistake until long after the date the deeds were executed and within four years of bringing suit. Relying on *Brown*, the court of appeals rejected her argument, concluding that the alleged mistakes in the deeds were so plain "'as to charge [Lesley] with the legal effect of the words used.'"[26]

But in *Brown*, we held that the deed language at issue was *not* so plain as to call a later-asserted mistake to the grantees' attention. The Browns had deeded property to the Kings, reserving "an undivided one-half non-participating royalty (Being equal to, not less than an undivided 1/16th) of all the oil, gas and other minerals, in, to and under or that may be produced from said land".[27] The Kings had conveyed the property to Havard and others (collectively, Havard), who leased the property for a three-eighths royalty, except for acreage including a shut-in well that they then developed themselves.[28] The Browns claimed one-half of the production from Havard's well and

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[24] Lesley does not contend for a favorable construction of the reservation according to its terms, taking into account the inconsistency she asserts. *Cf. Concord Oil Co. v. Pennzoil Exploration and Prod. Co.*, 966 S.W.2d 451, 457-458 (Tex. 1998) (plurality op.) (construing a deed with inconsistent fractions by determining the parties' intent from the terms).

[25] 593 S.W.2d 939, 943-944 (Tex. 1980) (citing *Miles v. Martin*, 321 S.W.2d 62 (Tex. 1959)).

[26] 281 S.W.3d 602, 625 (Tex. App.–Eastland 2009) (quoting *Brown v. Havard* 593 S.W.2d at 944).

[27] *Brown*, 593 S.W.2d at 940 (emphasis omitted).

[28] *Id*. at 940-941.

one-half of Havard's three-eighths royalty from the lease.[29] Havard sued for reformation, contending that the Browns' agreement was for a one-sixteenth royalty.[30] The jury returned a verdict supporting Havard's claim for reformation, but the trial court held that the claim was barred by limitations as a matter of law because the Kings were charged with knowledge of the deed's language.[31] We disagreed, holding that when the Kings should have realized the mistake Havard asserted was a factual issue because any "mistake [was not] so plainly evident as to charge King with the legal effect of the words used."[32]

The reservation in the Lesley deeds may not be as opaque as the one in *Brown*, but its reservation of one-fourth the delay and bonus payments is twice the amount to which a one-eighth mineral interest would be entitled. "Commentators have . . . observed that most grantors do not intend to convey interests of different magnitudes", but "[w]e cannot say categorically that no conveyance with differing fractions" does so.[33] Still, Bluegreen itself, in repeating the reservation in its own deeds to the lot owners, appears to have shared Lesley's understanding that she had reserved one-fourth of the entire minerals. In these circumstances, it cannot be said that, as a matter

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[29] *Id*. at 941.

[30] *Id*.

[31] *Id*.

[32] *Id*. at 944.

[33] *Concord Oil Co. v. Pennzoil Exploration and Prod. Co.*, 966 S.W.2d 451, 460 (Tex. 1998).

of law, Lesley knew or should have known of the mistake in her deed when she executed it. Whether her claim for reformation is barred by limitations involves disputed facts.[34]

B

The parties agree that Bluegreen owned the executive right in the 4,100-acre mineral estate when it implemented the restrictive covenants for the subdivision, but they dispute whether the right was included in Bluegreen's deeds to the lot owners. Each deed to a lot conveyed the land and Bluegreen's mineral interest, excepting Hedrick's and Lesley's interests, without mentioning the executive right.

Very similar circumstances were presented in *Day & Co., Inc. v. Texland Petroleum, Inc.* There, Keaton and Young deeded an 80-acre tract to Day, Inc., reserving an undivided one-half interest in the minerals, but expressly conveying the entire executive right.[35] Day, Inc., in turn, deeded ten acres to the Shoafs, reserving an undivided one-fourth interest in the minerals and making no mention of the executive right.[36] We held that the one-fourth mineral interest conveyed by Day to the Shoafs and the one-fourth mineral interest reserved to Day were each accompanied by the executive right covering that interest, explaining:

> When an undivided mineral interest is conveyed, reserved or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intention is expressed. Therefore, when a mineral interest is reserved or excepted in a deed, the executive right covering that interest is also retained unless specifically conveyed.

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[34] Bluegreen and the lot owners have not challenged the trial court's declaration that reformation will not deprive them of their bargain, and we express no view of the matter.

[35] 786 S.W.2d 667, 668 (Tex. 1990).

[36] *Id*.

> Likewise, when a mineral interest is conveyed, the executive right incident to that interest passes to the grantee unless specifically reserved.[37]

But the executive right, expressly conveyed to Day, covering the one-half mineral interest reserved by Keaton and Young, passed from Day to the Shoafs because it was not reserved or excepted in Day, Inc.'s deed to them.[38]

By the rules of *Day & Co.*, Bluegreen's deed to each lot conveyed the executive right covering both the lot owner's mineral interest and Hedrick's and Lesley's mineral interests, unless the right was reserved or excepted. Hedrick and Lesley argue that an exception in each deed for the restrictive covenant limiting development of the minerals effectively reserved the executive right to Bluegreen because the covenant prohibited the lot owners from developing the minerals, and thus from leasing them. But the argument overlooks the provision of the covenant allowing modification or abrogation by a two-thirds vote of the owners. The exception did not withdraw the executive right from the conveyances in the lot owners' deeds but merely subjected the exercise of the right to the covenant's limitations.[39] Thus restricted, the right was conveyed by each lot owner's deed.

IV

We come now to the principal issues in the case: the nature of the duty that the owner of the executive right owes to the non-executive interest owner, and whether that duty has been breached.

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[37] *Id*. at 669 n.1 (citations omitted).

[38] *Id*. at 669.

[39] The parties have argued here only that the executive right in Hedrick's and Lesley's minerals is owned either by Bluegreen or by the lot owners. The parties have not addressed the effect of the conveyances of the right covering Hedrick's and Lesley's minerals to multiple lot owners.

"The executive right is the right to make decisions affecting the exploration and development of the mineral estate", but it is "most commonly exercised . . . by executing oil and gas leases".[40] Executive rights are frequently severed from other incidents of mineral ownership,[41] as they were from the mineral interests reserved to Hedrick and Leslie. The non-executive mineral interest owner owns the minerals in place but does not have the right to lease them. The non-executive royalty interest owner owns an interest in the royalty when the executive leases the minerals.[42] Non-executive interests may be perpetual or only for a term.[43] They are created for many different reasons, among them the simple convenience of reserving the power to make leasing decisions in one person. And because executive and non-executive interests are real rather than personal, they survive the parties who created them and persist long after circumstances have changed. The Hedricks conveyed the executive right to their reserved one-half interest in their 4,100 acres decades before anyone contemplated developing a residential subdivision on the property or producing natural gas from the Barnett Shale beneath it.

For most mineral interest owners, revenue comes through leasing. If the exclusive right to lease the minerals could be exercised arbitrarily or to the non-executive's detriment, the executive power could destroy all value in the non-executive interest, appropriating its benefits for himself or

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[40] Ernest E. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEX. L. REV. 371, 372 (1985).

[41] *Id.*

[42] *See generally* 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 338 (1985) (the executive power to make leases remains with an owner of the mineral estate, generally speaking, after the owner grants a royalty interest).

[43] Smith, 64 TEX. L. REV. at 380-381.

others. The law has never left non-executive interest owners wholly at the mercy of the executive.[44] But the variety of non-executive interests and the reasons for their creation, and the effects of changing circumstances, make it difficult to determine precisely what duty the executive owes the non-executive interest.

We first addressed the issue in 1937 in *Schlittler v. Smith*.[45] Smith conveyed a tract of land to Schlittler, reserving only a one-half term interest in "the royalty rights [on all minerals] that may be produced".[46] The trial court held that Smith had conveyed the executive right in the entire tract to Schlittler and by his reservation "was to receive one-half of not less than the usual one-eighth royalty reserved by lessors in oil and gas leases."[47] We disagreed that the reservation required a lease for at least a one-eighth royalty. There was "nothing whatever to indicate that the royalty to be reserved was the usual one-eighth, although very likely neither of the parties thought it would be less."[48] Since the parties were to share equally in the royalty, we thought Schlittler's "self-interest . . . may be trusted to protect [Smith] as to the amount of royalty reserved",[49] but added, "[o]f course, there should be the utmost fair dealing on the part of the grantee in this regard."[50]

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[44] *See* Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 573 (1948) ("It seems clear that the Texas courts will not leave the royalty owner completely at the mercy of the holder of the exclusive-leasing privilege.").

[45] 101 S.W.2d 543 (Tex. 1937).

[46] *Id.* at 544.

[47] *Id*.

[48] *Id*. at 544-545.

[49] *Id*. at 545.

[50] *Id*.

Though the duty described in *Schlittler* was narrow — to negotiate a fair royalty — another case decided the same day, *Wintermann v. McDonald*, suggested a broader principle at work.[51] *Wintermann* involved the construction of a 1931 enactment and the Texas Relinquishment Act,[52] which authorized the owners of the soil of certain formerly public lands to act as the agent of the State in making oil and gas leases."[53] This statutory right was similar to the common-law executive right. Consistent with our view of the executive right in *Schlittler*, we held that under these statutes, "[t]he landowner owes to the State good faith in the performance of a duty which he has assumed, and he should discharge that duty with prudence and good faith, and with ordinary care and diligence."[54]

We have characterized an executive's duty of utmost fair dealing as fiduciary in nature, so that the discovery rule is invoked in determining when a claim against the executive accrues. In *Andretta v. West*, the Wests leased their property to Superior Oil Co.'s predecessor and later conveyed a one-fourth non-participating interest in their one-eighth royalty to Andretta's predecessor.[55] A dispute arose between the Wests and Superior over whether Superior should have drilled an offset well, and the Wests settled by accepting payment of a one-eighth royalty on

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[51] 102 S.W.2d 167 (Tex. 1937).

[52] Act approved May 29, 1931, 42nd Leg., R.S., ch. 271, 1931 Tex. Gen. Laws 452.

[53] *Wintermann*, 102 S.W.2d at 170.

[54] *Id*. at 173.

[55] 415 S.W.2d 638, 639 (Tex. 1967).

Superior's well on the adjoining tract.[56] We held that Andretta was entitled to one-fourth of the substitute royalty and that limitations on his claim did not begin to run until he knew or should have known of the royalty because he and the Wests were in a confidential relationship, given the power "entrusted" to the Wests by the executive right and their superior knowledge.[57] In *HECI Exploration Co. v. Neel*, we spoke more broadly of our decision in *Andretta*:

> We held that a fiduciary relationship exists between an owner of the executive rights and nonparticipating royalty owners in Andretta's position because the former has the power to make and amend the lease and thereby affect the latter's rights. Because of that fiduciary duty, an amendment to a lease executed and recorded after Andretta acquired his interest was not constructive notice because there was no occasion for him to search the records when he had no reason to know or suspect that West had agreed to a payment in lieu of royalty. We further held that limitations did not commence running until Andretta learned or should have learned of the wrong. That decision is consistent with other Texas decisions in which there was a breach of fiduciary duty.[58]

We again characterized the executive's duty as fiduciary in *Manges v. Guerra*,[59] a complex case[60] involving various dealings between Clinton Manges and his grantors, to whom we will refer for simplicity as Guerra. Manges had acquired, roughly speaking, 93,000 acres of land, together with one-half of Guerra's mineral interest in the property and the executive right in Guerra's retained interest.[61] He first executed a deed of trust covering all the mineral interest to secure a $7 million

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[56] *Id*.

[57] *Id*. at 641.

[58] 982 S.W.2d 881, 888 (Tex. 1998) (citations omitted).

[59] 673 S.W.2d 180 (Tex. 1984).

[60] The case was also one of some notoriety. *See* Ken Case, *Blind Justice*, TEXAS MONTHLY, May 1987, at 136.

[61] *Id*. at 181-182.

loan from a bank.[62] He then contracted with an entity, GPE,, giving GPE an option to buy production from all properties to which Manges held executive rights, for a loan to use in drilling and developing the mineral interests.[63] In essence, the GPE contracts gave Manges the ability to develop the minerals without leasing them. After Guerra sued, contending that the GPE contracts effectively withdrew the minerals from the lease market, Manges leased a large part of the minerals to himself for a nominal bonus of $5, asserting that Guerra's lawsuit had made it impossible to lease the minerals to anyone else.[64]

Without objection, the jury was instructed:

> [T]he possessor of an [executive right] owes to the co-mineral owners the same degree of diligence and discretion in exercising the rights and powers granted under such [e]xecutive [r]ights as would be expected of the average land owner who because of self-interest is normally willing to take affirmative steps to seek or to cooperate with prospective lessees . . . that in the exercise of the executive rights, the holder thereof is required to use utmost good faith and fair dealing as to the interest of the non-executive mineral interest owners. You are further instructed that the holder of the executive rights has a duty to prevent drainage of oil or gas from any lands covered by the executive rights. In any lease executed by the holder of the executive rights, the holder thereof is required to obtain all benefits that could be reasonably obtained from a disinterested third party.[65]

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[62] *Id*. at 182.

[63] *Id*. (neither contract required Manges to develop the Guerra lands in particular).

[64] *Id*.

[65] *Id*. at 183. The first sentence of the instruction appears to have been based on a law review article. *See* Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 581 (1948).

The jury found that Manges had violated his duty to Guerra.[66] The trial court rendered judgment on the verdict, canceling, in relevant part, the deed of trust, the GPE contracts, and Manges's lease to himself, and awarding Guerra actual and punitive damages.[67]

We agreed that Manges had breached his duty as executive. The duty of the executive to the non-executive is "fiduciary", we explained, citing cases that have long characterized this relationship as one "of trust",[68] with a duty of "utmost fair dealing".[69] We held that Manges had breached this duty by self-dealing — "in making the lease to himself, in agreeing upon a $5 nominal bonus for 25,911.62 acres of land, and in dealing with the entire mineral interest so that he received benefits that the non-executives did not receive."[70] We affirmed the judgment canceling the lease and deed of trust and awarding punitive damages against Manges for his willful "failure to negotiate for mineral leases with third persons".[71]

A fiduciary duty often, as it would for agent and principal, "requires a party to place the interest of the other party before his own",[72] but we did not suggest in *Andretta*, *HECI*, or *Manges*

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[66] *Manges*, 673 S.W.2d at 183.

[67] *Id*.

[68] *Id*.

[69] *Manges*, 673 S.W.2d at 183 (citing *Schlittler v. Smith*, 101 S.W.2d 543, 544 (Tex. 1937))and *First Nat'l Bank of Snyder v. Evans*, 169 S.W.2d 754, 757 (Tex. Civ. App.–Eastland 1943, writ ref'd)).

[70] *Id.* at 184.

[71] *Id.* at 184-185.

[72] *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992) (superseded by statute on other grounds as noted in *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225-26 (Tex.2002)); *see also National Plan Adm'rs, Inc. v. National Health Ins. Co.*, 235 S.W.3d 695, 700 (Tex. 2007).

that this requirement was part of the executive's duty. Rather, we stated in *Manges* that the executive's duty is to "acquire for the non-executive every benefit that he exacts for himself."[73]

We revisited the issue of the executive's duty to the non-executive most recently in *In re Bass*.[74] Bass owned a tract of some 20,000 acres, burdened by a 2/24ths non-participating royalty. The McGills, heirs of 1/3 of that royalty (2/72nds of the whole), sued Bass, alleging that he had breached his fiduciary duty to them by refusing to lease the minerals in order to force them to sell him their interest.[75] They sought discovery from Bass of privileged seismic data to support their claim that the minerals should be leased.[76] We held that the trial court had abused its discretion in compelling discovery because the McGills had failed to show that they had a valid claim for breach of fiduciary duty:

> Because *Manges* held that the executive owes the non-executive a fiduciary duty, the McGills correctly state that Bass owes them a duty to acquire every benefit for the McGills that Bass would acquire for himself. What differentiates this case from *Manges,* however, is that no evidence of self-dealing exists here. Bass has not leased his land to himself or anyone else. Bass has yet to exercise his rights as the executive. Because Bass has not acquired any benefits for himself, through executing a lease, no duty has been breached. Thus, the present facts are distinguishable from *Manges*. . . . [W]ithout exercising his power as an executive, Bass has not breached a fiduciary duty to the McGills as non-executives. . . . [T]he record . . . fails to show that Bass has breached his duty as the executive . . . .[77]

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[73] *Manges*, 673 S.W.2d at 183.

[74] 113 S.W.3d 735 (Tex. 2003).

[75] *iId*. at 738.

[76] *Id*. at 743.

[77] *Id*. at 745 (citations omitted).

Pointing to the penultimate sentence, Bluegreen and the lot owners argue that the executive cannot breach his duty to the non-executive until the executive power is actually exercised. Hedrick and Lesley counter that this reading of *Bass* places it in tension with *Manges*, which upheld a damage award for a failure to lease — a non-exercise of the executive right. We disagree with Hedrick and Lesley. The tension they see in *Bass* and *Manges* is relieved by the fact that *Manges*' finding of breach was in the context of pervasive self-dealing. In other words, Manges breached his duty not merely because he failed to lease to third parties as opposed to no one at all, but because he failed to lease to third parties as opposed to himself. The tacit assumption in *Manges* was that the minerals would be leased to someone. That was not the assumption in *Bass*, where the parties disputed whether the minerals should be leased at all.

Nevertheless, we do not agree with Bluegreen and the land owners that *Bass* can be read to shield the executive from liability for all inaction. It may be that an executive cannot be liable to the non-executive for failing to lease minerals when never requested to do so, but an executive's refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached his duty.[78] While there was an allegation of self-interest in *Bass*, we concluded that it was not sufficiently supported by the record to warranty compelling discovery of privileged information.

But we need not decide here whether as a general rule an executive is liable to a non-executive for refusing to lease minerals, if indeed a general rule can be stated, given the widely

[78] To the extent *Aurora Petroleum, Inc. v. Newton*, 287 S.W.3d 373, 376-377 (Tex. App.—Amarillo 2009), and *Hlavinka v. Hancock*, 116 S.W.3d 412, 419-420 (Tex. App.—Corpus Christi 2003), hold differently, we disapprove them.

differing circumstances in which the issue arises. Bluegreen did not simply refuse to lease the minerals in the 4,100 acres; it exercised its executive right to limit future leasing by imposing restrictive covenants on the subdivision. This was no less an exercise of the executive right than Manges's execution of a deed of trust covering Guerra's mineral interest. Bluegreen argues that it did not breach its duty as executive because the restrictive covenants benefitted only its interest in the surface estate, and its mineral interest was treated the same as Hedrick's and Lesley's. But Manges's deed of trust secured loans for his personal benefit and encumbered his mineral interest as well as Guerra's, yet we held that he breached his duty. Following *Manges*, we hold that Bluegreen breached its duty to Hedrick and Lesley by filing the restrictive covenants. The remedy, we think, should be the same as in *Manges*: cancellation of the restrictive covenants.

We recognize that Bluegreen as a land developer acquired the executive right for the specific purpose of protecting the subdivision from intrusive and potentially disruptive activities related to developing the minerals. But the common law provides appropriate protection to the surface owner through the accommodation doctrine.[79]

V

Three issues remain.

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[79] *Tarrant Cnty. Water Control & Imp. Dist. v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993) ("The accommodation doctrine, also known as the 'alternative means' doctrine, was first articulated . . . as a means to balance the rights of the surface owner and the mineral owner in the use of the surface: 'Where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under established practices in the industry there are alternatives available to the lessee whereby minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.'" (quoting *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex.1971))).

First: Petitioners, joined by the General Land Office as amicus curiae, argue that if the executive owes them no duty to lease their minerals, they retain the right of development — sometimes referred to as the right of ingress and egress — another "stick" in the bundle of independent property rights comprising the mineral estate.[80] They contend that they may engage in self-development of their minerals, even if the executive refuses to lease.[81] We have stated that "the right to develop is a correlative right and passes with the executive rights."[82] By this rule, petitioners have no right to develop. Having rejected the premise of their argument, and holding instead that they are owed a duty by the executive, we decline to reconsider the relation between the right to develop and the executive right.

Second: Petitioners contend that by filing the restrictive covenants without notice to them, Bluegreen breached a provision in the Lesley deeds. The court of appeals held that Bluegreen was not bound by the provision because it was contractual between Lesley and Bluegreen's predecessor and not a covenant running with the land.[83] We agree with the court of appeals' reasoning and its conclusion.

Third: Although not all of the lot owners appealed the trial court's judgment, the court of appeals concluded that the rights of the parties were so interwoven that its decision should apply to

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[80] *Supra* note 1.

[81] *See also* Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH. L. REV. 33, 73-74 (2009) (discussing possible benefits from separating the executive right from the right to self-develop).

[82] *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 n.1 (Tex. 1995) (citing *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669 n.1 (Tex. 1990)).

[83] 281 S.W.3d at 621-622.

all the parties in the trial court.[84] No one has raised the issue here, and we likewise conclude that our decision should apply to all parties in the trial court.

* * *

The judgment of the court of appeals is affirmed in part and reversed in part, and the case is remanded to the trial court for further proceedings in accordance with our opinion

Nathan L. Hecht
Justice

Opinion delivered: August 26, 2011

[84] 281 S.W.3d at 617 n.5.

IN THE SUPREME COURT OF TEXAS

NO. 09-0309

IN RE JOSEPH CHARLES RUBIOLA ET AL., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued September 16, 2010

JUSTICE MEDINA delivered the opinion of the Court.

In this original mandamus proceeding, Relators seek to compel arbitration under an arbitration agreement they did not sign. The real parties in interest, who are signatories to the arbitration agreement, object to arbitration and contend that Relators cannot compel arbitration because Relators are not parties to the arbitration agreement. The trial court apparently agreed because it denied Relators' motion to compel arbitration. The underlying arbitration agreement, however, designated certain non-signatories as parties to the agreement.

We must decide whether the parties who actually agree to arbitrate may also grant third parties the right to enforce their arbitration agreement and, if so, whether the signatories here intended to grant such rights to these Relators. We conclude that parties to an arbitration agreement may grant non-signatories the right to compel arbitration and that the Relators here were granted that

right. The trial court therefore erred in denying the motion to compel arbitration, and we conditionally grant the writ.

I

The underlying case concerns the sale and financing of a home. Brian and Christina Salmon agreed to purchase the home from Greg Rubiola and his wife Catherine. The transaction was handled by J.C. Rubiola, Greg's brother, who served as the listing broker for the property. The Salmons and Rubiolas signed a standard form Texas real estate sales contract, which did not contain an arbitration clause.

Greg and J.C. Rubiola operate a number of real estate related businesses in San Antonio. The Rubiola brothers buy and sell real estate through Rubiola Management, L.L.C., which is the general partner of Rubiola Realty, Ltd. and Rubiola Properties, Ltd. Greg and J.C. are also president and vice-president, respectively, of Rubiola Mortgage Company, a corporation the brothers use to obtain financing for real estate buyers. The Rubiola brothers' business interests are operated at the same location under the name Rubiola Mortgage and Realty, which they advertise as a one-stop shop for customers' real estate needs: offering the ability to buy, sell, build, finance, and manage real estate through a single company.

After agreeing to purchase Greg Rubiola's home, the Salmons applied for mortgage financing with Rubiola Mortgage Company, using J.C. Rubiola as their mortgage broker and loan officer. As part of the loan process, the Salmons executed an arbitration agreement with the mortgage company. This agreement provided that:

> Arbitrable disputes include any and all controversies or claims between the parties of whatever type or manner, including without limitation, all past, present and/or future credit facilities and/or agreements involving the parties. This arbitration provision shall survive any termination, amendment, or expiration of the agreement in which this agreement is contained, unless all of the parties expressly agree in writing.

The agreement further defined "parties" to include:

> Rubiola Mortgage Company, and each and all persons and entities signing this agreement or any other agreements between or among any of the parties as part of this transaction. "The parties" shall also include individual partners, affiliates, officers, directors, employees, agents, and/or representatives of any party to such documents, and shall include any other owner and holder of this agreement.

J.C. Rubiola signed the agreement on behalf of Rubiola Mortgage Company, and the Salmons signed a form acknowledging J.C.'s dual role as a real estate agent and mortgage broker. The sale closed, and the Salmons moved into their new home.

Several months later, the Salmons sued the Rubiolas and other entities and individuals involved in repairing the home (collectively referred to as the Rubiolas).[1] The Salmons alleged that J.C. Rubiola, acting as both the listing agent and a principal involved in the home's construction and repair, made a series of misrepresentations that induced the Salmons to purchase the home. They also alleged violations of the Deceptive Trade Practices Act and negligent supervision of repairs made to the home. The Salmons sought either to rescind the sale or to collect damages. The Rubiolas answered and moved to compel arbitration, relying on the arbitration agreement signed by the Salmons and Rubiola Mortgage Company during financing.

[1] J.C. Rubiola, Gregory Rubiola, Catherine Rubiola, JGL-Design Build, L.L.C., Michael Cortez individually and d/b/a The Heights Design and Construction are defendants in the underlying suit and Relators in this Court.

The trial court denied the Rubiolas' motion to compel, causing the Rubiolas to seek mandamus relief in the court of appeals. The court of appeals also refused to compel arbitration, and the Rubiolas filed the present mandamus proceeding, seeking again to enforce the underlying arbitration agreement as a non-signatory.

II

The Federal Arbitration Act (FAA) generally governs arbitration provisions in contracts involving interstate commerce. *See* 9 U.S.C. § 2; *see also In re L & L Kempwood Assocs., L.P.,* 9 S.W.3d 125, 127 (Tex. 1999) (per curiam). Parties may also expressly agree to arbitrate under the FAA. *In re AdvancePCS Health, L.P.*, 172 S.W.3d 603, 605-06 & n.3 (Tex. 2005) (per curiam). The arbitration agreement here expressly provides for arbitration under the FAA, and although the Salmons oppose arbitration, generally, they do not contest the application of the FAA.

Under Section 4 of the FAA, "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4; *see In re Halliburton Co.*, 80 S.W.3d 566, 573 (Tex. 2002). "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 Labatt Food Serv., L.P.*, 279 S.W.3d 640, 642-43 (Tex. 2009).

III

A party seeking to compel arbitration under the FAA must establish that (1) there is a valid arbitration clause, and (2) the claims in dispute fall within that agreement's scope. *In re Kellogg*

Brown & Root, Inc., 166 S.W.3d 732, 737 (Tex. 2005). The Rubiolas contend that the arbitration agreement, executed during financing, is broad enough to cover all of the Salmon's claims against them. The Salmons argue, however, that the arbitration agreement extends only to disputes under the financing agreement, as opposed to the real estate sales agreement, and that its breadth cannot be used by non-signatories to compel arbitration. This disagreement raises two issues: do the Rubiolas, as non-signatories to the arbitration agreement, have authority to compel the Salmons to arbitrate, and, if so, does the arbitration clause cover the Salmons' claims. The first issue questions the validity of the arbitration clause, while the second questions the clause's scope.

A

Whether a non-signatory can compel arbitration pursuant to an arbitration clause questions the existence of a valid arbitration clause between specific parties and is therefore a gateway matter for the court to decide. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005); *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008). Under the FAA, ordinary principles of state contract law determine whether there is a valid agreement to arbitrate. *In re Kellogg Brown & Root, Inc*., 166 S.W.3d at 738 (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). An obligation to arbitrate not only attaches to one who has personally signed the written arbitration agreement but may also bind a non-signatory under principles of contract law and agency. *Id.* at 738. Generally, however, parties must sign arbitration agreements before being bound by them. *See Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (noting that "arbitration is a matter of contract and cannot, in general, be required for a matter involving an arbitration agreement non-signatory"). Although "[a]rbitration agreements apply to nonsignatories

only in rare circumstances[,]" the question of "[w]ho is actually bound by an arbitration agreement is [ultimately] a function of the intent of the parties, as expressed in the terms of the agreement." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 355, 358 (5th Cir. 2003). Here the question is not whether a non-signatory may be compelled to arbitrate but rather whether a non-signatory may compel arbitration.

The Salmons argue that because none of the Rubiolas signed the arbitration agreement, except J.C., who signed only as the representative of Rubiola Mortgage Company, that none of them are entitled to compel the Salmons to arbitrate. The Salmons thus equate signing with being a party to the agreement. The arbitration agreement, however, expressly provides that certain non-signatories are to be parties to the agreement. The agreement defines parties to include "Rubiola Mortgage Company, and each and all persons and entities that sign this agreement or any other agreements between or among any of the parties as part of this transaction." Parties further include "individual partners, affiliates, officers, directors, employees, agents, and/or representatives of any party to such documents."

The Rubiolas argue, and we agree, that the arbitration agreement's broad definition of parties, at a minimum, made J.C. and Greg Rubiola parties to the arbitration agreement.[2] Rubiola Mortgage Company signed the arbitration agreement, and the Rubiola brothers are clearly officers and representatives of the mortgage company and thus non-signatory parties to the arbitration agreement

[2] J.C. and Greg Rubiola are the President and Vice President of Rubiola Mortgage Company. JGL Design Builders LL.C. is a Texas limited liability corporation, owned and managed by J.C. and Greg Rubiola. Michael Cortez individually and d/b/a the Heights Design and Construction was the original contractor hired by the Rubiolas to remediate the mold and water damage at the property.

under the agreement's terms. Because the arbitration agreement expressly provides that certain non-signatories are considered parties, we conclude that such parties may compel arbitration under the agreement. *See Sherer*, 548 F.3d at 382 (noting that trial court's application of equitable estoppel to determine whether non-signatory might compel arbitration, was unnecessary because the terms of the Loan Agreement clearly identify when a party might be compelled to arbitrate with a non-signatory); *Bridas*, 345 F.3d at 356 (noting that ordinary principles of contract and agency law may be called upon to bind a non-signatory to an agreement whose terms have not clearly done so); *see also* Carolyn Lamm, *Defining The Party — Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions,* 34 GEO. WASH. INT'L L. REV. 711, 720 (2003) (noting that courts prohibit enforcement by non-signatories "where (1) the contract does not expressly grant third parties the ability to participate in the arbitration; (2) the parties have not contemplated the idea; and (3) non-signatory involvement would constitute an invasion of the consensual nature of arbitration."). But even though the Rubiolas are identified as non-signatories who may compel arbitration, there remains the question whether the Salmons' underlying claims fall within the arbitration agreement's scope.

B

When deciding whether claims fall within an arbitration agreement, courts employ a strong presumption in favor of arbitration. *Cantella & Co., Inc. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996) (per curiam) (holding that "[f]ederal and state law strongly favor arbitration," and that "a presumption exists in favor of agreements to arbitrate under the FAA"); *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995) (holding that under the FAA "any doubts as to whether

claims fall within the scope of the agreement must be resolved in favor of arbitration," and that "[t]he policy in favor of enforcing arbitration agreements is so compelling that a court should not deny arbitration '*unless it can be said with positive assurance* that an arbitration clause is *not* susceptible of an interpretation which would cover the dispute at issue'"). The Rubiolas advance three arguments for why the arbitration clause covers the Salmons' claims: (1) the language of the clause covers the claims, (2) J.C.'s alleged actions occurred while he was acting under both the mortgage and real estate contracts, so his alleged actions were factually intertwined with the mortgage agreement, and (3) the two instruments should be read together because they were executed contemporaneously as part of the same transaction and because the mortgage agreement was essential to the overall deal. The Salmons argue, on the other hand, that the arbitration clause does not cover their claims because those claims relate only to J.C.'s role as the listing agent to the real estate contract. The Salmons further deny that their alleged facts intertwine with the mortgage agreement, or that the contracts should be construed together because they were signed by different parties at different times and without reference to each other.

To determine whether a claim falls within the scope of the agreement, courts must "focus on the factual allegations of the complaint, rather than the legal causes of action asserted." *Marshall*, 909 S.W.2d at 900. The factual allegations in the Salmons' complaint center around a variety of alleged misrepresentations that J.C. Rubiola made in his capacity as the listing agent to the real estate transaction. J.C. allegedly promised that certain repairs would be made to the Salmons' satisfaction after closing. When they were not and other serious problems materialized after closing, J.C.

allegedly made more promises to fix the problems or to repurchase the home if the repairs were not satisfactory.

The underlying arbitration agreement defines arbitrable disputes to include "any and all controversies between the parties of whatever type or manner, including without limitation, all past, present and/or future credit facilities and/or agreements involving the parties." The Rubiola brothers were, as we have already concluded, non-signatory parties to the arbitration agreement, which broadly covers all controversies between the parties and all past, present or future agreements involving the parties. This language indicates that the arbitration agreement was not limited to the financing part of the transaction but rather extended to the real estate sales contract and the Salmons complaints regarding that sale.

The Salmons argue, however, that including the real estate sales contract as part of the transaction subject to arbitration is contrary to the terms of that contract. The real estate contract stated that it constituted the entire agreement between the parties and further provided that the parties could enforce it in court. The contract, however, also states that it could be amended by a later writing. In the arbitration agreement, executed a month later as part of the process for obtaining financing, the Salmons agreed to arbitrate all controversies between the parties and all past agreements involving the parties.

* * *

We conclude that signatories to an arbitration agreement may identify other parties in their agreement who may enforce arbitration as though they signed the agreement themselves. We further conclude that the underlying arbitration agreement in this case identified the Rubiolas as parties to

the agreement and that they accordingly had the right to compel arbitration. Finally, we conclude that the trial court's order denying arbitration is an abuse of discretion for which we conditionally grant Relators' request for mandamus relief. TEX. R. APP. P. 52.8(c). The writ will issue only if the trial court fails to enforce the arbitration agreement.

_____
David M. Medina
Justice

Opinion Delivered: March 11, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0313

TERRI LOFTIN, PETITIONER,

v.

JANICE LEE AND BOB LEE, RESPONDENTS

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

Argued January 21, 2010

JUSTICE HECHT delivered the opinion of the Court.

The Texas Equine Activity Limitation of Liability Act[1] limits liability for inherent risks of equine activity. This case raises two issues regarding the proper construction of the Act. One is whether risks are inherent in equine activity only if they relate to animal behavior or are otherwise unavoidable. As we read the Act, an inherent risk is one that, in its general character, is associated with activities involving equine animals. The other issue is whether the Act limits liability for failing to fully assess a person's ability to participate in equine activity if that failure did not cause injury. We hold it does. We reverse the court of appeals' judgment[2] and render judgment for petitioner.

[1] TEX. CIV. PRAC. & REM. CODE §§ 87.001-.005. All references to the Act are to these provisions. All but five states — California, Maryland, Nevada, New York, and Pennsylvania — limit liability for equine activities by statute.

[2] 277 S.W.3d 519 (Tex. App.—Tyler 2009).

I

Janice Lee decided to go horseback riding with her friend, Terri Loftin, at Loftin's East Texas home. Lee had raised horses for years but had not ridden much and wanted to start. Loftin owned and trained horses. Loftin paired Lee with a twelve-year-old gelding named "Smash" that Loftin had bought for her daughter to ride in competitive barrel racing. To Lee, the horse seemed calm, gentle, and not at all dangerous.

Loftin chose a trail across her neighbor's property that she had ridden the week before, and she and Lee set out. About an hour later, they came to a wooded, boggy area. Loftin knew the low-lying area could be muddy, and Lee, who was in the lead, saw that it was. Neither thought to avoid it. Lee had also noticed vines hanging from the trees and knew that a horse might jump if something touches its flank. That is what happened. A vine touched the flank of Lee's horse, and already spooked by the mud, the horse bolted, as horses will. Lee fell, fracturing a vertebra.

Lee and her husband sued Loftin. The trial court granted summary judgment for Loftin, holding that the Act barred Lee's claims. The court of appeals reversed and remanded, concluding that material fact issues subsisted. We granted Loftin's petition for review.[3]

[3] 53 Tex. Sup. Ct. J. 15 (Oct. 23, 2009).

II

The Act is a comprehensive limitation of liability for equine activity of all kinds.[4] It covers "riding, handling, training, driving, assisting in the medical treatment of, being a passenger on, or assisting a participant or sponsor with"[5] "a horse, pony, mule, donkey, or hinny."[6] It applies to all participants.[7] Section 87.003 of the Act states in pertinent part:

> Except as provided by Section 87.004, any person . . . is not liable for . . . damages [for personal injury that] results from the dangers or conditions that are an inherent risk of an equine activity, including:
>
> (1) the propensity of an equine animal to behave in ways that may result in personal injury or death to a person on or around it;

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[4] TEX. CIV. PRAC. & REM. CODE § 87.001(3) ("'Equine activity' means: (A) an equine animal show, fair, competition, performance, or parade that involves any breed of equine animal and any equine discipline, including dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, driving, pulling, cutting, polo, steeplechasing, English and Western performance riding, endurance trail riding and Western games, and hunting; (B) equine training or teaching activities; (C) boarding equine animals; (D) riding, inspecting, or evaluating an equine animal belonging to another, without regard to whether the owner receives monetary consideration or other thing of value for the use of the equine animal or permits a prospective purchaser of the equine animal to ride, inspect, or evaluate the equine animal; (E) informal equine activity, including a ride, trip, or hunt that is sponsored by an equine activity sponsor; (F) placing or replacing horseshoes on an equine animal; or (G) without regard to whether the participants are compensated, rodeos and single event competitions, including team roping, calf roping, and single steer roping."). In 2001, the Legislature amended sections 87.001-.005 to add provisions for livestock shows. Act of May 22, 2001, 77th Leg., R.S., ch. 1108, 2003 Tex. Gen. Laws 2457. For simplicity, we have omitted references to these livestock provisions in this opinion.

[5] TEX. CIV. PRAC. & REM. CODE § 87.001(1) ("'Engages in an equine activity' means riding, handling, training, driving, assisting in the medical treatment of, being a passenger on, or assisting a participant or sponsor with an equine animal. The term includes management of a show involving equine animals. The term does not include being a spectator at an equine activity unless the spectator is in an unauthorized area and in immediate proximity to the equine activity.");

[6] *Id*. § 87.001(2) ("'Equine animal' means a horse, pony, mule, donkey, or hinny.").

[7] *Id*. § 87.001(9) ("'Participant' means: (A) with respect to an equine activity, a person who engages in the activity, without regard to whether the person is an amateur or professional or whether the person pays for the activity or participates in the activity for free; and (B) with respect to a livestock show, a person who registers for and is allowed by a livestock show sponsor to compete in a livestock show by showing an animal on a competitive basis, or a person who assists that person.").

(2) the unpredictability of an equine animal's reaction to sound, a sudden movement, or an unfamiliar object, person, or other animal;

(3) certain land conditions and hazards, including surface and subsurface conditions;

(4) a collision with another animal or an object; or

(5) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or another, including failing to maintain control over the equine animal or not acting within the participant's ability.[8]

Section 87.004, entitled "Exceptions to Limitation on Liability", states in part:

A person . . . is liable for . . . damage . . . caused by a participant in an equine activity if:

(1) the injury or death was caused by faulty equipment or tack used in the equine activity, the person provided the equipment or tack, and the person knew or should have known that the equipment or tack was faulty;

(2) the person provided the equine animal and the person did not make a reasonable and prudent effort to determine the ability of the participant to engage safely in the equine activity and determine the ability of the participant to safely manage the equine animal, taking into account the participant's representations of ability;

(3) the injury or death was caused by a dangerous latent condition of land for which warning signs, written notices, or verbal warnings were not conspicuously posted or provided to the participant, and the land was owned, leased, or otherwise under the control of the person at the time of the injury or death and the person knew of the dangerous latent condition;

(4) the person committed an act or omission with wilful or wanton disregard for the safety of the participant and that act or omission caused the injury; or

[8] *Id*. § 87.003 (livestock provisions omitted).

(5) the person intentionally caused the injury or death.[9]

The statutory text reflects an expansive view of "inherent risk". The five examples in section 87.003 cover a broad range — animal propensities and unpredictability, land conditions, collisions, and other participants' negligence — yet are expressly non-exclusive. And by excepting five other kinds of risks, section 87.004 necessarily implies that they might otherwise be deemed inherent in equine activity. Three obviously are — faulty equipment, a faulty assessment of a participant's abilities, and latent land conditions. But the other two — wanton disregard for safety and intentional conduct — might seem extraneous rather than inherent risks. Read together, sections 87.003 and 87.004 reflect the Act's intention to address the entire scope of equine activity.

Lee was injured while engaged in such activity — "riding . . . an equine animal belonging to another".[10] But she contends that her accident was caused by Loftin's negligence in choosing a trail to ride, one with mud and vines. Bad trails and "sponsor negligence", she argues, are avoidable and thus not inherent risks of equine activity. Lee also contends that for failing to make a reasonable

[9] *Id.* § 87.004 (livestock provisions omitted).

[10] TEX. CIV. PRAC. & REM. CODE § 87.001(3)(D).

and prudent effort to determine her ability to ride, Loftin can be liable under section 87.004(2).[11] Loftin contends that the Act bars Lee's claims as a matter of law.

The justices of the court of appeals were of three minds. The chief justice determined after a lengthy analysis that the vines and the horse's propensity to react to them were risks but were not inherent in trail riding under section 87.003 if they could have been avoided, as by choosing a different trail.[12] He also concluded that Loftin may not have fully determined Lee's ability to go trail riding and was therefore excepted from the limitation on liability by section 87.004(2).[13] One justice agreed on this latter point but would have held on the other one that Lee's injury was caused by inherent risks of equine activity.[14] The other justice disagreed with the chief justice on both points.[15] Thus, a majority of the court agreed to reverse Loftin's summary judgment because material fact issues remained under section 87.004(2) but not section 87.003.

We discuss first the arguments under section 87.003, then those under section 87.004(2).

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[11] In the trial court and court of appeals, Lee argued that her injury was caused by latent, dangerous, unmarked conditions of land for which liability is permitted by section 87.004(3). She does not make that argument in this Court, perhaps because it is clear that the mud and vines were not latent. Indeed, Lee saw them herself before the injury.

Here, Lee also argues that the Act violates the open courts and due course of law guarantees of article I, section 13 of the Texas Constitution, and that the Act is unconstitutionally vague. But Lee did not raise these issues in the trial court, and therefore she cannot argue them here. *See, e.g.*, *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 222 (Tex. 2002) (requiring an appellant to raise an open courts challenge at the trial court); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) ("As a rule, a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal.").

[12] 277 S.W.3d 519, 528-531 (Tex. App.–Tyler 2009) (Worthen, C.J.). The chief justice expressly did not consider whether the bog was a risk. *Id*. at 528 n.6 (Worthen, C.J.).

[13] *Id.* at 531-532.

[14] *Id*. at 533-535 (Hoyle, J., concurring).

[15] *Id*. 535-540 (Griffith, J., dissenting).

III

Lee argues that by "inherent risk of equine activity", the Act refers only to risks due to innate animal behavior and not those involved in the activity. She acknowledges that a horse may become skittish in mud or when its flank is touched, and that such behavior is an inherent risk of horseback riding. But she insists that her injury resulted, not from her horse's propensities, but from having been put in a place where those propensities could cause harm. Loftin was to blame, Lee argues, not the horse. A negligent sponsor is not an inherent risk of horseback riding. Nor are mud and vines inherent risks of trail riding; there are trails free of such conditions. Thus, she urges, the Act does not apply. She relies in part on *Steeg v. Baskin Family Camps, Inc.*, in which the court of appeals held that "[t]he Act denies immunity from liability for factors essentially within the sponsors' control".[16] In effect, Lee reads "equine activity" to mean only the activity *of* equine animals, not activity *involving* equine animals. The first two examples of inherent risk listed in section 87.003 are animal propensities and behavior.[17] But the remainder of the text contradicts Lee's position. Two other examples of inherent risk have nothing to do with animal behavior: land conditions and negligent participants. Lee's complaint against Loftin fits squarely under section 87.003(5): "the potential of a participant to act in a negligent manner that may contribute to injury to the participant or another". This provision alone refutes the argument that sponsor negligence is not an inherent risk of equine activity. We disapprove the contrary statement in *Steeg*.

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[16] 124 S.W.3d 633, 637 (Tex. App.–Austin 2003, pet. dism'd).

[17] TEX. CIV. PRAC. & REM. CODE § 87.003(1)-(2).

Consistent with section 87.003, section 87.004's exceptions to immunity imply that the risks covered by the Act are those inherent in activities involving equine animals: knowingly supplying faulty equipment, failing to determine a participant's ability, failing to warn of latent land conditions, wilfully or wantonly disregarding safety, and intentionally causing injury.[18] The structure of the Act shows that but for section 87.004, these risks would also be considered inherent in equine activity.

The Act simply cannot be fairly read to limit inherent risks to those which are unavoidably associated with equine behavior. Construed so narrowly, the Act would accomplish nothing. The common law does not impose liability on a person for injury caused by a domestic animal, like those covered by the Act, unless the animal was abnormally dangerous and the person had reason to know it, or the person was negligent in handling the animal.[19] It would have been pointless for the Legislature to limit liability when none existed. We must presume that the Legislature intended more.[20]

Nor must risks associated with equine activity be inevitable to be inherent. Lee and Loftin could have avoided boggy, wooded trails; they could have gone riding in West Texas. Perhaps Loftin could have chosen a nearby trail free of the conditions that caused Lee's fall. Even so, the risks of such choices are inherent in riding any trail. And the risk cannot be confined as narrowly

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[18] *Id.* § 87.004.

[19] *Marshall v. Ranne*, 511 S.W.2d 255, 257-259 (Tex. 1974) (citing RESTATEMENT OF TORTS §§ 507, 509 (1938)).

[20] *See Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998) ("[W]e do not lightly presume that the Legislature may have done a useless act." (citing *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981))).

as Lee attempts in her argument, to mud and vines. The risk inherent in trail riding is that a horse will be spooked by natural conditions, if not mud and vines, then birds or shadows.

Not every injury that occurs during equine activity is the result of inherent risk. An unrelated risk, one that occurs during the activity simply by coincidence, is not inherent in the activity. For example, had Loftin accidentally driven a vehicle into Lee while she was waiting by the stables to embark on the trail ride, Loftin's liability would not be limited by section 87.003. The accident would have been wholly unrelated to any equine activity. On the other hand, had Lee been struck by a horse trailer while unloading the horse she was to ride on the trail, her injury would have resulted from a risk inherent in equine activity because the two were directly related.

Whether risks are inherent in equine activity may sometimes raise fact issues. The Act suggests, however, that determining what risks are inherent should be based on a common-sense understanding of the nature of equine activities. In this case, all the causes of Lee's injury — the propensity of her horse to react to trail conditions, the unpredictability of that reaction, the conditions themselves, and Loftin's choice of trails — fall within the risks listed in section 87.003. Unless Lee's injury was also caused by Loftin's failure to determine her ability under section 87.004(2), Loftin's liability is limited as a matter of law.

IV

Section 87.004(2) denies the immunity afforded by section 87.003 to a person who provides an equine animal without making "a reasonable and prudent effort to determine the ability of the participant to engage safely in the equine activity and determine the ability of the participant to safely

manage the equine animal, taking into account the participant's representations of ability".[21] Lee argues, and the court of appeals held, that fact issues remain whether Loftin may be liable under this provision.[22]

Section 87.004(2) does not expressly require the failure to have resulted in the injury. It can be read to say that a person who fails to make the prescribed determination of a participant's ability is liable for *whatever* injury befalls, even one a thorough investigation could not have avoided. So construed, section 87.004(2) would impose strict liability for an inadequate determination of a participant's ability. But this is not a reasonable construction of the statute. For one thing, the express purpose of the Act is to limit liability, not create strict liability. For another, section 87.004 contains exceptions to section 87.003's limitation on *existing* liability. Each of the other four provisions of section 87.004 requires the specified misconduct to have caused the injury, thus leaving liability as if section 87.003 did not exist. A provision creating strict liability for the first time cannot fairly be said to be an exception to a limitation on existing liability. Finally, the requirement of causation is strongly implied. Reading from the beginning of the sentence, section 87.004 provides: "*A person* . . . is liable for . . . damage . . . caused by *a participant* in an equine activity if . . . *the person* provided the equine animal and . . . did not . . . determine the ability of *the participant* . . . ."[23] The provision connects the damage caused with the failure to determine ability; it does not suggest that liability would result without the connection. Accordingly, we hold that section

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[21] TEX. CIV. PRAC. & REM. CODE § 87.004(2).

[22] 277 S.W.3d 519, 531-532 (Tex. App.–Tyler 2009).

[23] TEX. CIV. PRAC. & REM. CODE § 87.004 (emphasis added).

87.004(2) applies only when the failure to make the required determination is itself the cause of the damage.

Lee argues, and a majority of the court of appeals held, that Loftin should have done more to determine Lee's ability to ride trail, pointing out that Loftin asked her no questions. Loftin counters that she already knew all there was to know about Lee's ability without questioning further — that though Lee had raised horses for years, she rode infrequently. Also, as they began their ride, Loftin could see that Lee had no trouble mounting her horse. Under these circumstances, she contends, she satisfied the "reasonable and prudent effort" standard of section 87.004(2). She and amici curiae[24] argue that the Act does not contemplate that a person must submit to interrogation before being provided a horse to ride.

We agree that section 87.004(2) does not require a formal, searching inquiry. Lee does not contend that any further inquiry by Loftin into her ability to ride could have prevented the accident. Therefore, section 87.004(2) does not apply. Lee asserts that Loftin, knowing what she knew, should have chosen another trail. But the statute limits liability for such a claim.

* * *

As a matter of law, Loftin's liability was limited by the Act, and the trial court properly granted summary judgment for Loftin. Therefore, the judgment of the court of appeals is reversed and judgment rendered that the Lees take nothing.

[24] Amicus briefs supporting Loftin have been filed by the Texas Farm Bureau and the Texas Quarter Horse Association.

Nathan L. Hecht
Justice

Opinion delivered: April 29, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0326

LARRY ROCCAFORTE, PETITIONER,

v.

JEFFERSON COUNTY, RESPONDENT

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

Argued October 14, 2010

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON, JUSTICE GUZMAN, and JUSTICE LEHRMANN, and joined by JUSTICE WILLETT as to parts I through III.

JUSTICE WILLETT delivered a concurring opinion.

The Local Government Code requires a person suing a county to give the county judge and the county or district attorney notice of the claim. TEX. LOC. GOV'T CODE § 89.0041. The plaintiff provided that notice here, but did so by personal service of process, rather than registered or certified mail as the statute contemplates. We conclude that when the requisite county officials receive timely notice enabling them to answer and defend the claim, the case should not be dismissed. Because the court of appeals concluded otherwise, we reverse its judgment and remand the case to the trial court for further proceedings.

I. Background

Former Chief Deputy Constable Larry Roccaforte sued Jefferson County and Constable Jeff Greenway, alleging that his wrongful termination deprived him of rights guaranteed by the Texas Constitution. Roccaforte personally served County Judge Carl Griffith with the suit, and fifteen days later, the County (represented by the district attorney) and Constable Greenway answered, denying liability. The County propounded written discovery requests, deposed Roccaforte, and presented County officials for depositions. The County also filed a plea to the jurisdiction, asserting that Roccaforte did not give requisite notice of the suit. *See* TEX. LOC. GOV'T CODE § 89.0041. Roccaforte disagreed, arguing that the statute applied only to contract claims. Alternatively, he argued that 42 U.S.C. § 1983 preempted the notice requirements and that he substantially complied with them in any event.

Although the trial court indicated that it would sustain the County's plea and sever those claims from the underlying case, it did not immediately sign an order doing so. In the meantime, Roccaforte tried his claims against Greenway. A jury returned a verdict in Roccaforte's favor. Afterwards, the trial court signed an order granting the County's jurisdictional plea. The order did not sever the claims from the underlying case. Roccaforte then pursued this interlocutory appeal. His notice of appeal stated that "[p]ursuant to Civ. P. Rem. Code § 51.014(b), all proceedings are stayed in the trial court pending resolution of the appeal." But the proceedings were not stayed.

In the underlying case, Greenway moved for judgment notwithstanding the verdict, which the trial court granted as to Roccaforte's property interest and First Amendment retaliation claims but denied as to Roccaforte's claimed violation of his liberty interest. Roccaforte moved for entry

of judgment. Notwithstanding the statutory stay referenced in Roccaforte's notice of appeal, the trial court rendered judgment for Roccaforte and awarded damages, attorney's fees, and costs. The judgment was titled "FINAL JUDGMENT"; it "denie[d] all relief no [sic] granted in this judgment"; and it stated "[t]his is a FINAL JUDGMENT." The County was included in the case caption. No one objected to the continuation of trial court proceedings despite the statutory stay.

Greenway appealed, and Roccaforte cross-appealed, raising as his only issues complaints regarding the trial court's JNOV on his claims against Greenway. The court of appeals affirmed in part and reversed in part, rendering judgment that Roccaforte take nothing. *Greenway v. Roccaforte*, 2009 Tex. App. LEXIS 8290, *15 (Tex. App.—Beaumont 2009, pet. denied).[1]

In Roccaforte's separate interlocutory appeal, the court of appeals made the following notation:

> Roccaforte notes that immediately after the dismissal order, the trial of the case proceeded to judgment without the County as a party. No one disputes that all the claims against all other parties have been resolved. The order of dismissal is therefore appealable whether or not the statute at issue is jurisdictional.

281 S.W.3d 230, 231 n.1. The court ultimately concluded that Roccaforte's failure to notify the County of the suit by registered or certified mail mandated dismissal of his suit against the County, but not because the trial court lacked jurisdiction. *Id*. at 236-37. Accordingly, the court modified the dismissal order to reflect that dismissal was without prejudice and affirmed the order as modified. *Id*.

[1] Today, we deny that petition for review.

Roccaforte petitioned this Court for review, which we granted.[2] 53 Tex. Sup. Ct. J. 1061 (Aug. 27, 2010).

II. Did the trial court's final judgment moot this interlocutory appeal?

Before turning to the merits, we must decide a procedural matter: What happens when a party perfects an appeal of an interlocutory judgment that has not been severed from the underlying action, and that action proceeds to trial and a final judgment? The trial court did not sever Roccaforte's claims against the County [3] and denied "all relief not granted" in its final judgment. Ordinarily, under these circumstances, Roccaforte would have to complain on appeal that the trial court erroneously dismissed those claims. Roccaforte, however, did not complain about the County's dismissal in his appeal from the final judgment. His separate interlocutory appeal, then, rests on a precipice of mootness.

A. Roccaforte waived any complaint about the trial court's actions during the statutory stay.

Although Roccaforte's interlocutory appeal was supposed to stay all proceedings in the trial court pending resolution of the appeal,[4] Roccaforte did not object to the trial court's rendition of judgment while the stay was in effect. To the contrary, he affirmatively moved for entry of

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[2] Dallas County submitted an amicus curiae brief in support of Jefferson County.

[3] "As a rule, the severance of an interlocutory judgment into a separate cause makes it final." *Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, 63 S.W.3d 795, 795 (Tex. 2001) (per curiam).

[4] TEX. CIV. PRAC. & REM. CODE § 51.014(b); *see also* TEX. R. APP. P. 29.5 (providing that "[w]hile an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and *unless prohibited by statute* may make further orders, including one dissolving the order complained of on appeal") (emphasis added).

judgment. Because a final judgment frequently moots an interlocutory appeal,[5] we must decide whether the trial court's failure to observe the stay made the final judgment void or merely voidable. If the final judgment is void, it would have no impact on this interlocutory appeal. *Lindsay v. Jaffray*, 55 Tex. 626 (Tex. 1881) ("A void judgment is in legal effect no judgment.") (quoting FREEMAN ON JUDGMENTS, § 117).[6] If voidable, then we must decide whether it moots this proceeding. *See Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010) (observing that voidable orders must be corrected by direct attack and, unless successfully attacked, become final). We conclude it is voidable.

Two of our courts of appeals have held that the failure to object when a trial court proceeds despite the automatic stay waives any error the trial court may have committed by failing to impose it. *See Escalante v. Rowan*, 251 S.W.3d 720, 724-25 (Tex. App.—Houston [14th Dist.] 2008), *rev'd on other grounds*, 2011 Tex. LEXIS 74 (Tex. Jan. 21, 2011) (per curiam); *Henry v. Flintrock Feeders, Ltd.*, No. 07-04-0224-CV, 2005 Tex. App. LEXIS 4310, at *1 (Tex. App.—Amarillo June 1, 2005, no pet.) (mem. op.). In *Escalante*, the court of appeals held that a party's failure to object to a trial court's ruling on summary judgment motions during the statutory stay "failed to preserve error as to any objection that the summary judgment is voidable based on the stay." *Escalante*, 251 S.W.3d at 725. In *Henry*, the court held that a party's failure to object to the trial court's action in

[5] *See, e.g.*, *Hernandez v. Ebrom*, 289 S.W.3d 316, 319 (Tex. 2009) ("Appeals of some interlocutory orders become moot because the orders have been rendered moot by subsequent orders.").

[6] *See also Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010) (noting that "[a] judgment is void . . . 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") (quoting *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005)).

violation of the stay waived any error resulting from that action. *Henry*, 2005 Tex. App. LEXIS 4310, at *4 (holding that trial court's grant of summary judgment mooted interlocutory appeal challenging denial of special appearance). We find particularly instructive a case involving a trial court's rendition of final judgment while an interlocutory appeal of a class certification order was pending:

> [I]f a trial court proceeds to trial during the interlocutory appeal, the class action plaintiff must inform the court of section 51.014(b) and request that the stay be enforced. If a court proceeds to trial over the objection of a class action plaintiff, the class action plaintiff could request a mandamus and this court would grant it. However, if the class action plaintiff fails to inform the trial court of section 51.014(b), and allows the court to proceed to trial, as happened here, the plaintiff waives the right to object or request any relief on appeal. *See* TEX. R. APP. P. 33.1(a). We see this as no different from any other trial court error that is not preserved—it is waived.

Siebenmorgen v. Hertz Corp., No. 14-97-01012-CV, 1999 Tex. App. LEXIS 311, at *10-11 (Tex. App.—Houston [14th Dist.] Jan. 21, 1999, no pet.) (dismissing as moot interlocutory appeal of order denying class certification).

A third court of appeals has implicitly concluded that parties can waive the right to insist on a section 51.014(b) stay. *See Lincoln Property Co. v. Kondos*, 110 S.W.3d 712, 715 (Tex. App.—Dallas 2003, no pet.). In that case, the court observed that the trial court's grant of summary judgment while an interlocutory appeal was pending violated the statutory stay. Noting that "neither party requested a stay from this Court" and "both parties sought to commence the 'trial' below by filing and/or arguing motions for summary judgment while this appeal was pending," the court of appeals did not conclude that the trial court's summary judgment was void. *Id*. at 715. Instead, the appellate court held that the summary judgment mooted the interlocutory appeal. *Id*. at 715-16

(noting that the interlocutory class certification order merged into the final judgment). The court concluded: "By rendering a final judgment during this appeal, the trial court also rendered itself powerless to reconsider its class certification ruling were we to conclude here the ruling was entered in error." *Id*. at 715.

We agree with those decisions that have held that a party may waive complaints about a trial court's actions in violation of the stay imposed by section 51.014(b). That stay differs from a situation in which the relevant statute vests "exclusive jurisdiction" in a particular forum. *See, e.g.*, *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940) (noting that bankruptcy law in effect at the time "vested in the bankruptcy courts exclusive jurisdiction" and "withdr[ew] from all other courts all power under any circumstances"). For that reason, we have held that actions taken in violation of a bankruptcy stay are void, not just voidable. *Cont'l Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex. 1988).[7]

But as we have noted, "a court's action contrary to a statute or statutory equivalent means the action is erroneous or 'voidable,' not that the ordinary appellate or other direct procedures to correct it may be circumvented." *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990); *cf. Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex. 2004) (noting that failure to comply with a non-jurisdictional statutory requirement may result in the loss of a claim, but that failure must be

[7] *But see Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989) (holding that, under the 1978 Bankruptcy Act, "the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void"); *see also Chisolm v. Chisholm*, No. 04-06-00504-CV, 2007 Tex. App. LEXIS 3936, at *6-*7 (Tex. App.—San Antonio May 23, 2007, no pet.) (noting conflict between *Sikes* and *Continental Casing*); *In re De La Garza*, 159 S.W.3d 119, 120-21 (Tex. App.—Corpus Christi 2004, no pet.) (same); *Oles v. Curl*, 65 S.W.3d 129, 131 n.1 (Tex. App.—Amarillo 2001, no pet.)(same); *Chunn v. Chunn*, 929 S.W.2d 490, 493 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (same).

timely asserted and compliance can be waived). That is the case here. The trial court's rendition of final judgment while the stay was in effect was voidable, not void, and Roccaforte's failure to object to the trial court's actions waived any error related to the stay. We must, therefore, confront the fact that the trial court signed a final judgment disposing of all parties and all claims and that Roccaforte did not present in his appeal from that judgment the arguments he advances in this interlocutory appeal.

B. The trial court's final judgment implicitly modified its interlocutory order, and we treat this appeal as relating to that final judgment.

We have repeatedly held that the right of appeal should not be lost due to procedural technicalities.[8] Roccaforte timely perfected appeals from both the interlocutory order and the final judgment, and this is not a situation in which further proceedings mooted the issues raised in Roccaforte's interlocutory appeal.[9]

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[8] *See, e.g.*, *Guest v. Dixon*, 195 S.W.3d 687, 688 (Tex. 2006) ("[W]e have repeatedly stressed that procedural rules should be construed and applied so that the right of appeal is not unnecessarily lost to technicalities."); *Crown Life Ins. Co. v. Estate of Gonzalez*, 820 S.W.2d 121, 121-22 (Tex. 1991) (per curiam)(stating that procedural rules should be "liberally construed so that the decisions of the courts of appeals turn on substance rather than procedural technicality").

[9] *See, e.g.*, *Isuani v. Manske-Sheffield Radiology Grp., P.A.*, 802 S.W.2d 235, 236 (Tex. 1991) (holding that final judgment mooted interlocutory appeal of order granting or denying temporary injunction); *Providian Bancorp Servs. v. Hernandez*, No. 08-04-00186-CV, 2005 Tex. App. LEXIS 288, at *2 (Tex. App.—El Paso Jan. 13, 2005, no pet.) (mem. op.)(dismissing as moot interlocutory appeal from order denying motion to compel arbitration, because trial court entered an order compelling arbitration); *Mobil Oil Corp. v. First State Bank of Denton*, No. 2-02-119-CV, 2004 Tex. App. LEXIS 6940, at *2 (Tex. App.—Fort Worth July 29, 2004, no pet.) (dismissing as moot interlocutory appeal from class certification order, because trial court subsequently vacated order, decertified class, and dismissed class action); *Lincoln Property Co. v. Kondos*, 110 S.W.3d 712, 715-16 (Tex. App.—Dallas 2003, no pet.) (dismissing as moot interlocutory appeal of order granting class certification, as trial court subsequently granted summary judgment motion); *see also Hernandez*, 289 S.W.3d at 321 (acknowledging that a party may not, after trial and an unfavorable judgment, prevail on a complaint that the party's summary judgment motion should have been granted, nor could a party complain of a failure to dismiss a health care liability claim based on an inadequate expert report, after a full trial and evidence establishing the elements of that claim).

Our procedural rules provide that:

> After an order or judgment in a civil case has been appealed, if the trial court modifies the order or judgment, or if the trial court vacates the order or judgment and replaces it with another appealable order or judgment, the appellate court must treat the appeal as from the subsequent order or judgment and may treat actions relating to the appeal of the first order or judgment as relating to the appeal of the subsequent order or judgment. The subsequent order or judgment and actions relating to it may be included in the original or supplemental record. Any party may nonetheless appeal from the subsequent order or judgment.

TEX. R. APP. P. 27.3. Here, although the trial court's final judgment did not expressly modify its interlocutory order, it did so implicitly. Because the claims against the County had not been severed, the County remained a party to the underlying proceeding despite the interlocutory appeal. The final judgment necessarily replaced the interlocutory order, which merged into the judgment,[10] even though Roccaforte's interlocutory appeal remained pending. Under our rules, however, we may treat this interlocutory appeal as an appeal from the final judgment. That permits us to reach the merits of Roccaforte's claims rather than dismiss the interlocutory appeal as moot.

Although not relying on rule 27.3, the court of appeals took a similar approach, treating Roccaforte's appeal as though it were from the final judgment. 281 S.W.3d at 231 n.1. Similarly, we treat Roccaforte's appellate complaints about the trial court's grant of the County's jurisdictional plea as though they related to the appeal of the final judgment. We turn now to the merits of his claim.

III. The post-suit notice requirements are not jurisdictional.

Local Government Code section 89.0041 provides:

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[10] *See Webb v. Jorns*, 488 S.W.2d 407, 408-409 (Tex. 1972) (holding that interlocutory judgment merged into final judgment, which was then appealable).

(a) A person filing suit against a county or against a county official in the official's capacity as a county official shall deliver written notice to:

(1) the county judge; and

(2) the county or district attorney having jurisdiction to defend the county in a civil suit.

(b) The written notice must be delivered by certified or registered mail by the 30th business day after suit is filed and contain:

(1) the style and cause number of the suit;

(2) the court in which the suit was filed;

(3) the date on which the suit was filed; and

(4) the name of the person filing suit.

(c) If a person does not give notice as required by this section, the court in which the suit is pending shall dismiss the suit on a motion for dismissal made by the county or the county official.

TEX. LOC. GOV'T CODE § 89.0041. In 2005, the Legislature amended the Government Code to provide that "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." TEX. GOV'T CODE § 311.034.

The County contends section 311.034 makes Roccaforte's failure to comply with section 89.0041's notice requirements jurisdictional—an issue we have never decided. Our courts of appeals, however, have concluded that the notice requirements are not jurisdictional, even in light of section 311.034. *See El Paso Cnty. v. Alvarado*, 290 S.W.3d 895, 898-99 (Tex. App.—El Paso 2009, no pet.) (holding that section 89.0041 is not jurisdictional because section 311.034 applies only to prerequisites to file suit, not post-suit notice requirements); *Ballesteros v. Nueces Cnty.*, 286

S.W.3d 566, 570 (Tex. App.—Corpus Christi 2009, pet. denied) (same); 281 S.W.3d 230, 232-33 (same); *Dallas Cnty. v. Coskey*, 247 S.W.3d 753, 754-56 (Tex. App.—Dallas 2008, pet. denied) (same); *Dallas Cnty. v. Autry*, 251 S.W.3d 155, 158 (Tex. App.—Dallas 2008, pet. denied) (same); *Cnty. of Bexar v. Bruton*, 256 S.W.3d 345, 348-49 (Tex. App.—San Antonio 2008, no pet.) (same).

We presume "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 v. White*, 288 S.W.3d 389, 394 (Tex. 2009). The statutes' language reflects no such intent here. Section 311.034 applies to *prerequisites* to suit, not notice requirements that can be satisfied only *after* suit is filed. *Compare* TEX. GOV'T CODE § 311.034, *with* TEX. LOC. GOV'T CODE § 89.0041 (requiring notice of cause number, court in which case is filed, and date of filing). Nor does Local Government Code section 89.0041 show such intent: that section states that a trial court may dismiss a case for noncompliance only after the governmental entity has moved for dismissal. TEX. LOC. GOV'T CODE 89.0041(c) ("If a person does not give notice as required by this section, the court in which the suit is pending shall dismiss the suit on a motion for dismissal made by the county or the county official."). The motion requirement means that a case may proceed against those governmental entities that do not seek dismissal—in other words, that a county can waive a party's noncompliance. This confirms that compliance with the notice requirements is not jurisdictional. *See Loutzenhiser*, 140 S.W.3d at 359 ("The failure of a non-jurisdictional requirement mandated by statute may result in the loss of a claim, but that failure must be timely asserted and compliance can be waived."). We find no basis upon which to conclude that the Legislature intended section 89.0041 to be jurisdictional.

IV. Where the appropriate county officials receive timely notice of the suit, the case should not be dismissed if notice was provided by some means other than mail.

Roccaforte provided timely notice of every item required by section 89.0041, and the requisite officials received that notice. Did the Legislature intend to bar Roccaforte's claim, merely because that notice was hand-delivered rather than mailed?

Roccaforte argues that the County's actual notice of the suit and his substantial compliance with section 89.0041 should suffice. A number of courts of appeals (though not the court of appeals in this case) agree with him.[11] The County disagrees, arguing that the statute requires strict compliance with its terms, and dismissal is mandated if those terms are not satisfied.

Section 89.0041 ensures that the appropriate county officials are made aware of pending suits, allowing the county to answer and defend the case. *See Howlett*, 301 S.W.3d at 846 ("The apparent purpose of section 89.0041 is to ensure that the person responsible for answering and defending the suit—the county or district attorney-has actual notice of the suit itself."); *Coskey*, 247 S.W.3d at 757 ("Section 89.0041's notice of suit requirement against a county serves the purpose of aiding in the management and control of the City's finances and property . . . ."). That purpose was served here—the county judge and the district attorney had notice within fifteen days of Roccaforte's filing, and they answered and defended the suit. *Cf. Loutzenhiser*, 140 S.W.3d at 360 (observing that

[11] *Compare Howlett v. Tarrant Cnty.,* 301 S.W.3d 840, 847 (Tex. App.—Fort Worth 2009, pet. denied) (holding that substantial compliance with section 89.0041 was sufficient because the purpose of the statute was to ensure notice, and that purpose was accomplished), *Ballesteros v. Nueces Cnty*., 286 S.W.3d 566, 570 (Tex. App.—Corpus Christi 2009, pet. denied) (same), *Dallas Cnty. v. Coskey*, 247 S.W.3d 753, 757 (Tex. App.—Dallas 2008, pet. denied) (same), *and Dallas Cnty. v. Autry*, 251 S.W.3d 155, 158 (Tex. App.—Dallas 2008, pet. denied) (same), *with* 281 S.W.3d at 237 (holding that "[r]eading a broad actual notice or service exception into the statute—without any attempt by plaintiff to comply—would, in effect, largely eliminate the specified, additional written notice requirement of the statute"). That conflict gives us jurisdiction over this interlocutory appeal. TEX. GOV'T CODE § 22.225(c), (e).

"if in a particular case a governmental unit were not prejudiced by lack of notice and chose to waive it, we do not see how the statutory purpose would thereby be impaired"). The statute was not intended to create a procedural trap allowing a county to obtain dismissal even though the appropriate officials have notice of the suit. *See Southern Surety Co. v. McGuire*, 275 S.W. 845, 847 (Tex. Civ. App.—El Paso 1925, writ ref'd) (holding that failure to present written claim to commissioners' court as required by statute did not bar the claim, because "[t]he purpose of the statute was fully accomplished by [oral presentment]"); *see also Coskey*, 247 S.W.3d at 757 ("The manner of delivery specified by the statute assures that county officials will receive notice of a suit after it has been filed to enable it to respond timely and prepare a defense."). Because those officers had the requisite notice, we conclude that the trial court erred in dismissing Roccaforte's claims.

V. Conclusion

Roccaforte's claims against the County should not have been dismissed for lack of notice.[12] We reverse the court of appeals' judgment as to those claims and remand the case to the trial court for further proceedings. TEX. R. APP. P. 60.2(d).

Wallace B. Jefferson
Chief Justice

Opinion Delivered: April 29, 2011

[12] Because this issue is dispositive, we do not reach Roccaforte's argument that 42 U.S.C. § 1983 preempts section 89.0041's notice requirements.

IN THE SUPREME COURT OF TEXAS

NO. 09-0326

LARRY ROCCAFORTE, PETITIONER,

v.

JEFFERSON COUNTY, RESPONDENT

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

Argued October 14, 2010

JUSTICE WILLETT, concurring in part.

I join Parts I–III of the Court's opinion. As for Part IV, I join the result but not the reasoning. There is a better approach, one more allegiant to the Legislature's words. Roccaforte's claim should proceed, but the reason is rooted not in his substantial compliance but rather the County's substantial dalliance.

* * *

Aristotle would have enjoyed this case, which perfectly illustrates the challenge he recognized of reconciling the "absoluteness" of the written law with equity in the particular case.[1] Believing that "the equitable is superior" and that rigid laws must bend,[2] Aristotle urged "a

[1] Aristotle, Nicomachean Ethics bk. V, ch. 10.

[2] *Id*.

correction of law where it is defective owing to its universality."[3] From Athens, Greece to Athens, Texas (and beyond), judges still debate the bounds of interpretive discretion—whether it is appropriate to temper the "absoluteness" of statutory mandates and ameliorate their seeming harshness. Millennia may have passed since Aristotle's Lyceum, but this great philosophical and jurisprudential debate endures.

I

As the Court persuasively explains in Part III, the post-suit notice requirements in Section 89.0041 are not jurisdictional, meaning a County can waive a plaintiff's noncompliance.[4] Here, the County objected to Roccaforte's noncompliance, prompting the Court to ask: "Did the Legislature intend to bar Roccaforte's claim, merely because that notice was hand-delivered rather than mailed?"[5] If phrased that way, our recent and unanimous precedent answers the question "yes," since "the surest guide to legislative intent" is the language lawmakers chose.[6] In other words, "Where text is clear, it is determinative of that intent."[7] The Court today agrees that nothing in Section 89.0041 relieves Roccaforte from compliance. So, to escape the statute's emphatic "shall dismiss the suit" mandate,[8] the Court pivots on "actual notice" and "substantial compliance" and holds that the statute's purpose was fulfilled via hand-delivery.

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[3] *Id*.

[4] __ S.W.3d __, __ (explaining that compliance with the notice requirements of Section 89.0041 of the Local Government Code "is not jurisdictional") (citation omitted).

[5] __ S.W.3d at __.

[6] *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010) (citation and quotation marks omitted).

[7] *Id*.

[8] *See* TEX. LOC. GOV'T CODE § 89.0041(c).

Honoring a statute's plain words is indispensable, even if enforcing those words as written works an unpalatable result. To be sure, courts deviate from otherwise-clear textual commands to avert "absurd" results or to vindicate constitutional principles.[9] But as a general matter, if the legal deck is stacked via technical statutory requirements, the Legislature should reshuffle the equities, not us.[10]

As for whether Section 89.0041's use of phrases like "shall deliver,"[11] "must be delivered,"[12] "as required,"[13] and "shall dismiss"[14] mandates strict compliance, I would take the statute at face value. Beyond that, those desiring additional reassurance that lawmakers intended what they enacted can find it in a properly contextual reading of other notice-related statutes.

First, the Legislature, while omitting an actual-notice exception from Section 89.0041, expressly included one in the Tort Claims Act, stating the Act's pre-suit notice requirements "do not apply if the governmental unit has actual notice . . . ."[15] The Legislature understands how to let actual notice excuse technical noncompliance; it easily could have said actual notice suffices, thus

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[9] The absurdity doctrine, rightly understood, is a safety valve reserved for truly exceptional cases, not just those where the mandated statutory outcome is thought unwise or inequitable. *See generally* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003). As Chief Justice Marshall famously put it, a court's allegiance to the text ceases when applying the text "would be so monstrous that all mankind would, without hesitation, unite in rejecting the application." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819).

[10] The Legislature can, of course, if it wishes, statutorily overturn today's holding that Section 89.0041 is nonjurisdictional and subject to an actual-notice exception.

[11] TEX. LOC. GOV'T CODE § 89.0041(a).

[12] *Id.* § 89.0041(b).

[13] *Id.* § 89.0041(c).

[14] *Id.*

[15] TEX. CIV. PRAC. & REM. CODE § 101.101(c).

obviating the need for service via certified or registered mail. Instead, it opted against actual notice, presumably on purpose. For better or worse, lawmakers enacted strict compliance, not substantial compliance. Our interpretive focus, both textual and contextual, must be on the law as written, and we should refuse to engraft what the Legislature has refused to enact.

Second, reading "actual notice" into Section 89.0041's *post*-suit notice requirement robs it of any real meaning and also makes Section 89.004's *pre*-suit notice requirement redundant. Section 89.004 forbids someone from suing a county or county official "unless the person has presented the claim to the commissioners court and the commissioners court neglects or refuses to pay all or part of the claim . . . ."[16] This presentment requirement assures actual notice of a claim before it is filed and was already on the books when Section 89.0041 was added in 2003. Logically then, Section 89.0041 must require something *in addition to* the preexisting notice and presentment requirements.[17]

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[16] TEX. LOC. GOV'T CODE § 89.004(a).

[17] Another point: As the Court notes, some courts of appeals have concluded that a substantial-compliance exception lies hidden within Section 89.0041, notwithstanding the statute's emphatic "shall dismiss" mandate. __ S.W.3d at __ (citing *Howlett v. Tarrant Cnty.*, 301 S.W.3d 840, 847 (Tex. App.—Fort Worth 2009, pet. denied) (holding that substantial compliance with Section 89.0041 was sufficient because the purpose of the statute was to ensure notice, and that purpose was accomplished); *Ballesteros v. Nueces Cnty.*, 286 S.W.3d 566, 570 (Tex. App.—Corpus Christi 2009, pet. denied) (same); *Dallas Cnty. v. Coskey*, 247 S.W.3d 753, 757 (Tex. App.—Dallas 2008, pet. denied) (same); *Dallas Cnty. v. Autry*, 251 S.W.3d 155, 158 (Tex. App.—Dallas 2008, pet. denied) (same)). Two of the three courts of appeals even cite as support two of our decisions involving notice in other contexts. *Coskey*, 247 S.W.3d at 757 ("Both *Artco-Bell Corp.* and *Cox Enterprises, Inc.* support a standard of substantial compliance with notice requirements under certain circumstances, and we conclude that standard applies in these circumstances.") (citations omitted); *Ballesteros*, 286 S.W.3d at 571–72. A third court of appeals opinion in turn relies upon *Coskey*. *See Autry*, 251 S.W.3d at 158.

Closer analysis reveals *Coskey* and *Ballesteros* offer feeble support, as they misinterpret this Court's holdings in *Cox Enters., Inc. v. Bd. of Trs. of Austin Indep. Sch. Dist.,* 706 S.W.2d 956 (Tex. 1986), and *Artco-Bell Corp. v. City of Temple*, 616 S.W.2d 190 (Tex. 1981). The issue in *Cox* involved *how much* particularity was required in notice. 706 S.W.2d at 960 (noting that "less than full disclosure is not substantial compliance" and that "the Open Meetings Act requires a full disclosure of the subject matter of the meetings"). *Artco-Bell* is likewise inapposite. In *Artco-Bell*, the Court simply invalidated the notice requirement in a city's charter and held the plaintiff had provided sufficient notice. 616 S.W.2d at 193–94 ("[W]e hold that the requirement of verification represents an unreasonable limitation on the

The requisite officials here received notice, but they did not receive "requisite notice," as the Court states.[18] The Court may deem it *adequate*, but it is irrefutably not *requisite*. As the Court reads Section 89.0041, it is not only nonjurisdictional (I agree on this point), but also nonmandatory. I acknowledge the statute's no-exceptions mandate works a harsh result,[19] but to the degree this seems a trap for the unwary, it is a trap the Legislature left well marked.

II

Having said all that, I agree with the Court that Roccaforte ultimately wins his notice dispute, but on different grounds. Instead of asking whether the Legislature meant to bar Roccaforte's claim, I would rephrase the question in a manner less assaultive to the statutory text: Did the County effectively *waive* Roccaforte's noncompliance by not timely asserting it? I believe so.[20]

City's liability and is invalid as it is contrary to the limitation of authority placed upon home rule cities . . . .") (footnote omitted).

Cox was about the specificity of notice; *Arcto-Bell* resulted in the invalidation of notice. In neither case did the Court craft an *exception* for notice. The lower courts' treatment of these cases was thus strained, and should not be taken as a correct reading of our jurisprudence on statutory notice requirements.

[18] __ S.W.3d at __.

[19] Had the County "timely asserted" Roccaforte's noncompliance, dismissal would have been mandatory under the statute's rigid, no-discretion mandate, thus raising the question of whether Section 89.0041's notice regime is preempted by 42 U.S.C. § 1983. *See Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex. 2004) ("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."). That question, while interesting legally, is not before us.

[20] Waiver may actually be the wrong term; it may be more accurate to call this forfeiture. As the United States Supreme Court explains: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the *timely assertion* of a right, waiver is the intentional relinquishment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (emphasis added) (citations and quotation marks omitted). In any event, under our definition:

> "[W]aiver" is the intentional relinquishment of a right actually or constructively known, or intentional conduct inconsistent with claiming that right. The elements of waiver include (1) an existing right, benefit, or advantage held by a party; (2) the party's actual or constructive knowledge of its existence; and (3) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right.

Perry Homes v. Cull, 258 S.W.3d 580, 602–03 (Tex. 2008) (citations omitted).

True, the County, after waiting for limitations to expire, filed a motion for dismissal complaining that Roccaforte provided notice via personal service rather than registered or certified mail. I believe that obscures the key point, which on these facts is not *whether* the County sought dismissal, but *when*. A governmental body can raise a jurisdictional bar like immunity from suit whenever it pleases because "the trial court does not have—and never had—power to decide the case,"[21] thus making judgments forever vulnerable to delayed attack. Not so with nonjurisdictional requirements like this, which are waived if not timely raised. Under our precedent, dismissal delayed is sometimes dismissal denied: "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."[22] Moreover, "if a governmental unit is to avoid litigation to which it should not be subjected because of lack of notice, it should raise the issue as soon as possible."[23] On these facts, there was no timely assertion, much less one made "as soon as possible."[24]

We have held that waiver is decided on a case-by-case basis, meaning courts look to the

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[21] *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 306 (Tex. 2010) (citation omitted).

[22] *Loutzenhiser*, 140 S.W.3d at 359 (emphasis added).

[23] *Id*. at 360. "Moreover, if in a particular case a governmental unit were not prejudiced by lack of notice and chose to waive it, we do not see how the statutory purpose would thereby be impaired." *Id*.

[24] Reading Section 89.0041 in tandem with our settled precedent distinguishing mandatory requirements (waivable) from jurisdictional ones (nonwaivable) is consistent with a textualist approach that integrates established interpretive norms. For example, even the most ardent textualist would read a statute of limitations in light of the common-law rules of equitable tolling. *See Young v. United States*, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute.") (citations and quotation marks omitted); *see also United States v. Beggerly*, 524 U.S. 38, 48 (1998). As Justice Scalia noted in *Young*, a limitations period is subject to the principles of equitable tolling, so long as the statutory text does not preclude such tolling. 535 U.S. at 47. Same here, where the Legislature drafts notice requirements in light of our decisions differentiating between mandatory and jurisdictional provisions and the consequences that flow from each characterization.

totality of the circumstances.[25] Here, the County sought dismissal based on imperfect notice more than two years after suit was filed; more than two years after the County filed its answer; more than two years after the County filed its special exceptions; after the County presented three County officials for deposition and defended those depositions; after the County sent written discovery requests; after the County deposed Roccaforte; and after the County filed a motion for continuance. If two-plus years qualifies as "timely asserted" or "as soon as possible"—at least in the context of a statutory notice requirement commanding action—then these phrases have been drained of all meaning.[26] Indeed, the only thing the County "timely asserted" was limitations. I would disallow the County's belated insistence on dismissal given its decision to defend the case for so long,

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[25] *See Perry Homes*, 258 S.W.3d at 589–91 (explaining that a party waives an arbitration clause by engaging in substantial litigation to the other party's detriment or prejudice).

In *Jernigan v. Langley*, the Court considered whether a defendant physician waived his statutory right to contest the adequacy of the plaintiff's expert reports by waiting too long. 111 S.W.3d 153, 153 (Tex. 2003). The Court held that delay does not always result in waiver, but it does when the defendant's silence or inaction for such a long period shows an intent to yield a known right. *Id.* at 157. I would hold that the County's actions are inconsistent with the intent to assert its statutory right to up-front dismissal based on defective notice. Moreover, *Jernigan* predates our 2004 decision in *Loutzenhiser*, which speaks specifically to statutorily mandated notice requirements involving governmental units and says notice-based objections should be asserted "as soon as possible." 140 S.W.3d at 360.

[26] It is true that defendants may assert defenses like limitations in the trial court even following extensive discovery and other pre-trial activity. *See* TEX. R. CIV. P. 94 (affirmative defenses including limitations must be pleaded); TEX. R. CIV. P. 63 (pleadings may be amended without leave of court until seven days before trial). Today's case, though, involves a statutory notice requirement that mandates action within a prescribed time, something *Loutzenhiser* held should be raised "as soon as possible" since the statutory purpose is to avoid litigation altogether. 140 S.W.3d at 360.

Section 89.0041 may not be a prerequisite to bringing suit, but it is a postrequisite to maintaining suit. In my view, Section 89.0041, unlike the Tort Claims Act, does not allow actual notice to forgive defective notice, but that does not mean actual notice may not affect the *waiver* inquiry of whether a defendant "timely asserted" noncompliance. For reasons stated above, I believe a county that quickly asserts statutory noncompliance, even if it has actual notice, is entitled to dismissal under Section 89.0041. But a county with actual notice that untimely asserts noncompliance (here only after limitations had run two-plus years later) has waived its objection and is not entitled to dismissal. *See City of Desoto v. White*, 288 S.W.3d 389, 400–01 (Tex. 2009) (noting that a party that declines to act in light of "full knowledge" of a defect in a nonjurisdictional notice requirement generally waives any complaint). Any other result would incentivize counties to sit on their rights rather than assert them immediately. Here, the County would be rewarded for wasting over two-years' worth of judicial resources and taxpayer dollars in defending a suit it could have easily dismissed from the outset.

asserting noncompliance only after seizing tactical advantage via limitations, and thus materially prejudicing Roccaforte. There is no countervailing prejudice in allowing Roccaforte's suit to proceed against the County, which can hardly argue at this late stage that imperfect notice has harmed its legal position (unlike its fiscal position, having underwritten years of legal and judicial expenses). On these facts, two-plus years of litigation activity to run out the limitations clock betrays the County's too-little, too-late request for dismissal and constitutes waiver.

* * *

The Court's understandable desire to work an eminently fair result has led it to revise the statute as desired rather than read it as enacted. I favor a different approach to the same outcome. Roccaforte should win not because the Court waived the Legislature's words but because the County did.

_____

Don R. Willett
Justice

OPINION DELIVERED: April 29, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0330

LIANA LEORDEANU, PETITIONER,

v.

AMERICAN PROTECTION INSURANCE COMPANY, RESPONDENT

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

Argued April 15, 2010

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

JUSTICE JOHNSON filed a dissenting opinion.

Generally, traveling home from work is not in the "course and scope of employment" as defined by the Texas Workers' Compensation Act.[1] But is traveling from one workplace to another while on the way home? The court of appeals answered no.[2] We disagree.

Petitioner Liana Leordeanu, a pharmaceutical sales representative officing out of her northwest Austin apartment, drove her company car to business appointments in Bastrop some forty

[1] *Evans v. Ill. Emp'rs Ins. of Wausau*, 790 S.W.2d 302, 304 (Tex. 1990) ("In general, injuries which occur while the employee is traveling to or from work are not compensable under the Act.").

[2] 278 S.W.3d 881 (Tex. App.–Austin 2009).

miles southeast, then back to a south Austin restaurant for dinner with clients. Afterward, her route home took her past a company-provided self-storage unit, adjacent her apartment complex, in which she kept drug samples and marketing materials. She intended to stop at the unit and empty her car of business supplies in preparation for an out-of-town personal trip the next day. But midway there, she ran off the highway and was seriously injured.

Respondent, American Protection Insurance Company, denied Leordeanu's claim for workers' compensation. The Texas Department of Insurance Workers' Compensation Commission Division upheld APIC's decision, concluding that Leordeanu was not in the course and scope of employment at the time of her accident, and she appealed. A jury found to the contrary, and the trial court rendered judgment on their verdict for Leordeanu. A divided court of appeals reversed and rendered judgment for APIC, holding that there was no evidence to support the verdict.[3]

The 1917 enactment of the Texas Workers' Compensation Act defined a compensable injury —one "sustained in the course of employment"—to include

> all . . . injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere.[4]

[3] *Id*. at 891.

[4] Act of Mar. 28, 1917, 35th Leg., R.S., ch. 103, § 1, Part IV, § 1, 1917 Tex. Gen. Laws 269, 292, formerly TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1925).

The definition had two components: the injury had to (1) relate to or originate in, and (2) occur in the furtherance of, the employer's business. Both had to be satisfied.[5]

The Act did not require that an employee be injured on the employer's premises. Cases applying the Act concluded that work-required travel is in the course of employment,[6] but not, as a general rule, travel between home and work. An employee's travel to and from work makes employment possible and thus furthers the employer's business, satisfying the second component of the definition, but such travel cannot ordinarily be said to originate in the business, the requirement of the first component, because "[t]he risks to which employees are exposed while

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[5] *Tex. Emp'rs Ins. Ass'n v. Page*, 553 S.W.2d 98, 99 (Tex. 1977) ("Thus, for a claimant to recover under our statute he must meet two requirements. First, the injury must have occurred while the claimant was engaged in or about the furtherance of his employer's affairs or business. Second, the claimant must show that the injury was of a kind and character that had to do with and originated in the employer's work, trade, business or profession."); *Smith v. Texas Emp'rs' Ins. Ass'n*, 105 S.W.2d 192, 193 (Tex. 1937) ("It is now firmly settled by the decisions construing our statute that in order that an employee may recover under the provisions of [the Act], proof that his injury occurred, while he was engaged in or about the furtherance of the employer's affairs or business is not alone sufficient. He must also show that his injury was of such kind and character as had to *do with* and *originated in* the employer's work, trade, business, or profession." (internal quotation marks and brackets omitted) (emphasis in original)).

[6] *Smith*, 105 S.W.2d at 193 ("[E]mployees such as deliverymen, messengers, [and] collectors, . . . [are] by the very nature of the work . . . subjected to the perils and hazards of the streets; in which case it may be properly said that the risks are inherent in and incident to the employment."); *Jecker v. W. Alliance Ins. Co.*, 369 S.W.2d 776, 779 (Tex. 1963), *overruled in part on other grounds by McKelvy v. Barber*, 381 S.W.2d 59 (Tex. 1964) ("[T]he Legislature surely did not intend to provide that an employee whose employment requires him to travel at his own expense in his own automobile on streets and highways, either constantly or intermittently, should be denied compensation if accidently injured while thus exposed to risks growing out of his employment. Any such holding would be wholly unjust to salesmen, servicemen, repairmen, deliverymen, and a host of others who may be required to use their own automobiles in their work, and would be a strict rather than a liberal interpretation of the Workmen's Compensation Act."); *Shelton v. Standard Ins. Co.*, 389 S.W.2d 290, 293 (Tex. 1965) ("Most courts which have considered the question regard an employee whose work entails travel away from the employer's premises as being in the course of his employment when the injury has its origin in a risk created by the necessity of sleeping or eating away from home, except when a distinct departure on a personal errand is shown."); *see*, *e.g.*, *Emp'rs' Indem. Corp. v. Kirkpatrick*, 214 S.W. 956, 957 (Tex. Civ. App.–Austin 1919, writ dism'd w.o.j.) (a laundry employee, though he had put away his horse and wagon in his employer's stables for the day, went to collect a bill for his employer on his way home, as he and other employees frequently did, and so was injured in the course and performance of his duties).

traveling to and from work are shared by society as a whole and do not arise as a result of the work of employers."[7] We have explained it this way:

> When an ordinary workman who lives at home and works at a fixed location is injured while going to or returning from work, his presence at the place of injury is causally related to the employment. The services for which he is employed cannot be performed unless he goes regularly to the place where the work is to be done, and in that sense he furthers the affairs or business of his employer by making the journey. The problem in each case is to determine whether the relationship between the travel and the employment is so close that it can fairly be said that the injury had to do with and originated in the work, business, trade or profession of the employer.[8]

Chief Justice Calvert referred to the exclusion of travel between work and home from the course and scope of employment as the "coming and going rule"[9] and noted that the case law had recognized several exceptions.[10]

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[7] *Evans v. Ill. Emp'rs Ins. of Wausau*, 790 S.W.2d 302, 305 (Tex. 1990) ("Had [the workers] been injured while en route from the safety meeting to the primary work site . . . , these injuries would have been covered by the Act. However, since neither of them had begun work, their injuries fall squarely within the 'coming and going' rule and they are thereby precluded from recovering workers' compensation benefits."); *accord Smith*, 105 S.W.2d at 193 ("It has further been firmly settled that compensation is not allowable for injuries to employees while going to or returning from the place of their employment, except in certain particular cases. This conclusion is based on the premise that one injured upon the streets or highways while going to or from his work suffers his injury as a consequence of risks and hazards of the streets and highways to which all members of the public are alike subject, and not as a consequence of risks and hazards having to do with and originating in the work, business, trade or profession of the employer." (citations and internal quotation marks omitted)).

[8] *Shelton*, 389 S.W.2d at 292.

[9] *Janak v. Tex. Emp'rs' Ins. Ass'n*, 381 S.W.2d 176, 178 (Tex. 1964) ("The general rule . . . is that an injury occurring in the use of the public streets or highways in going to and returning from the place of employment is noncompensable. The rule is known as the 'coming and going' rule." (citation omitted)).

[10] *Am. Gen. Ins. Co. v. Coleman*, 303 S.W.2d 370, 374 (Tex. 1957) ("The general rule is well settled that an injury incurred in the use of public streets or highways in going to and returning from the place of employment is not a compensable injury because not incurred in the course of the employment as required by [the Act]. There are exceptions to the rule. An injury incurred in going to or returning from work is held to be in the course of a workman's employment where the means of transportation is furnished by the employer. So, also, where the employer pays another to transport the injured employee. An injury is held to be in the course of a workman's employment if in going to or returning from his place of employment or his place of residence he undertakes a special mission at the direction of his employer, or performs a service in furtherance of his employer's business with the express or implied approval of his employer.").

Another rule that developed in the case law is this: an employee traveling for both business and personal purposes is in the course and scope of employment only if the business purpose is both a necessary and sufficient cause for the travel. This "dual purpose" rule was explained by Chief Judge Cardozo in *Marks' Dependents v. Gray*, as follows:

> The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.[11]

We indicated our approval of the rule in a 1944 case.[12]

In 1957, the Legislature codified the "coming and going" rule and its exceptions in one sentence, and the "dual purpose" rule in another sentence,[13] and placed both in a new section of the Act as follows:

> Unless transportation is furnished as a part of the contract of employment or is paid for by the employer, or unless the means of such transportation are under the control of the employer, or unless the employee is directed in his employment to proceed from one place to another place, such transportation shall not be the basis for a claim that any injury occurring during the course of such transportation is sustained in the course of employment. Travel by an employee in the furtherance of the affairs or business of his employer shall not be the basis for a claim that an injury occurring during the course of such travel is sustained in the course of employment, if said

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[11] 167 N.E. 181, 183 (N.Y. 1929). *See* 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 16.02 (2010) (stating that the rule in *Marks* has been "accepted by the great majority of jurisdictions").

[12] *McKim v. Commercial Standard Ins. Co.*, 179 S.W.2d 357, 359 (Tex. Civ. App.–Dallas 1944, writ ref'd).

[13] *Janak*, 381 S.W.2d at 179-180 (stating that the Legislature adopted the "dual purpose" rule and that "[t]he generally accepted test to be used in applying the 'dual purpose' rule is found in the opinion of Chief Judge Cardozo in [*Marks*]").

> travel is also in furtherance of the personal or private affairs of the employee, unless the trip to the place of occurrence of said injury would have been made even had there been no personal or private affairs of the employee to be furthered by said trip, and unless said trip would not have been made had there been no affairs or business of the employer to be furthered by said trip.[14]

Then in 1989, the Legislature rewrote this provision and the 1917 general definition, and combined them in a single section of the Act.[15] The result, with minor edits in 1993,[16] is now section 401.011(12) of the Texas Labor Code, which states:

> "Course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations. The term does not include:
>
> (A) transportation to and from the place of employment unless:
>
> (i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;
>
> (ii) the means of the transportation are under the control of the employer; or
>
> (iii) the employee is directed in the employee's employment to proceed from one place to another place; or
>
> (B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:

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[14] Act of May 23, 1957, 55th Leg., R.S., ch. 397, § 3, 1957 Tex. Gen. Laws 1186, 1192-1193.

[15] Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 1.03(12), 1989 Tex. Gen. Laws 1, 2, formerly TEX. REV. CIV. STAT. ANN. art. 8308-1.03(12).

[16] Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1131.

(i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and

(ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.[17]

In the parlance of insurance policies, the general definition describes coverage, and travel must meet both its components to be in the course and scope of employment.[18] Subsections (A) and (B) are exclusions, each followed by exceptions. Subsection (A) has three, disjunctive exceptions; if any one is met, the exclusion does not apply, and travel to and from work is not excluded from the course and scope of employment. Subsection (B) has two, conjunctive exceptions and applies unless both are met. Subsection (B) is somewhat convoluted. More simply put, it does not exclude work-required travel from the course and scope of employment merely because the travel also furthers the employee's personal interests that would not, alone, have caused him to make the trip.

Although the Act was completely overhauled in 1989, the operative language of section 401.011(12) largely tracks the 1917 definition of course of employment and the 1957 provision codifying the two travel rules. The revisions to those provisions appear to have been attempts at clarification rather than substantive changes. But the 1957 statute's statement of the two travel rules, in two sentences one after the other, gave no indication of any relationship between them, while

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[17] TEX. LAB. CODE § 401.011(12).

[18] *Tex. Gen. Indem. Co. v. Bottom*, 365 S.W.2d 350, 353-354 (Tex. 1963) ("The [statute] does not provide that an employee shall be deemed or may be regarded as being in the course of his employment when any one of the specified conditions is satisfied. . . . It is still necessary . . . for the claimant to show that the injury is of a kind and character that had to do with and originated in the work, business, trade or profession of his employer and was received while he was engaged in or about the furtherance of the affairs or business of the employer.").

section 401.011(12)'s rewrite, listing them as two disjunctive exclusions, can be read to suggest that travel is excluded from the course and scope of employment if either one applies. The difficulty with this construction is that travel between work and home is just one kind of dual-purpose travel, benefitting both employer and employee. If both subsections (A) and (B) apply in every situation, (A) becomes merely a specialized application of (B).

The two rules did not develop that way in the case law. The "dual purpose" rule was devised for the distinct situation in which the employee is traveling between work and a place other than home. In *Marks*, for example, the employee was injured en route to a nearby town to meet his wife, who was visiting relatives. His employer had given him a "trifling" job to do while there, but Marks would not have gone for that reason alone, nor would he have cancelled had his employer said never mind.[19] The court held that he was not injured in the course and scope of employment, making no mention of the "coming and going" rule.[20] In each of the two cases in which we have applied subsection (B), *Davis v. Argonaut Southwest Insurance Co.*[21] and *Jecker v. Western Alliance Insurance Co.*,[22] the employee had left work to travel out-of-town for both business and personal reasons and was killed in a car accident on the return trip.[23] In both cases, we held that there was

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[19] *Marks' Dependents v. Gray*, 167 N.E. 181, 182 (N.Y. 1929).

[20] *Id*. at 183.

[21] 464 S.W.2d 102, 102-103 (Tex. 1971).

[22] 369 S.W.2d 776, 779 (Tex. 1963), *overruled in part on other grounds by McKelvy v. Barber*, 381 S.W.2d 59 (Tex. 1964).

[23] *Davis*, 464 S.W.2d at 102-103; *Jecker*, 369 S.W.2d at 779.

evidence to support jury findings that the deaths were compensable under the "dual purpose" rule.[24] The "coming and going" rule developed separately, specifically for travel between home and work.[25]

If the "dual purpose" rule also applied to travel to and from work, homeward-bound travel could never be in the course and scope of employment. It could satisfy subsection (A) and both components of the general definition, but it could never meet subsection (B)(ii). Subsection (B)(ii) excepts dual-purpose travel from the exclusion only if it would not have been made had it not furthered a business purpose. But any employee intending to take care of business on the way home, if the business purpose evaporates, will still go home. Subsection (A) provides that travel home from work may be in the course and scope of employment if the employer furnishes, pays for, or controls the means of transportation, or directs the employee to proceed from one place to another along the way—in short, if the travel furthers the employer's interest. But if subsection (B)(ii) cannot be satisfied, if the employee would further his own interest[26] by going home regardless of whether subsection (A)(I)-(iii) applied, the travel could not be in the course and scope of employment. Applying subsection (B)(ii) to employees coming home from work limits subsection (A) to a "going" rule.

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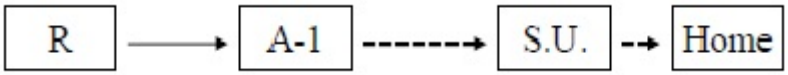
[24] *Davis*, 464 S.W.2d at 104; *Jecker*, 369 S.W.2d at 781.

[25] *See Evans*, 790 S.W.2d at 304-305 (noting that an "exception has been made for a 'special mission' when an employee is 'directed in his employment to proceed from one place to another place'" and citing provision recodified as § 401.011(12)(B); further noting that the workers' "safety meetings were not 'special missions' but rather a regularly scheduled part of each employee's job"; and concluding that the workers fell within the general "coming and going" rule, since they were injured on the way to the safety meeting and not between the meeting and their work site).

[26] *See Johnson v. Pac. Emp'rs Indem. Co.*, 439 S.W.2d 824, 828 (Tex. 1969) ("As used in the dual-purpose rule in the phrase 'in furtherance of personal or private affairs of the employee,' we think the word 'furtherance' connotes the conferring of a benefit on the employee by helping to forward or advance his personal or private affairs . . . .").

That is the problem in the case at hand. The court of appeals held that there was no evidence to support the jury's finding that Leordeanu was injured in the course and scope of her employment, reasoning that subsection (B) applied and (B)(ii) was not met. Leordeanu testified that after she left her business dinner, she intended to stop by her storage unit to unload business supplies from her car, then go to her apartment. The storage unit, she stated, was adjacent her apartment complex, and the route from the restaurant to the storage unit was identical to the route home, except that her apartment was a stone's throw farther. This schematic depicts her travel—



—where R represents the restaurant, A-1 the accident site, and S.U. the storage unit. The court of appeals reasoned:

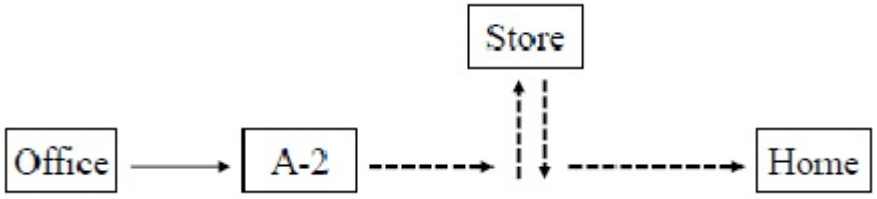
> Leordeanu concedes that she was going home for the evening from the restaurant. There is no evidence that Leordeanu would not have made this travel if she did not intend to drop off items at the storage unit. On the contrary, Leordeanu concedes that she was going home whether or not she dropped items off at the storage unit. Therefore, on this record, the answer to [the question whether the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel,] is "no," and it precludes a finding that Leordeanu was in the course and scope of her employment at the time of her injury.[27]

The court of appeals noted that in *St. Paul Fire & Marine Insurance Co. v. Confer*,[28] a sister court had reached a different conclusion in a similar situation. There, Dr. Confer left work intending to stop by a computer store for supplies on the way home, but he was killed in a car wreck before

[27] 278 S.W.3d 881, 890 (Tex. App.–Austin 2009) (footnotes omitted).

[28] 956 S.W.2d 825 (Tex. App.–San Antonio 1997, pet. denied).

he reached the store. The opinion in the case is somewhat confused, stating initially that "in order to travel to [the store], it would have been necessary for Dr. Confer to deviate from his normal route home",[29] and later that the store "happen[ed] to be along the same route as his route home" so that he was not "forc[ed] . . . to travel away from his regular route [home]".[30] From the opinion's turn by turn description of his normal route, it appears that while the store was on *a* route home, that route was not his usual one or the most direct. Going to the store required a slight deviation from his normal route, and the accident occurred before he reached that point. Schematically, Confer's intended travel was as follows—



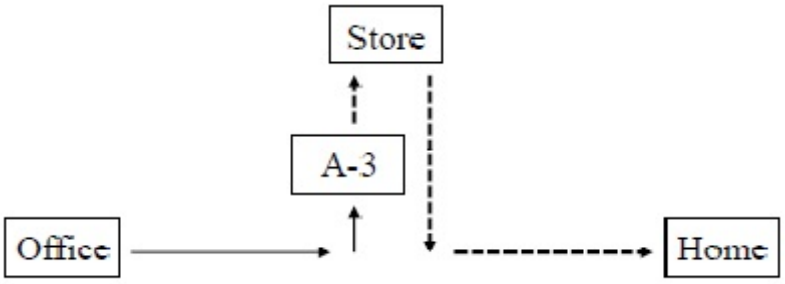
—where A-2 is the accident site. The court divided his trip into two segments, office-to-store and store-to-home, and concluded that the first, on which he was injured, was in the course and scope of employment because he was on a business errand.[31] The court also reasoned that if Confer had been injured after diverging from his normal route but before reaching the store, at site A-3 in the

[29] *Id*. at 827, 830 ("[A]n injury occurring between work and the business errand would be compensable because the employee has not completed work, while an injury occurring between the business errand and home would not be compensable because the employee's work would be finished.").

[30] *Id*.

[31] *Id*.

following schematic—



—he would clearly have been in the course and scope of employment, since that part of the trip would have been made solely for business reasons. "Why should the result be any different" at A-2 or A-3, the court asked.[32]

> Two reasons, answered the court of appeals in the present case:
>
> > first, the statute expressly declines to adopt the policy of allowing coverage whenever there is any business-related component to travel, and it mandates a different result for dual purpose travel based on specific statutory criteria; second, the statutory scheme has a rational basis in that a policymaker could well come to the conclusion that dual purpose travel should not be compensable unless it is predominately for a business-related purpose rather than predominately for a personal purpose with an incidental business-related component.[33]

In sum, because the Legislature said so. But that answer begs the question whether the Legislature really intended by section 401.011(12)(B) a result that is certainly peculiar, if not perverse. Confer's travel at site A-3 would not have been excluded from the course and scope of his employment by the statute because (B)(i) and (ii) would both be satisfied: (i) he would have been there even if he had not been going home, because of his business errand, and (ii), he would not have been there but for

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[32] *Id*.

[33] 278 S.W.3d at 889.

the errand. Yet to get to A-3, he had to pass A-2, where he would have been, even without a business purpose, because he was going home no matter what, and therefore condition (ii) would not have been met.

Though the court of appeals' answer to *Confer*'s rhetorical question is unsatisfactory, its criticism of *Confer*'s analysis has weight. Dividing Confer's intended work-to-store-to-home trip into a work-to-store business segment followed by a store-to-home personal segment does not leave him with a single, business purpose at point A-2. However you slice it, when the accident occurred, Confer had two concurrent purposes: to run a business errand and to go home. If he had had no errand to run, he would still have made the same trip to the accident site on his way home, just as he usually did. Thus, subsection (B)(ii) cannot be satisfied by dissection.

And if it could, the court of appeals continued, there would be no need for the "dual purpose" rule at all.

> [S]ection 401.011(12)(B) would not exist. The statute would simply provide that if travel had any business purpose at all, it is in the course and scope of employment. There would not be a dual purpose rule because there would be no special treatment of dual purpose travel. Dual purpose travel would, by definition, have a business purpose component and, therefore, would always be travel in the course and scope of employment.[34]

This overstates the case. The "dual purpose" rule would still have application in the situations for which it was devised, cases like *Marks*, *Davis*, and *Jecker*, where the employee was not headed home but to another destination, both on business and for pleasure. But the overstatement highlights what we think is the real problem: the application of the "dual purpose" rule to "coming and going" travel.

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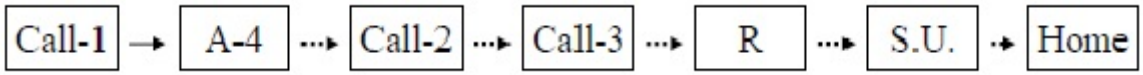
[34] *Id.*

Under the "dual purpose" rule, Leordeanu's travel from her last appointment in Bastrop to the restaurant would also have been outside the course and scope of employment if, had the business dinner cancelled, she would have continued on to the storage unit and home. Indeed, had she arranged her business calls so that all were along the route home—



—even an accident at site A-4 would be excluded from the course and scope of employment if she would have continued home had her appointments at Call-2, Call-3, and R cancelled. This would not be a reasonable application of section 401.011(12).[35]

Rather, we hold that only subsection (A) applies to travel to and from the place of employment,[36] and that subsection (B) applies to other dual-purpose travel. This is consistent with the historical development of the "coming and going" and "dual purpose" rules, their application in our cases, and the reasonable results they were designed to achieve.

It is undisputed that Leordeanu was driving a car provided by her employer at the time of her accident and therefore excepted from the "coming and going" rule by subsection (A)(i). APIC

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[35] We construe statutes to give effect to every provision and ensure that no provision is rendered meaningless or superfluous. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006). To apply the "dual purpose" rule to "coming and going" travel, as the dissent argues, would contravene this principle by substantially undermining the "dual purpose" rule and the import of subsection (B)(ii).

[36] In a broad sense, of course, all travel is homeward. *See* HERMAN MELVILLE, WHITE-JACKET 374 (A.L. Burt Co. 1892) (1850) ("Whoever afflict us, whatever surround, Life is a voyage that's homeward-bound!"). It is said that Masons identify one another among strangers by asking, "Brother, are you headed home?", to which the fraternal response is, "Brother, aren't we always headed home?". We do not by today's decision expand the "coming and going" rule beyond its traditional boundaries.

argues that there is no evidence of the first element of the general definition in section 401.011(12)—that Leordeanu's travel at the time of her injury "ha[d] to do with and originate[d] in the work, business, trade, or profession of [her] employer"—because she was simply on her way home from work. But leaving aside the fact that she officed at home and intended to do some paperwork there before retiring for the night,[37] Leordeanu was also on her way from an employer-sponsored dinner to an employer-provided storage facility to empty her company car of business supplies. APIC cites no authority suggesting that such activity was not work-related, and we hold it was. As for the second element of the definition—that at the time of her injury, Leordeanu was "engaged in or about the furtherance of the affairs or business of [her] employer"—APIC concedes that "there was evidence of one or more work purposes to the trip" and that "[a]part from the ["dual purpose" rule], she would satisfy the 'furtherance' requirement."[38] Thus, there was evidence to support the jury's verdict that Leordeanu was injured in the course and scope of employment. APIC's challenge to the legal sufficiency of the evidence to support the verdict fails.

Accordingly, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Nathan L. Hecht
Justice

Opinion delivered: December 3, 2010

[37] Leordeanu argues that she was injured in the course and scope of employment not only because she was on her way to the storage unit but also because she intended to work at her home-office before retiring. We do not address this latter contention.

[38] Brief of Respondent at 8.

IN THE SUPREME COURT OF TEXAS

NO. 09-0330

LIANA LEORDEANU, PETITIONER,

v.

AMERICAN PROTECTION INSURANCE COMPANY, RESPONDENT

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

Argued April 15, 2010

JUSTICE JOHNSON, dissenting.

Workers' compensation statutes are construed liberally in favor of workers. *In re Poly-America, L.P.*, 262 S.W.3d 337, 350 (Tex. 2008). But construing statutes liberally does not mean effectively adding language to them to alter their meaning, which is what the Court does today. I dissent.

For an employee's injury to be compensable under the Texas Workers' Compensation Act, the injury must arise out of and be in the course and scope of the employee's employment. TEX. LAB. CODE § 401.011(10). The Act specifically excludes some injuries during travel from being in the course and scope of employment:

> The term ["course and scope of employment"] does not include:
> (A) transportation to and from the place of employment unless:
> (i) the transportation is furnished as a part of the

> contract of employment or is paid for by the employer;
> (ii) the means of the transportation are under the control of the employer; or
> (iii) the employee is directed in the employee's employment to proceed from one place to another place; or
>
> (B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:
>
> (i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and
> (ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

Id. § 401.011(12). Simplified, the definition specifies that the term "course and scope of employment" does not include "(A) transportation to and from the place of employment [with exceptions]; *or* (B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless [both (B)(i) and (B)(ii) are satisfied]." (Emphasis added) The Court concludes that subsection (A) applies to travel to and from the place of employment and subsection (B) applies to other dual purpose travel. ___ S.W.3d ___. Under the Court's construction of the statute, "course and scope of employment" does not include "(A) transportation to and from the place of employment [with exceptions]; *or, in dual-purpose travel activities other than those specified in (A),* (B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless [both (B)(i) and (B)(ii) are satisfied]."

The Court reaches its conclusion by improperly reading words into the statute that the Legislature did not include. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 631 (Tex. 2008) ("[C]hanging the meaning of [a] statute by adding words to it, we believe, is a legislative function, not a judicial function."). It does so by noting that the Act's "listing [401.011(12)(A) and (B)] as two disjunctive exclusions, can be read to suggest that travel is excluded from the course and scope of employment if either applies." ___ S.W.3d at ___. In my view, the statute not only "suggests" that travel is excluded from the course and scope of employment if either (A) or (B) applies, it plainly says so.

The court of appeals concluded that the statute declines to adopt the policy of allowing coverage when there is any business-related component to travel and mandates a different result for dual purpose travel. 278 S.W.3d at 881, 889. The court explained that a policymaker could come to the conclusion that dual purpose travel is compensable only if it is predominately for a business-related purpose. *Id.* The Court appears to downplay the court of appeals' reasoning by summarizing the appeals court's interpretation of the straightforward statutory language as being "[i]n sum, because the Legislature said so." ___ S.W.3d ___. But when courts interpret statutory language, they should take that language as it is written. *See Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984) ("[I]t would be a usurpation of our powers to add language to a law where the legislature has refrained."); *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) ("[Courts] are not the law-making body. They are not responsible for omissions in legislation."). Courts generally presume the Legislature said what it meant, and that the Legislature's omission of words was intentional. *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) ("Where [statutory] text is clear, text is determinative

of [Legislative] intent."); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981); *Mauzy v. Legislative Redistricting Bd.*, 471 S.W.2d 570, 572 (Tex. 1971); *see Tex. & N. O. R. Co. v. Tex. R.R. Comm'n*, 200 S.W.2d 626, 629 (Tex. 1947). Courts should only read words into a statute when those words are necessary to effect clear legislative intent or are implicit in the statute, or when the statute yields a nonsensical or absurd result absent the words. *See Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995) ("[C]ourts should not insert words in a statute except to give effect to clear legislative intent."); *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."); *Jones v. Liberty Mut. Ins. Co.*, 745 S.W.2d 901, 902 (Tex. 1988) (same).

The words the Court adds by "construction" are not implicit in the statute. Further, the court of appeals' opinion properly interprets the statute as the Legislature wrote it, effects the Legislature's intent as embodied in the language used, and demonstrates that construing the statute as it is written does not yield a nonsensical or absurd result.

I agree with the court of appeals that the dual purpose rule applies to Leordeanu's claim and her injury is not in the course and scope of her employment. For the reasons set out by the court of appeals, I would affirm its judgment.

Phil Johnson
Justice

OPINION DELIVERED: December 3, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0340

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, PETITIONER,

v.

CARMEN MURO, RESPONDENT

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

Argued March 3, 2011

JUSTICE MEDINA delivered the opinion of the Court.

The Texas Workers' Compensation Act authorizes the award of lifetime income benefits to employees who lose certain body parts or suffer certain injuries in work-related accidents. The specific body parts and injuries that qualify an employee for this type of benefit are enumerated in section 408.161 of the act. *See* TEX. LAB. CODE § 408.161(a)(1)–(7). That enumeration includes, among others, "loss [or lost use] of both feet at or above the ankle." *Id.* § 408.161(a)(2), (b).

The question here concerns the standard for awarding lifetime income benefits under section 408.161. The employee in this case injured her hips, an injury and body part not enumerated in section 408.161. The hip injuries, however, affected the use of her feet to the extent that she could no longer work. Although her feet were not injured, per se, the employee was awarded lifetime income benefits because her hip injuries prevented her from continuing to work. The issue then is

whether the statute authorizes the award of lifetime benefits for injuries to body parts not enumerated in the statute, that is, whether the occurrence of one of the injuries identified in section 408.161 is a prerequisite to the award of lifetime benefits or whether other injuries that result in the employee's total and permanent incapacity, such as the hip injuries here, are enough.

Affirming the employee's award of lifetime income benefits, the court of appeals concluded that section 408.161 does not limit the award of lifetime income benefits to the specific injuries and body parts enumerated in the statute. 285 S.W.3d 524, 529 (Tex. App.—Dallas 2009). We conclude, however, that section 408.161 limits the award of lifetime benefits to the injuries enumerated therein and that an employee does not lose the use of a body part, within the statute's meaning, without some evidence of an injury to that body part. Because there is no evidence that the employee suffered one of the enumerated injuries in this case, we reverse and render.

I

Carmen Muro was seriously injured at work in 1996. She slipped and fell on a restroom floor, injuring her hips, lower back, right shoulder, and neck. Her injuries resulted in several surgeries, including the replacement of both her hips, a surgical repair of her right shoulder, and a cervical fusion. Complications with her left hip required additional surgery and the replacement of her first artificial hip. During this period, she received workers' compensation benefits. Muro eventually returned to her job in revenue management with her employer but left again in 1999 because she had difficulty walking from the parking lot and sitting at her desk. Unable to work, Muro sought lifetime income benefits.

The workers' compensation act enumerates certain catastrophic injuries for which an employee may recover lifetime income benefits. TEX. LAB. CODE § 408.161(a). The enumerated injuries include the loss of both feet, the loss of both hands, or the loss of a hand and a foot, among others. *Id.* § 408.161(a)(2), (3), (4). Muro asserted that she was entitled to lifetime benefits because her workplace accident caused her to lose the use of her right hand and both feet. Her employer's workers' compensation carrier, the Insurance Company of the State of Pennsylvania, disagreed. It refused to pay benefits beyond 401 weeks, asserting that Muro's circumstances did not qualify her for lifetime income. To resolve this dispute over benefits, the Texas Workers' Compensation Commission ("TWCC") scheduled a contested case hearing.

The TWCC hearing officer concluded that Muro was entitled to lifetime income benefits "based on the total and permanent loss of use of both feet at or above the ankle, or one foot at or above the ankle and one hand at or above the wrist." The TWCC appeals panel declined to reverse the hearing officer's decision, and the carrier, having exhausted the administrative process, appealed to the district court. *See id*. § 410.251 (authorizing judicial review).

In the district court, a jury heard testimony from several witnesses regarding the nature and extent of Muro's injuries and disability. Dr. Hooman Sedighi, a TWCC-appointed physician, testified that the injuries to, and surgeries on, Muro's hips and right shoulder limited her ability to use her legs and right arm and that these limitations likewise affected the use of her feet and right hand. Muro's feet and hands, however, were, according to the doctor, "functioning fine" and "near normal function." Dr. Sedighi's neurological exam revealed Muro's motor assessment to be "four-plus out of five in both upper and lower extremities without any focal myotomal deficits." He

explained that such testing utilizes a gradation that "goes from zero, meaning absolutely no motor strength whatsoever, to five, being normal." Dr. Sedighi further testified that pinprick or sensation testing indicated that Muro had normal sensation in her feet and hands. Although her feet and right hand were functional, Dr. Sedighi concluded that the injury to Muro's shoulder and hips had "diminished the ability to use both lower extremities and the right upper extremity" to the extent that she "would be considered totally disabled from any and all work."

Dr. Charles Crane, Muro's treating physician, also testified that Muro was completely disabled. In his opinion, the injury to Muro's hips had impaired the use of her feet to the extent that she could no longer obtain and retain employment requiring their use. Finally, Muro and her daughter testified about Muro's daily life, her limitations, and her inability to function without assistance.

The jury found that Muro had the "total and permanent loss of use of both feet at or above the ankle" and the "total and permanent loss of use of one foot at or above the ankle and one hand at or above the wrist." On this verdict, the district court rendered judgment for Muro, awarding her lifetime income benefits and attorney's fees. The insurance carrier appealed, and the court of appeals affirmed the district court's judgment. 285 S.W.3d 524. A petition for review to this Court followed, and we granted the petition to consider the requirements of section 408.161 and Muro's award of lifetime income benefits.

II

Lifetime income is the greatest income benefit a worker can receive under the workers' compensation act. In addition to lifetime income, the act provides for three lesser awards: temporary

income benefits, impairment income benefits, and supplemental income benefits. *See* TEX. LAB. CODE §§ 408.101, 408.121, 408.142, 408.161. These benefits accrue when a compensable injury causes a decrease in the employee's earnings and are generally paid weekly by the insurance carrier "as and when they accrue." *Id.* §§ 401.011(25), 408.081(b). A claimant's combined eligibility for temporary income benefits, impairment income benefits, and supplemental income benefits generally terminates 401 weeks after the date of injury. *Id*. § 408.083(a). But the 401-week limitation does not apply to lifetime income benefits, which, as the name implies, are payable until the injured employee's death. *Id*. § 408.161(a).

Section 408.161(a) provides for the payment of lifetime income benefits under seven circumstances:

> (1) total and permanent loss of sight in both eyes;
> (2) loss of both feet at or above the ankle;
> (3) loss of both hands at or above the wrist;
> (4) loss of one foot at or above the ankle and the loss of one hand at or above the wrist;
> (5) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg;
> (6) a physically traumatic injury to the brain resulting in incurable insanity or imbecility; or
> (7) third degree burns that cover at least 40 percent of the body and require grafting, or third degree burns covering the majority of either both hands or one hand and the face.

Id. § 408.161(a)(1)–(7). The statute equates the loss of the use of an enumerated body part with its loss, stating that "the total and permanent loss of use of a body part is the loss of that body part." *Id.* § 408.161(b). The statute does not elaborate further on what it means to lose the use of one of

the enumerated body parts, but we have written on the question under an earlier version of the workers' compensation act. *See Travelers Ins. Co. v. Seabolt*, 361 S.W.2d 204 (Tex. 1962).

III

In *Seabolt*, the Court "sought to clarify the law regarding the total loss of use" of specific body parts identified in the workers' compensation act. *Angelina Cas. Co. v. Holt*, 362 S.W.2d 99, 100 (Tex. 1962). The act at that time used the term "member" instead of "body part," but otherwise equated the loss of use of a member or body part with its loss, as it does now. *See Seabolt*, 361 S.W.2d at 205 (citing former act).[1] *Seabolt* observed that the phrase "total loss of the use of a member" embraced two concepts, one narrow, relating to the absence of any utility in the body part, and the other "somewhat broader concept," recognizing that the member might possess some utility as a part of the body and yet "its condition be such as to prevent the workman from procuring and retaining employment requiring the use of the injured member." *Id*. at 205–06.

Seabolt then proposed the following definition:

> A total loss of the use of a member exists whenever by reason of injury, such member no longer possesses any substantial utility as a member of the body, or the condition of the injured member is such that the workman cannot procure and retain employment requiring the use of the member.

[1] The former act provided that for purposes of lifetime benefits "the total and permanent loss of use of a member shall be considered to be the total and permanent loss of the member" and that the "total loss of use" of a member is "equivalent to" and is to "draw the same compensation" as the "total and permanent loss of such member." TEX. REV. CIV. STAT. ANN. art. 8306, §§ 10(b), 11a (repealed by Acts 1989, 71st Leg., 2nd C.S., ch. 1, § 16.01(7)–(9), 1989 Tex. Gen. Laws 114). The act now provides that the "total and permanent loss of use of a body part is the loss of that body part." TEX. LAB. CODE § 408.161(b).

Id. at 206.[2] The insurance carrier points out that this definition uses the adjective "injured" to describe the affected member, indicating that the enumerated member must itself be injured before a loss of use can occur. The carrier submits that an employee therefore does not lose the use of an enumerated body part without some evidence of an injury to it.

The carrier requested a jury instruction on this principle, tendering the *Seabolt* definition, but the court refused, submitting the following instruction instead: "'Loss of use' means the condition of the body part is such that the Defendant cannot get and keep employment requiring the use of that body part. Loss of use does not require amputation." Because the court's charge omitted any requirement of injury to a statutory body part, the carrier complains that Muro was able to recover lifetime benefits for the total loss of use of her feet and her right hand, even though these body parts remained uninjured and functional.

Muro responds that the statute does not expressly require evidence of an injury to a statutory body part but rather only the "total and permanent loss of use" of such body part. *See* TEX. LAB. CODE § 408.161(b). Muro submits that any injury that results in the "total and permanent loss of use" of a statutory body part is enough. Therefore, evidence of her hip and shoulder injuries and their effect on her feet and right hand are enough to satisfy the statute.

The court of appeals agreed that Muro did not need evidence of an injury to her right hand and feet to support the jury's finding of lost use. 285 S.W.3d at 529. Citing five cases from other courts of appeals, the court concluded "that injury to one part of the body can support a loss of use

[2] This definition was subsequently incorporated into the Texas Pattern Jury Charges. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–WORKMEN'S COMPENSATION PJC 26.04 (1970).

finding for another part of the body, bringing the injury within the category of injuries encompassed by the [lifetime income benefits] statute." *Id.* (citing *Galindo v. Old Republic Ins. Co.*, 146 S.W.3d 755, 760 (Tex. App.—El Paso 2004, pet. denied); *Hartford Underwriters Ins. Co. v. Burdine*, 34 S.W.3d 700,705-06 (Tex. App.—Fort Worth 2000, no pet.); *Second Injury Fund of the State of Tex. v. Avon*, 985 S.W.2d 93, 95 (Tex. App.—Eastland 1998, pet. denied); *Tex. Gen. Indem. Co. v. Martin*, 836 S.W.2d 636, 638 (Tex. App.—Tyler 1992, no writ); *Tex. Employers' Ins. Ass'n v. Gutierrez*, 795 S.W.2d 5, 6 (Tex. App.—El Paso 1990, writ denied)). In short, the court of appeals concluded that Muro was entitled to lifetime income benefits because injuries to her hips and right shoulder affected her ability to use her feet and right hand to the extent that she could not continue to work.

A

Four of the five cases on which the court of appeals relies were decided under article 8306 of the Texas Revised Civil Statutes, an earlier version of the workers' compensation act. *See* TEX. REV. CIV. STAT. ANN. art. 8306 (repealed by Acts 1989, 71st Leg., 2nd C.S., ch. 1, § 16.01, 1989 Tex. Gen. Laws 114). The Legislature repealed that version of the act when it reformed the workers' compensation system in 1989. These reforms created a new regulatory agency, benefits structure, and dispute resolution process. *See generally Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 510–16 (Tex. 1995) (discussing changes). The changes were subsequently codified in Title 5 of the Texas Labor Code. Act of May 22, 1993, 73rd Leg., R.S., ch. 269 § 1, 1993 Tex. Gen. Laws 987, 1173.

Injuries occurring before January 1, 1991 (the effective date of the reform bill), are commonly referred to as "old-law cases." Injuries occurring on or after January 1, 1991, are commonly referred to as "new-law cases." Old-law cases can be useful in understanding the new act, but their relevance to any particular provision requires a careful comparison of the old and new law.

Although the new law significantly changed the workers' compensation system, it did not wholly replace the old law's treatment of lifetime income benefits. The old law enumerated six injuries for which lifetime income benefits were to be paid, describing the enumerated injuries as conclusively establishing a worker's total and permanent incapacity. *See* TEX. REV. CIV. STAT. ANN. art. 8306, §§ 10(b), 11a (repealed by Acts 1989, 71st Leg., 2nd C.S., ch. 1, § 16.01(7)–(9), 1989 Tex. Gen. Laws 114). Section 408.161 of the new law incorporates these same six injuries, adding serious burns as a seventh specific injury qualifying for lifetime benefits. TEX. LAB. CODE § 408.161(a)(1)–(7). Section 408.161, however, no longer expressly equates the enumerated injuries with total and permanent incapacity. *Id.* § 408.161. But, under either version of the act, lifetime benefits are payable for certain statutory injuries, such as the loss of both feet, the loss of both hands, or a combination of the two. *Compare* TEX. LAB. CODE § 408.161(a)(2)–(4), *with* TEX. REV. CIV. STAT. ANN. art. 8306, § 11a(2)–(4) (repealed). And as already mentioned, both versions equate the total and permanent loss of use of an enumerated body part with its loss. *Compare* TEX. LAB. CODE § 408.161(b), *with* TEX. REV. CIV. STAT. ANN. art. 8306, §§ 10(b), 11a (repealed).[3]

[3] *See supra* note 1.

The respective laws differ, however, in their approach to other serious injuries, resulting in a workers' total incapacity. The new law does not directly address any other serious injuries not enumerated in the act, while the old law does address the subject, but does so inconsistently.

The old law indicates that the six enumerated injuries are the exclusive means of proving a worker's entitlement to lifetime benefits, but the old law also states that the enumeration is a non-exclusive list. For example, section 10(b) provides that, if the claimant's injury is "one of the six (6) enumerated in Section 11a," the claimant is entitled to lifetime benefits; however, "in no other case of total and permanent incapacity" can the claimant recover benefits for a period in excess of 401 weeks from the date of injury. TEX. REV. CIV. STAT. ANN. art. 8306, § 10(b) (repealed). Section 10(b) thus indicates that the nature of the injury (its enumeration in the statute) is more important than the extent of the incapacity resulting from the injury.

Section 11a, however, indicates the opposite. After enumerating the six injuries, that section concludes with the following paragraph, commonly referred to as the "other loss" clause:

> The above enumeration is not to be taken as exclusive but in all other cases the burden of proof shall be on the claimant to prove that his injuries have resulted in permanent, total incapacity.

Id. art. 8306, § 11a (repealed). In contrast to section 10(b), the "other loss" clause focuses on the nature of the worker's incapacity, rather than the injury itself, suggesting that the injury's nature (its enumeration in the statute) is less important than the degree of incapacity or disability the injury produces. Clearly, the old law is conflicted on the purpose served by its six enumerated injuries. Given this inconsistency in the old law, a number of courts opted to apply section 11a's "other loss" clause to extend lifetime benefits to workers whose non-enumerated injuries resulted in total and

permanent incapacity. *See, e.g., City of Del Rio v. Contreras*, 900 S.W.2d 809, 810–11 (Tex. App.—San Antonio 1995, pet. denied) (holding the old law to be "at best ambiguous" on the issue of exclusivity and resolving the ambiguity in the worker's favor).

Most of the court of appeals' case authority here is premised on this application of the "other loss" clause. *See* 285 S.W.3d at 529 (citing *Avon*, 985 S.W.2d at 95 (jury's finding of total and permanent loss of use of both legs supports recovery of lifetime income under the provision for the "loss of both feet at or above the ankle"); *Martin*, 836 S.W.2d at 638 (total and permanent loss of use of a leg "necessarily inflicts" the loss of use of the attached foot at or above the ankle); *Gutierrez*, 795 S.W.2d at 6 (finding of the total loss of use of a leg encompasses the loss of a foot at or above the ankle)). The "other loss" clause, however, did not survive the act's reformation. Because this provision is not part of the current act, the old-law cases that apply it are neither relevant nor useful to our understanding of section 408.161.

B

The court of appeals does cite one new-law case that applies section 408.161 under circumstances similar to the present case. *See Galindo*, 146 S.W.3d 755. In *Galindo*, the worker sought an award of lifetime income benefits after an exposure to sulfur dioxide gas rendered him a "pulmonary invalid." *Galindo*, 146 S.W.3d at 759–60. Pulmonary injuries are not mentioned in section 408.161. *See* TEX. LAB. CODE § 408.161(a)(1)–(7) (enumerating the seven injuries that qualify for lifetime benefits). Because the worker's injury was not one enumerated in the statute, the trial court summarily denied the worker's claim. The court of appeals, however, reversed the summary judgment, concluding that the worker's pulmonary injury raised fact questions about

whether the worker had permanently lost the use of both hands, or both feet, "or even all four extremities." *Galindo*, 146 S.W.3d at 760. The *Galindo* court thus focused on the workers' total and permanent incapacity rather than the nature of the injury producing that incapacity, just as old-law cases had done when applying the "other loss" clause. Similarly, the court here focuses on Muro's incapacity or disability and, as in *Galindo*, that disability stems from a non-statutory injury or impairment.

Concepts of "impairment" and "disability" are not interchangeable under the new law, however. The act defines "impairment" as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." TEX. LAB. CODE § 401.011(23). "Disability," on the other hand, is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." *Id.* § 401.011(16). The injuries enumerated in section 408.161 all result in impairments, but whether they also result in disabilities will "depend upon the nature of the employee's pre-injury job." *Mid-Century Ins. Co. v. Tex. Workers' Comp. Comm'n*, 187 S.W.3d 754, 760 (Tex. App.—Austin 2006, no pet.). Section 408.161 therefore defines lifetime-income-benefits eligibility in terms of specific impairments rather than general disabilities. *See id.* (noting that § 408.161 defines eligibility without regard to the existence of a disability); *cf. Consol. Underwriters v. Langley*, 170 S.W.2d 463, 464 (Tex. 1943) (noting that "[w]here injury results to a particular member of the body, compensation for the loss of which is specifically provided by statute, the liability of the insurer is limited to that amount, even though the loss of or injury to that particular member actually results in total permanent incapacity of the employee to labor").

The statute merely provides that lifetime income benefits are to be paid for the seven injuries or conditions enumerated in section 408.161. *Compare* TEX. LAB. CODE § 408.161, *with* TEX. REV. CIV. STAT. ANN. art. 8306, § 11a (repealed). Had the Legislature intended for total and permanent incapacity to serve generally as the basis for the award of lifetime income benefits under the new law, it would have retained the old law's "other loss" clause or replaced the specific injuries and conditions enumerated in section 408.161 with a disability system focused on the worker's inability to work. Because the Legislature chose both to retain the enumerated injuries and to repeal the "other loss" clause, it clearly did not intend to continue the broader application of lifetime income benefits formerly recognized by some courts of appeals under the old-law's "other loss" clause.

C

The evidence in this case indicates that physical injuries to Muro's hips, shoulder, back, and neck limited or impaired her ability to use her feet and right hand. There was no evidence, however, that these physical injuries extended to the hand or feet, either directly or indirectly as was the case in *Burdine*, another decision on which the court of appeals relies. *See* 285 S.W.3d at 529 (citing *Burdine*, 34 S.W.3d at 707).

In *Burdine*, the worker's injury involved her back and "the associated nerve roots" which extended "down the legs into the feet." *Burdine*, 34 S.W.3d at 706. The treating physician testified that the injury had caused a "muscular malfunction" rendering the worker unable to lift her feet, a condition referred to as "footdrop." *Id*. The physician further testified that the worker was totally disabled and that the loss of her legs and feet at or above the ankles was a permanent condition for which he had prescribed an electric wheelchair. *Id*. at 706–07. The injury in *Burdine* therefore

extended to the worker's feet and resulted in her inability to "get and keep employment requiring [their] use." *Burdine*, 34 S.W.3d at 707 (quoting *Seabolt*'s definition of "total loss of use"). This evidence of an injury to a body part enumerated in the statute distinguishes *Burdine* from the present case.[4]

Under the old law, we said that an injury to one body part or system could extend to and affect another body part or system and thereby amplify the benefits otherwise due an injured worker. *Tex. Employers' Ins. Ass'n v. Wilson*, 522 S.W.2d 192, 194 (Tex. 1975); *Travelers Ins. Co. v. Marmolejo*, 383 S.W.2d 380, 381–82 (Tex. 1964). But Muro does not contend that her injuries extended to her feet or right hand. The expert testimony confirms that they did not. Muro urges instead that injuries to her hips, back, neck, and shoulder were sufficient to support the underlying award of lifetime income benefits. We cannot agree.

The Legislature has limited the award of lifetime income benefits to the specific injuries and body parts enumerated in section 408.161; nothing in the statute authorizes the substitution of other injuries or body parts for those enumerated. TEX. LAB. CODE § 408.161. The injury to the statutory body part may be direct or indirect, as in *Burdine*, but the injury must extend to and impair the statutory body part itself to implicate section 408.161. Because there is no contention here that Muro's feet and right hand ceased to possess "any substantial utility as a member of the body"[5] and no evidence of injury to these body parts that prevented her from procuring and retaining

[4] *Burdine* is also an old-law case, and the result in the case might also be justified under the former act's "other loss" clause. TEX. REV. CIV. STAT. ANN. art. 8306, § 11a (repealed).

[5] *Seabolt* recognized this as an alternative definition for the "total loss of use of a member." The Division of Workers' Compensation adjudicated the "substantial utility" theory of recovery against Muro, and it is not an issue in this appeal. *See Seabolt*, 361 S.W.2d at 205–06.

employment requiring their use, we conclude that Muro is not entitled to the award of lifetime income benefits. *See Seabolt*, 361 S.W.2d at 206.

III

The insurance carrier also complains about the award of attorney's fees. An insurance carrier that seeks judicial review of a TWCC appeals panel's final decision regarding, among other things, benefits eligibility is liable for reasonable and necessary attorney's fees incurred by a prevailing claimant in the appeal. TEX. LAB. CODE § 408.221(c). Muro was accordingly awarded attorney's fees because she prevailed in the district court, and the court of appeals affirmed that award. Our determination that Muro is not entitled to lifetime income benefits under section 408.161 requires that we also reverse her award of attorney's fees.

* * *

The court of appeals' judgment is reversed and judgment is rendered denying the claimant an award of lifetime income benefits under section 408.161 of the workers' compensation act.

_____

David M. Medina
Justice

Opinion Delivered: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 08-0523

TEXAS LOTTERY COMMISSION, PETITIONER,

v.

FIRST STATE BANK OF DEQUEEN, STONE STREET CAPITAL, INC., AND CLETIUS L. IRVAN, RESPONDENTS

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

Argued December 16, 2009

JUSTICE JOHNSON delivered the opinion of the Court.

This case arises because provisions of the Texas Uniform Commercial Code (UCC) and the Texas Lottery Act conflict as to whether installment payments of a lottery prize are assignable. The primary issues are whether the Commission has sovereign immunity from suit and whether the Lottery Act's prohibition against transferring the last two installments of a prize are negated by the UCC.

Cletius Irvan, a Texas Lottery prizewinner, assigned his final two annual installment prize payments as part of a financial arrangement by which he was to pay a bank debt. The Lottery Commission refused to recognize the assignment because the Lottery Act prohibits assignments of installment payments due within the final two years of the prize payment schedule. Irvan and other

parties to the assignment sought a declaratory judgment that the UCC permits such assignments and specifically renders conflicting provisions of the Lottery Act ineffective. The trial court and court of appeals held that the UCC prevailed and the assignments were permitted. We agree and affirm the court of appeals' judgment.

I. Background

A. The Statutory Conflict

When the Lottery Act was first enacted, lottery prizes generally could not be assigned, and to the extent they could be assigned, the assignment had to be pursuant to an "appropriate judicial order" that resolved a controversy involving the prize winner. *See* Act of Aug. 12, 1991, 72nd Leg., 1st C.S., ch. 6, § 2, 1991 Tex. Gen. Laws 197, 218 (current version at TEX. GOV'T CODE § 466.406). In 1999, the Act was amended and restrictions on assignment of prizes were relaxed. Act of May 30, 1999, 76th Leg., R.S., ch. 1394, §§ 2, 4, 1999 Tex. Gen. Laws 4717, 4717-18. The amended provisions authorized prize winners to assign all but the last two installment prize payments if certain requirements were met.[1] TEX. GOV'T CODE § 466.410(a). Under the amended Act, however, "prize payments due within the final two years of the prize payment schedule may not be assigned." *Id.*

[1] The requirements are not relevant to disposition of this appeal, but they include: (1) approval of the assignments by a district court in Travis County, (2) service of the petition seeking approval on the executive director of the Lottery Commission, (3) the assignment being in writing, and (4) the assignor providing an affidavit stating that he is of sound mind, is over 18 years of age, has been advised regarding the assignment by independent legal counsel, has had the opportunity to receive independent financial advice, and has been provided a disclosure stating the payments being assigned, the purchase price being paid, the rate of discount to the present value of the prize, and the amount of closing fees. TEX. GOV'T CODE § 466.410(b).

The apparent statutory conflict in this case arises because thirteen days before amending the Lottery Act in 1999 the Legislature amended the UCC and included "winnings in a lottery or other game of chance operated or sponsored by a state" as part of the definition of "account." Act of May 17, 1999, 76th Leg., R.S., ch. 414, § 1.01, 1999 Tex. Gen. Laws 2639, 2640 (codified at TEX. BUS. & COM. CODE § 9.102(a)(2)(viii)). Under the UCC, accounts are assignable. *See* TEX. BUS. & COM. CODE § 9.406(a). The UCC amendments, however, did not parallel the Lottery Act amendments that prohibited assignment of the last two installment payments of a lottery prize. To the contrary, the UCC reinforced the assignable character of accounts by specifying that rules of law, statutes and regulations purporting to prohibit or restrict assignment of accounts are ineffective:

> [A] rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:
>
> > (1) prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account or chattel paper . . . .

Id. § 9.406(f). The amendments to the UCC were effective in 2001. In 2001, section 9.406(f) was amended in part and reenacted; the provisions making conflicting statutes ineffective were not changed by the amendment. *See* Act of May 17, 2001, 77th Leg., R.S. ch. 705, § 11, 2001 Tex. Gen. Laws 1403, 1405 (codified at TEX. BUS. & COM. CODE § 9.406(f)).

B. Facts

Cletius Irvan won a Texas Lottery prize in 1995. The prize was payable in twenty annual installments of just over $440,000 each, with the final two payments to be made in 2013 and 2014. After the Legislature amended the Act so prize payments could be assigned, Irvan assigned his rights to all but the last two of his prize payments in exchange for a lump sum.[2] He later became indebted to First State Bank of DeQueen (FSB DeQueen). Arrangements were made in 2006 for Irvan to pay the debt through a common-law Composition of Creditors proceeding in Arkansas. The creditors' arrangement provided for Irvan to assign the rights to his final two annual lottery payments to Stone Street Capital, which would in turn assign the rights to Great-West Life and Annuity. In consideration for assigning his rights, Irvan was to receive a lump sum of $308,032, out of which he would pay FSB DeQueen. The arrangement was approved by an Arkansas court. FSB DeQueen notified the Lottery Commission of the assignment and filed an application in Travis County to register the Arkansas judgment approving the arrangement. *See* TEX. CIV. PRAC. & REM. CODE § 35.003. The Commission advised FSB DeQueen and Irvan that it did not recognize the validity of the Arkansas judgment and it intended to make the final prize payments to Irvan.

FSB DeQueen, Irvan, and Stone Street Capital (collectively, FSB) filed suit pursuant to the Declaratory Judgments Act (DJA) seeking declaratory and injunctive relief. *See id.* §§ 37.001-.011. Specifically, FSB sought declaratory judgment that (1) the final Arkansas order is effective as a Travis County judgment, (2) Section 9.406(c) of the UCC renders Lottery Act sections 466.406 and 466.410 ineffective, (3) the assignments of the final prize payments from Irvan to Stone Street and

[2] Irvan made two assignments to the same company. The record is not clear whether he received one or two lump sum payments.

from Stone Street to Great-West are enforceable, and alternatively, (4) the Arkansas Final Order is an "appropriate judicial order pursuant to which the Commission shall make the final prize payments to Great-West." *See* TEX. GOV'T CODE § 466.406(f) ("A prize to which a winner is otherwise entitled may be paid to any person under an appropriate judicial order."). FSB also requested the court to enjoin the Commission and to require it to make the final lottery payments to Great-West.

FSB moved for partial summary judgment on its claim that the UCC renders the anti-assignment provisions of the Lottery Act ineffective. The trial court granted the motion and declared that UCC sections 9.406 and 9.102 render Lottery Act sections 466.406 and 466.410 ineffective to the extent those sections purport to restrict or prohibit assignment of prize payments. At the parties' request, the trial court severed the UCC claim and the Commission appealed the summary judgment. The court of appeals affirmed. 254 S.W.3d 677.

In this Court, the Commission seeks reversal of the court of appeals judgment on the bases that: (1) the Commission has sovereign immunity from suit, thus the appeal and suit should be dismissed for lack of jurisdiction; (2) under the UCC, conflicts should be resolved in favor of the Lottery Act because the act is a consumer protection law; and (3) under established canons of statutory interpretation regarding conflicting statutes, the Lottery Act controls.[3] We disagree with the Commission and affirm the judgment of the court of appeals.

II. Jurisdiction

[3] The Commission also, in a footnote, urges that the UCC does not apply because it is inapplicable to assignments undertaken to satisfy a preexisting debt such as Irvan's debt to FSB DeQueen. The Commission does not cite authority for nor present argument to support its position. We decline to make its case for it. *See* TEX. R. APP. P. 55.2(i).

The Commission first argues that it has sovereign immunity from suit so the appeal and suit should be dismissed for lack of jurisdiction. It urges that this is an *ultra vires* suit which must be brought against a state official and it cannot be brought against the Commission because the Commission is a governmental entity. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372-73 (Tex. 2009). FSB counters that this appeal involves a challenge to the validity of a statute and the DJA waives the Commission's immunity as to such claims. We agree with FSB. As we explain below, the claim in this appeal is not one involving a government officer's action or inaction, but is a challenge to a statute. Thus this is not an *ultra vires* claim to which a government officer must be a party.

An *ultra vires* suit is one to require a state official to comply with statutory or constitutional provisions. *Id.* at 372. In *Heinrich* we distinguished between claims seeking declaratory relief in an *ultra vires* suit, which must be brought against governmental officials, and suits challenging the validity of an ordinance or statute. *Id.* at 373 n.6 ("For claims challenging the validity of ordinances or statutes . . . the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity." (citing TEX. CIV. PRAC. & REM. CODE § 37.006(b))). While FSB filed an initial claim challenging Commission actions and requesting the Commission be required to comply with statutory provisions, that is not the claim at issue here. FSB asserted in its pleadings that the Commission did not recognize the validity of the final order filed in Travis County and refused to acknowledge and comply with it, but that the Act authorized the Commission to accept and comply with the assignments. FSB requested a declaratory judgment that the final order was an appropriate judicial order pursuant to which the Commission should make payments to

Great-West. It also sought a judgment enjoining the Commission to make payments to Great-West. Those claims were severed from the question ruled on by the trial court and at issue here: whether UCC sections 9.406 and 9.102 render Texas Government Code sections 466.406 and 466.410 ineffective to the extent those sections restrict or prohibit the assignment of Texas Lottery prize payments. FSB asserts that immunity does not apply because, unlike the plaintiff in *Heinrich*, it is not challenging an individual's actions under a statute, but is challenging the validity of the statute itself. We agree.

> The Declaratory Judgments Act
>
> > expressly provides that persons may challenge ordinances or statutes, and that governmental entities must be joined or notified. Governmental entities joined as parties may be bound by a court's declaration on their ordinances or statutes. The Act thus contemplates that governmental entities may be—indeed must be—joined in suits to construe their legislative pronouncements.

Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 446 (Tex. 1994).[4]

The Commission also argues that the DJA does not waive immunity in this case because it only waives immunity of a municipality, not a state entity. The Commission points to Civil Practice and Remedies Code section 37.006(b), which states that "[i]n any proceeding that involves the validity of a municipal ordinance . . . the municipality must be made a party." But the Court in *Leeper* did not rely on section 37.006 when it concluded that "governmental entities" are to be joined in suits to construe legislative pronouncements. Rather, the Court concluded that because the DJA permits statutory challenges and governmental entities may be bound by those challenges, the DJA

[4] *See also Heinrich*, 284 S.W.3d at 373 n.6 (citing Texas Civil Practice and Remedies Code section 37.006(b) and noting that when the *validity* of ordinances or statutes is challenged, the DJA waives immunity to the extent it requires relevant governmental entities be made parties).

contemplates entities must be joined in those suits. *Leeper*, 893 S.W.2d at 446. We have subsequently applied the holding of *Leeper* to different governmental entities. *Heinrich*, 284 S.W.3d at 373 n.6; *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-98 (Tex. 2003); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 859-60 (Tex. 2002). Accordingly, we disagree that the DJA only waives the immunity of municipalities.

Next, the Commission asserts that the DJA does not waive immunity because it applies only to suits involving constitutional invalidation and not to those involving statutory interpretation. But the language in the DJA does not make that distinction. In *Leeper*, the issue was whether a mandatory school attendance private school exemption statute applied to children taught at home. *Leeper*, 893 S.W.2d at 433. While the plaintiffs also claimed that enforcement of the statute violated their constitutional rights, the Court did not reach the constitutional issue. *Id.* at 446. Rather, the DJA discussion was in the context of a statutory clarification. *Id.*

Because the claim at issue here is not one involving a government officer's action or inaction, but is a challenge to a statute, this is not an *ultra vires* claim to which a government officer should have been made a party. The decision on this claim may ultimately impact actions taken by officers of the Commission, but that does not deprive the trial court of jurisdiction. *Id.* at 445 (noting that the DJA allows courts to declare relief "whether or not further relief is or could be claimed"). The trial court properly exercised jurisdiction over this claim.

We next turn to the question of whether the UCC impacts the Lottery Act's anti-assignment provisions, and if so, how.

III. Construing the Statutes

We review issues of statutory construction de novo. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). In construing statutes our primary objective is to give effect to the Legislature's intent. *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008). We presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind. *See In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *Chastain v. Koonce*, 700 S.W.2d 579, 582 (Tex. 1985).

A. Does the Lottery Act Provide a Different Rule for Consumers?

The UCC authorizes state lottery winners to freely assign their winnings. TEX. BUS. & COM. CODE § 9.406(a) (permitting account assignments); *see id.* § 9.102(a)(2)(viii) (including "winnings in a lottery or other game of chance operated or sponsored by a state" in the definition of "Account"). Citing section 9.201 of the UCC, the Commission asserts that Chapter 9 of the UCC conflicts with the Lottery Act and the Lottery Act controls.

Section 9.201 of the UCC provides, in relevant part:

> (b) A transaction subject to this chapter is subject to any applicable rule of law that establishes a different rule for consumers . . . .
>
> (c) In case of a conflict between this chapter and a rule of law, statute, or regulation described in Subsection (b), the rule of law, statute, or regulation controls.

Id. § 9.201. The Commission asserts sections 9.201(b) and (c) make it clear that any conflict between Article 9 and consumer protection laws must be resolved against Article 9 and that the

Lottery Act and its anti-assignment provisions are unquestionably consumer protection provisions. FSB counters that (1) the Lottery Act provision does not "establish a different rule of law for consumers" because neither the Lottery Act nor the UCC refers to lottery prize winners or assignors as "consumers," (2) the Lottery Act's anti-assignment provisions protect lottery *winners* who are not consumers, but rather who are account creditors who sell their rights, and (3) a lottery winner such as Irvan who sells his right to receive payments is not purchasing or acquiring anything, thus he cannot be a consumer as to the transaction. We agree with FSB that the Lottery Act does not provide a different rule for consumers within the meaning of section 9.201 of the UCC.

Chapter 9 of the UCC does not provide a definition for "consumer," but the term is defined in Chapter 1 as "an individual who enters into a transaction primarily for personal, family, or household purposes." *Id.* § 1.201(b)(11). The Chapter 1 definitions apply to all chapters of the UCC except when the context in which they are used requires otherwise or a different definition is provided by a particular chapter. *Id.* § 1.201(a). Neither of the exceptions applies here, thus the definition in section 1.201(b)(11) applies.

While the Lottery Act establishes a rule regarding lottery prize assignments different from the provisions in the UCC, the Lottery Act's rule is not specifically directed at or limited to individuals who enter into a transaction primarily for personal, family, or household purposes. Any purchaser of a lottery ticket, whether an individual or some type of entity such as a partnership, trust, or corporation, purchases the ticket subject to the provisions of the Lottery Act. TEX. GOV'T CODE § 466.252 ("By purchasing a ticket in a particular lottery game, a player agrees to abide by and be bound by the commission's rules, including the rules applicable to the particular lottery game

involved."). The Lottery Act provides that "[a] person may assign, in whole or in part, the right to receive prize payments that are paid by the commission" and then sets out what is required of the assignor. *Id.* § 466.410. The Legislature has defined the term "person" to include "[a] corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." *Id.* § 311.005(2). Nothing in section 466.410 indicates the assignment provisions are applicable only when an individual purchases a ticket, much less only when an individual purchases a ticket for purposes of personal, family, or household use. *See* TEX. BUS. & COM. CODE § 1.201(b)(11). Nor does the Lottery Act limit the applicability of the assignment provisions and restrictions to individuals such as Irvan, even if they are entering the assignment transaction to receive and use money for personal, family, or household purposes. To the contrary, the Lottery Act contemplates that a prizewinner, and therefore a person entitled to receive and assign—or restricted from assigning—prize payments, may be "persons" who are not individuals or consumers. *See* TEX. GOV'T CODE § 466.406(b). Furthermore, the Lottery Act refers to "individuals" in several sections. *See, e.g.*, *id.* § 466.3051 (providing that an individual younger than eighteen years of age may not purchase a lottery ticket); *id.* § 466.409 (providing that certain individuals are not eligible to receive lottery prizes). The fact that the Legislature made certain provisions of the Act applicable only to individuals indicates that its use of the word "person" rather than "individual" in section 466.410 was intentional. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 193 n.20 (Tex. 2007); *see also Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009) (noting that we examine the Legislature's words in context of the statute as a whole and do not consider words or parts of the statute in

isolation). So, while section 466.410 applies to individuals who assign or desire to assign their prize payments for personal, family, or household purposes, the use of "person" in context of section 466.410 does not require a different definition than that prescribed by the Code Construction Act. And, we do not see how use of the Legislature's definition yields an absurd result. Under the circumstances, we are bound to construe the term "person" to mean what the Legislature defined it to mean, and it is not limited to consumers as defined by the Lottery Act, the UCC, or any other applicable definition of consumer. Moreover, if section 9.201(b)'s reference to a statute or rule that establishes a different rule for consumers encompasses statutes and rules applying equally to both consumers and non-consumers, as opposed to only consumers, then all conflicting laws or rules that apply to consumers would be subject to the exception, and the exception would swallow the UCC's overarching rule that accounts are assignable.

The Commission stresses that a transaction by a consumer occurred in this case: Irvan assigned his future lottery winnings in return for an up-front lump sum payment—a transaction primarily for personal, family, or household purposes. But even assuming Irvan's assignment was a consumer *transaction*, the UCC does not address individual transactions undertaken by consumers. It addresses rules of law, statutes, and regulations that apply broadly. Section 466.410 establishes a rule for all persons, not just individuals involved in Lottery Act transactions primarily for personal, family, or household purposes. Read in context, we do not believe section 466.410 is a statute or rule of law "that establishes a different rule for consumers" within the meaning of section 9.201(b).

B. Do Canons of Construction Apply?

The Commission asserts that the UCC does not render the Lottery Act assignment restrictions in sections 466.406 and 466.410 ineffective based on established canons of statutory interpretation. It points to the Code Construction Act, which provides guidance for courts when they seek to determine the Legislature's intent. Specifically, the Commission points to the following as legislative guidance that should be used here: (1) an entire enacted statute is presumed to be effective, TEX. GOV'T CODE § 311.021(2); (2) if statutes are irreconcilable, the statute latest in date of enactment prevails, *id.* § 311.025(a); and (3) a specific statutory provision prevails as an exception over a conflicting general provision. *Id.* § 311.026.

FSB argues that even though the Legislature's guidance for construing statutes would confirm the conclusions of the trial court and court of appeals if they were applied, applying the canons is inappropriate because in the UCC the Legislature specifically provided the means for resolving conflicts between the UCC and other statutes such as the Lottery Act. We agree with FSB that because the Legislature expressly and unambiguously set out the method for resolving conflicts between the UCC and other statutes, it would be improper to go outside the language of the statute and use canons of construction to resolve the question. *City of Rockwall*, 246 S.W.3d at 626 ("When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language."). Courts "do not lightly presume that the Legislature may have done a useless act." *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998). But we must take statutes as we find them and first and primarily seek the Legislature's intent in its language. *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997). Courts are not responsible for omissions in legislation, but we are responsible for a true and fair

interpretation of the law as it is written. *Id.* Additionally, "[i]t is at least theoretically possible that legislators—like judges or anyone else—may make a mistake." *Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004). Even when it appears the Legislature may have made a mistake, courts are not empowered to "fix" the mistake by disregarding direct and clear statutory language that does not create an absurdity. *See id.* (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979)). And although some might believe precluding lottery prize winners from assigning all or some of their installment payments is the better policy choice, we do not see how it is an absurdity to construe this clear statutory language to mean what it says. Here the result is that lottery winners are allowed to assign what no one contests is their property, even at the risk of their making poor assignment choices.

The UCC specifies that state lottery winnings are accounts and are assignable, TEX. BUS. & COM. CODE § 9.406(a), but the Lottery Act prohibits assignments of the last two prize installments. TEX. GOV'T CODE §§ 466.406, 466.410. While these statutory provisions conflict, the Legislature also explicitly provided that "a rule of law, statute, or regulation that prohibits [or] restricts" an assignment of a prize won in a state lottery "is ineffective." TEX. BUS. & COM. CODE § 9.406(f). Giving effect to the clear legislative language about how to resolve conflicts regarding assignments results in there being no conflict to resolve because the Lottery Act's anti-assignment provisions are ineffective insofar as they conflict with the UCC.

Moreover, the Commission's argument that we should not construe the UCC to render the Lottery Act anti-assignment provisions useless turns on itself. If we construe the Lottery Act's anti-assignment restrictions as valid because otherwise their enactment would be a useless legislative

action, we render UCC section 9.406(f) useless as it applies here. Under that construction section 9.406(f) would be useless legislative action, at least in part, because that section clearly was enacted to address situations in which the Legislature enacted a conflicting statute.

The Commission points to cases from other jurisdictions holding that statutory restrictions on lottery assignments are effective. In three of the cases the facts and statutes are distinguishable from those at issue here. *See In re Guluzian*, No. BK 04-10390-JMD, 2004 WL 2813523, at *3 (Bankr. D.N.H. Dec. 3, 2004) (noting that legislation amending the UCC assignment provisions to include lottery payments also amended the lottery statute to provide that the lottery prize assignment prohibition prevailed over UCC provisions); *In re Duboff*, 290 B.R. 652, 656 (Bankr. C.D. Ill. 2003) (holding that UCC provision was inapplicable because it was not enacted until nineteen months after the assignment was executed); *Midland States Life Ins. Co. v. Cardillo*, 797 N.E.2d 11, 17-18 (Mass. App. Ct. 2003) (noting that at the same time the UCC was amended, the lottery statute was amended to provide that it prevailed over UCC provisions).

In two cases factually similar to the one before us, courts held that statutory restrictions on lottery prize assignments prevailed over UCC provisions declaring such restrictions ineffective. *See Stone St. Capital, LLC v. Cal. State Lottery Comm'n*, 80 Cal. Rptr. 3d 326, 340 (Cal. Ct. App. 2008); *Va. State Lottery Dept. v. Settlement Funding, LLC*, No. CH-2003-183848, 2005 WL 3476682, at *3 (Va. Cir. Ct. Nov. 7, 2005). But in both those cases, the courts relied on statutory construction aids to reach their conclusions. *Stone St. Capital*, 80 Cal. Rptr. 3d at 333 (noting that under California rules of statutory construction, a more specific statute controls over a general statute, regardless of which statute was passed earlier); *Va. State Lottery Dep't*, 2005 WL 3476682, at *2-3

(applying the rule of statutory construction that a specific statute applies over a general one). While we have no argument with how those courts resolved their statutory conflicts, neither court discussed resolving the conflict by initially and primarily looking at the language in the statutes themselves. In contrast, we construe statutes by first looking to the statutory language for the Legislature's intent, and only if we cannot discern legislative intent in the language of the statute itself do we resort to canons of construction or other aids such as which statute is more specific. *City of Rockwall*, 246 S.W.3d at 626. Under Texas rules of statutory construction, the language of UCC section 9.406 prevails because on its face it manifests clear legislative intent that conflicting statutes are ineffective.

The Commission argues that failing to give effect to the Lottery Act would essentially amount to an impermissible requirement that the Legislature use explicit language to carve out the Lottery Act from the reach of section 9.406; in other words, a requirement of a "magical password." *See Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) ("When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'"). But Justice Scalia was referring to provisions that require Congress to use specific language in order to repeal, limit, or modify a statutory provision. *See id.* Here, UCC section 9.406(f) does not require some specific language to be included in subsequent legislation in order for it to be modified or repealed. Nor does the Commission contend that the Legislature was attempting to repeal or otherwise modify section 9.406(f) when it enacted the prohibition on lottery prize assignments.

Finally, the Commission asserts that we should give serious consideration to the Commission's construction of the Lottery Act, by which it gives full effect to the assignment restrictions. *See Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993) ("Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute."). But here we are not construing the Lottery Act. We are construing the UCC and determining whether it renders sections 466.406 and 466.410 of the Lottery Act ineffective. The Commission does not argue that it is charged with enforcement of the UCC, and even if it were so charged, its interpretation of the UCC contradicts the plain language of that statute. *See id.*

In sum, the language of UCC section 9.406(f) is clear; we need not use a canon of construction to construe it other than the prime canon: we construe statutes by first looking to the statutory language for the Legislature's intent, and only if we cannot discern legislative intent in the language of the statute itself do we resort to canons of construction or other aids such as which statute is more specific. *City of Rockwall*, 246 S.W.3d at 626. Here the statute's unambiguous words disclose the legislative intent: if the Legislature should happen to have enacted, or enacts, a conflicting statute, the conflicting statute is "ineffective to the extent that the . . . statute . . . prohibits [or] restricts" the assignment of an account. TEX. BUS. & COM. CODE § 9.406(f). Section 9.406(f) makes sections 466.406 and 466.410 of the Lottery Act ineffective to the extent they prohibit or restrict Irvan's assignment.

IV. Child Support

Finally, the Commission asserts that holding the UCC prevails over sections 466.406 and 466.410 will inhibit the State's efforts to collect child support because the Lottery Act provisions requiring the Commission to deduct the amount of a child support lien before paying a prize to a child support obligor will also be rendered ineffective. *See* TEX. GOV'T CODE § 466.4075. The argument is substantively similar to the argument that we should use construction aids to resolve the conflict between the statutory provisions; it effectively urges us to disregard the rule that when a statute's language is clear and unambiguous courts do not resort to rules of construction or extrinsic aids to construe the language. *See City of Rockwall*, 246 S.W.3d at 626. We agree that persons who owe child support should pay it. But when the language of a statute is clear, it is not the judicial prerogative to go behind or around that language through the guise of construing it to reach what the parties or we might believe is a better result. *See Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 847 (Tex. 2009).

V. Conclusion

Sections 466.406 and 466.410 of the Lottery Act are ineffective to the extent they restrict or prohibit Irvan's assignment. We affirm the judgment of the court of appeals.

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Phil Johnson
Justice

OPINION DELIVERED: October 1, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0377

AARON GLENN HAYGOOD, PETITIONER,

v.

MARGARITA GARZA DE ESCABEDO, RESPONDENT

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

Argued September 16, 2010

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

JUSTICE LEHRMANN filed a dissenting opinion, in which JUSTICE MEDINA joined.

Damages for wrongful personal injury include the reasonable expenses for necessary medical care, but it has become increasingly difficult to determine what expenses are reasonable. Health care providers set charges they maintain are reasonable while agreeing to reimbursement at much lower rates determined by insurers to be reasonable, resulting in great disparities between amounts billed and payments accepted. Section 41.0105 of the Texas Civil Practice and Remedies Code, enacted in 2003 as part of a wide-ranging package of tort-reform measures,[1] provides that "recovery of

[1] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.08, 2003 Tex. Gen. Laws 847, 889.

medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."[2] We agree with the court of appeals[3] that this statute limits recovery, and consequently the evidence at trial, to expenses that the provider has a legal right to be paid.

I

Aaron Glenn Haygood sued Margarita Garza De Escabedo for injuries he sustained when the car he was driving collided with Escabedo's minivan as she was pulling out of a grocery store parking lot. Haygood's injuries required surgeries on his neck and shoulder. Both were successful, but some impairment remains.

Twelve health care providers billed Haygood a total of $110,069.12, but he was covered by Medicare Part B, which generally "pays no more for . . . medical and other health services than the 'reasonable charge' for such service."[4] Criteria for determining reasonable charges include customary charges for similar services and prevailing charges in the same locality for similar services.[5] Federal law prohibits health care providers who agree to treat Medicare patients from charging more than Medicare has determined to be reasonable.[6] Accordingly Haygood's health care

[2] TEX. CIV. PRAC. & REM. CODE § 41.0105.

[3] 283 S.W.3d 3 (Tex. App.–Tyler 2009).

[4] 42 C.F.R. § 405.501(a).

[5] 42 C.F.R. § 405.502(a).

[6] 42 U.S.C. § 1395cc(a)(1)-(2).

providers adjusted their bills with credits of $82,329.69, leaving a total of $27,739.43. At the time of trial, $13,257.41 had been paid, and $14,482.02 was due.[7]

Invoking section 41.0105, Escabedo moved to exclude evidence of medical expenses other than those paid or owed. Haygood, asserting the collateral source rule, moved to exclude evidence of any amounts other than those billed, and of any adjustments and payments. The trial court denied Escabedo's motion and granted Haygood's. At trial, Haygood offered evidence from each of his health care providers that the charges billed were reasonable and the services necessary. The jury found that Escabedo's negligence caused the accident and that Haygood's damages were $110,069.12 for past medical expenses, $7,000 for future medical expenses, $24,500 for past pain and mental anguish, and $3,000 for future pain and mental anguish. The trial court overruled Escabedo's objection to an award of past medical expenses in excess of those paid or owed and rendered judgment on the verdict.

The court of appeals reversed, holding that section 41.0105 precluded evidence or recovery of expenses that "neither the claimant nor anyone acting on his behalf will ultimately be liable for paying".[8] The court suggested a remittitur of the amount of the health care providers' adjustments,[9] which Haygood did not accept, and the case was remanded for a new trial.[10] The court noted that

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[7] The record indicates that almost all of what has been paid was by insurance.

[8] 283 S.W.3d at 7.

[9] The court of appeals miscalculated the adjustments by $35. *Id.* at 5, 8.

[10] *Id*. at 8.

two other courts had reached conflicting decisions.[11] We granted Haygood's petition for review to resolve the conflict.[12]

II

The Legislature enacted section 41.0105 against a backdrop of health care pricing practices and the collateral source rule. We discuss each before turning to the statutory text and its consequences.

A

Charges for health care, once based on the provider's costs and profit margin, have more recently been driven by government regulation and negotiations with private insurers.[13] A two-tiered structure has evolved: "list" or "full" rates sometimes charged to uninsured patients,[14] but

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[11] *Id*. at 7 (citing *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 931-933 (Tex. App.–Dallas 2009, pet. denied), and *Gore v. Faye*, 253 S.W.3d 785, 789-790 (Tex. App.–Amarillo 2008, no pet.)). Since then, two other courts have followed *Brown*. *Arango v. Davila*, Nos. 13-09-00470-CV, 13-09-00627-CV, 2011 WL 1900189, at *9 (Tex. App. –Corpus Christi May 19, 2011, no pet. h.); *Frontera Sanitation, L.L.C. v. Cervantes*, No. 08-08-00330-CV, 2011 WL 1157559, at *5 (Tex. App.–El Paso Mar. 30, 2011, no pet. h.).

[12] 53 Tex. Sup. Ct. J. 562 (Apr. 9, 2010).

[13] *See* Keith T. Peters, *What Have We Here? The Need for Transparent Pricing and Quality Information in Health Care: Creation of an SEC for Health Care*, 10 J. HEALTH CARE L. & POL'Y 363, 366 (2007) ("The price of a particular provider's services depends on many factors including geography, experience, location, government payment methods, and the desire to make a profit. Hospital prices are supposed to be determined by the cost of providing care. However, the reimbursement rates for federal programs such as Medicare and Medicaid drive the list price of health care.") (footnotes omitted).

[14] *See* Uwe E. Reinhardt, *The Pricing Of U.S. Hospital Services: Chaos Behind A Veil Of Secrecy*, 25 HEALTH AFF. 57, 62 (2006) ("Partly under pressure from consumers and lawmakers and partly on their own volition, many hospitals now have means-tested discounts off their chargemasters for uninsured patients, which bring the prices charged the uninsured closer to those paid by commercial insurers or even below. Some very poor patients, of course, have received hospital care free of charge all along, on a purely charitable basis.") (footnote omitted).

frequently uncollected,[15] and reimbursement rates for patients covered by government and private insurance.[16] We recently observed that "[f]ew patients today ever pay a hospital's full charges, due to the prevalence of Medicare, Medicaid, HMOs, and private insurers who pay discounted rates."[17] Hospitals, like health care providers in general,[18] "feel financial pressure to set their 'full charges' . . . as high as possible, because the higher the 'full charge' the greater the reimbursement amount the hospital receives since reimbursement rates are often set as a percentage of the hospital's 'full charge.'"[19]

Although reimbursement rates have been determined to be reasonable under Medicare or other programs, or have been reached by agreements between willing providers and willing insurers, providers nevertheless maintain that list rates are also reasonable. Providers commonly bill insured patients at list rates, with reductions to reimbursement rates shown separately as adjustments or

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[15] *See* George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L.J. 101, 120 (2005-06) ("While all uninsured patients are expected to pay the hospital's 'full charges,' it appears that in fact less than five percent actually pay the full charge.").

[16] *See* Peters, *supra* note 13, at 366 ("The 'price' of health care . . . can be divided into two prices. First, there is the list price[,] . . . similar to the sticker price one might find when purchasing a new car — it serves only as a beginning point for the negotiations, for those who have the market share to negotiate. . . . From these list prices, private insurers, Medicaid and Medicare, and other groups negotiate discounts to arrive at . . . the 'actual price.' Although the list price of health care varies widely across different regions of the country, the actual price paid is relatively static.") (footnotes omitted).

[17] *Daughters of Charity Health Servs. of Waco v. Linnstaedter*, 226 S.W.3d 409, 410 (Tex. 2007) (citing Nation, *supra* note 15, at 104 ("[A] hospital's 'regular rates,' 'full charges,' or 'list prices' . . . are generally at least double and may be up to eight times what the hospital would accept as payment in full for the same services from Medicare, Medicaid, HMOs, or private insurers. The labels for these charges, 'regular,' 'full,' or 'list,' are misleading, because in fact they are actually paid by less than five percent of patients nationally.") (footnotes omitted)).

[18] *See, e.g., Vencor, Inc. v. Nat'l States Ins. Co.*, 303 F.3d 1024, 1029 n.9 (9th Cir. 2002) ("It is worth noting that in a world in which patients are covered by Medicare and various other kinds of medical insurance schemes that negotiate rates with providers, providers' supposed ordinary or standard rates may be paid by a small minority of patients.").

[19] *See* Nation, *supra* note 15, at 119.

credits.[20] Portions of bills showing only list charges are admitted in evidence, with proof of reasonableness coming from testimony by the provider, or more often, by affidavit of the provider or the provider's records custodian as permitted by section 18.001 of the Texas Civil Practice and Remedies Code.[21]

In all these respects, the present case is entirely typical. The providers testified the charges billed to Haygood were reasonable, even though those charges were four times the amount they were entitled to collect.

B

As a general principle, compensatory damages, like medical expenses, "are intended to make the plaintiff 'whole' for any losses resulting from the defendant's interference with the plaintiff's

[20] *See* James McGrath, *Overcharging the Uninsured in Hospitals: Shifting a Greater Share of Uncompensated Medical Care Costs to the Federal Government*, 26 QUINNIPIAC L. REV. 173, 183 (2007) ("Hospitals usually bill all patients at the list price for the same service, and then significantly discount these rates for third-party payers who contract with the hospital."); Reinhardt, *supra* note 14, at 59 ("Typically, a hospital will submit, for all of its patients, detailed bills based on its chargemaster, even to patients covered by Medicare. An advantage of these bills is that at least in principle, patients can check whether all of the supplies and services listed on the bill were actually delivered. A disadvantage, for hospitals, is that these bills are very lengthy and add up to large totals that do not bear any systematic relationship to the amounts third-party payers actually pay them for the listed services.").

[21] TEX. CIV. PRAC. & REM. CODE § 18.001(b) ("Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary."); *id.* § 18.001(c) ("The affidavit must: (1) be taken before an officer with authority to administer oaths; (2) be made by: (A) the person who provided the service; or (B) the person in charge of records showing the service provided and charge made; and (3) include an itemized statement of the service and charge.").

rights."[22] The collateral source rule is an exception.[23] Long a part of the common law of Texas[24] and other jurisdictions,[25] the rule precludes any reduction in a tortfeasor's liability because of benefits received by the plaintiff from someone else — a collateral source. Thus, for example, insurance payments to or for a plaintiff are not credited to damages awarded against the defendant.[26] "The theory behind the collateral source rule is that a wrongdoer should not have the benefit of insurance independently procured by the injured party, and to which the wrongdoer was not privy."[27]

Haygood contends that an adjustment in billed medical charges required by an insurer is a collateral benefit covered by the rule. We disagree. The benefit of insurance to the insured is the payment of charges owed to the health care provider. An adjustment in the amount of those charges to arrive at the amount owed is a benefit to the insurer, one it obtains from the provider for itself,

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[22] *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994).

[23] *See* RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1977) ("Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury.").

[24] *Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999); *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980); *Tex. & Pac. Ry. Co. v. Levi & Bro.*, 59 Tex. 674, 676 (1883).

[25] *See* RESTATEMENT (SECOND) OF TORTS § 920A(2) ("Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.").

[26] *Mid-Century*, 997 S.W.2d at 274 ("The collateral source rule bars a wrongdoer from offsetting his liability by insurance benefits independently procured by the injured party."); *Levi*, 59 Tex. at 676 ("The insurer and the defendant are not joint tort-feasors or joint debtors so as to make the payment or satisfaction by the former operate to the benefit of the latter; nor is there any legal privity between the defendant and the insurer so as to give the former the right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff at his expense, and to the procurement of which the defendant was in no way contributory . . . . It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant, nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit.") (internal quotation marks omitted).

[27] *Brown*, 601 S.W.2d at 934.

not for the insured. Haygood argues that the adjustment reduces the insured's liability, but the insured's liability is for payment of taxes, if a government insurer, or premiums, if a private insurer, and for any deductible. Any effect of an adjustment on such liability is at most indirect and is not measured by the amount of the adjustment.

The collateral source rule reflects "the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor."[28] To impose liability for medical expenses that a health care provider is not entitled to charge does not prevent a windfall to a tortfeasor; it creates one for a claimant, as we recently wrote in *Daughters of Charity Health Services of Waco v. Linnstaedter*.[29] Linnstaedter and Bolen sued Jones for injuries they sustained in a motor vehicle accident, claiming damages for the full amount of their hospital expenses.[30] The hospital was reimbursed part of those expenses by workers' compensation insurance and was precluded from seeking payment of the unpaid balance from its patients by the Workers' Compensation Act.[31] Nevertheless, the hospital asserted a lien on any damages the patients recovered against Jones.[32] Jones settled with the patients and paid the hospital the balance on its bill to discharge the lien.[33] The patients then sued the hospital for the amount of that

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[28] RESTATEMENT (SECOND) OF TORTS § 920A cmt. b.

[29] 226 S.W.3d 409, 412 (Tex. 2007).

[30] *Id*. at 410, 412.

[31] *Id*. at 410-411.

[32] *Id*. at 410.

[33] *Id.*

payment.[34] We held that the hospital's claim to part of the patients' recovery against Jones was a claim against the patients themselves that was precluded by the Act.[35] Furthermore, we said, to allow the hospital to recover more than the reimbursement allowed by the Act would defeat its purpose of controlling medical costs.[36] But the patients had sued Jones for "the full medical charges billed by the hospital rather than the reduced amount paid by their compensation carrier".[37] "[A] recovery of medical expenses in that amount", we said, "would be a windfall; as the hospital had no claim for these amounts against the patients, they in turn had no claim for them against Jones."[38] Moreover, we noted, "[t]his rule has since been codified [in TEX. CIV. PRAC. & REM. CODE § 41.0105]".[39]

Consistent with our views in *Daughters of Charity*, we hold that the common-law collateral source rule does not allow recovery as damages of medical expenses a health care provider is not entitled to charge.[40]

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[34] *Id.*

[35] *Daughters of Charity*, 226 S.W.3d at 411 ("[A] lien against a patient's tort recovery is just as much a claim against the patient as if it were filed against the patient's house, car, or bank account.").

[36] *Id.* at 412 ("Further, granting hospitals a lien in excess of the established guidelines for fair and reasonable rates would frustrate the Legislature's effort to achieve effective medical cost control through the Labor Code.").

[37] *Id.*

[38] *Id.*

[39] *Id*. at 412 n.22.

[40] Courts in other jurisdictions have split on this issue. Some agree. *Slack v. Kelleher*, 104 P.3d 958, 967 (Idaho 2004); *Stanley v. Walker*, 906 N.E.2d 852, 857-858 (Ind. 2009); *Martinez v. Milburn Enters.*, 233 P.3d 205, 222-223 (Kan. 2010); *Robinson v. Bates*, 857 N.E.2d 1195, 1200-1201 (Ohio 2006). Others do not. *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 69 (Cal. 1970); *Wills v. Foster*, 892 N.E.2d 1018, 1030 (Ill. 2008); *Bozeman v. State*, 879 So. 2d 692, 701-702 (La. 2004); *Covington v. George*, 597 S.E.2d 142, 144-145 (S.C. 2004); *Acuar v. Letourneau*, 531 S.E.2d 316, 322-323 (Va. 2000); *Leitinger v. DBart, Inc.*, 736 N.W.2d 1, 14 (Wis. 2007).

C

With this background, we turn to the text of section 41.0105, which states simply: "In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."[41] Haygood argues that a claimant incurs the full charges billed by a provider, even if the provider is required by law or contract to reduce those charges because the claimant is covered by insurance, and therefore the statute imposes no limit on recovery. In his view, "actually" modifies only "paid", or if it also modifies the second "incurred", then the first "incurred" and "actually incurred" mean the same thing. Either way, the sentence reads: "recovery of . . . expenses incurred is limited to the amount . . . incurred". This is a meaningless tautology. "Statutory language should not be read as pointless if it is reasonably susceptible of another construction."[42] An amount "actually paid" unquestionably means one for which payment has been made. And it is reasonable to read "actually" as also modifying "incurred",[43] referring to expenses that are to be paid, not merely included in an invoice and then adjusted by required credits. Thus, "actually paid and incurred" means expenses that have been or will be paid, and excludes the difference between such amount and charges the service provider bills but has no right to be paid.

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[41] TEX. CIV. PRAC. & REM. CODE § 41.0105.

[42] *Franka v. Velasquez*, 332 S.W.3d 367, 393 (Tex. 2011).

[43] *See, e.g.*, *McIntyre v. Ramirez*, 109 S.W.3d 741, 746 (Tex. 2003) (holding that the adverb "ordinarily" in the phrase "a person who would ordinarily receive or be entitled to receive a salary, fee, or other remuneration for administering care" modifies both "receive" and "be entitled to receive").

Haygood argues that this construction is inconsistent with our decision in *Black v. American Bankers Insurance Co.*,[44] but it is not. Black sued his health insurer, American Bankers, for medical bills, a portion of which had been paid by Medicare.[45] The policy covered expenses Black "actually incurred", and American Bankers argued that Black had not actually incurred the expenses paid by Medicare because he was never liable for them.[46] We held that the issue had been "resolved by the stipulation of the parties, which recites that plaintiff 'incurred the reasonable, necessary and customary charges by said Hospital . . . as shown by the bill'".[47] We added: "Further, as a matter of law, we hold that when plaintiff entered the hospital and received its services, there was created an implied contract to pay for same, and he was liable therefor until he or someone else paid the bill."[48] *Black* differs from the present case, not only because it involved the construction of a policy and primary insurance issues, but also because Black's entire bill was actually paid while most of Haygood's bill was adjusted with credits the service provider was required to apply.

Haygood concedes that in *Daughters of Charity*,[49] "[t]his court has previously implied that § 41.0105 affects the recovery of medical expenses",[50] but our decision in that case was more than an implication. As already explained, we held that a tortfeasor is not liable to a health care provider

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[44] 478 S.W.2d 434 (Tex. 1972).

[45] *Id*. at 435.

[46] *Id.* at 435-436.

[47] *Id*. at 437.

[48] *Id*.

[49] 226 S.W.3d 409, 412 n.22 (Tex. 2007).

[50] Petitioner's Brief on the Merits at 8 n.2 (emphasis omitted).

or its patients for medical expenses the patients were not required to pay the provider. For the patients to recover such expenses from the tortfeasor "would be a windfall".[51] Our holding, we said, had been "codified" in section 41.0105.[52] The effect of section 41.0105 is thus to prevent a "windfall" to a claimant. Our decision in *Daughters of Charity* does not merely imply that Haygood's argument is without merit; it rejects the argument outright.

Finally, Haygood argues that if the Legislature had intended to limit recovery, it would also have had to amend section 18.001 of the Civil Practice and Remedies Code, which states in part:

> Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.[53]

But this statute is purely procedural, providing for the use of affidavits to streamline proof of the reasonableness and necessity of medical expenses. The statute does not establish that billed charges are reasonable and necessary; on the contrary, it expressly contemplates that the issue can be controverted by affidavit, which could aver that only the amount actually paid was reasonable.

Accordingly, we hold that section 41.0105 limits a claimant's recovery of medical expenses to those which have been or must be paid by or for the claimant. All the courts of appeals that have

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[51] *Daughters of Charity*, 226 S.W.3d at 412.

[52] *Id*. at 412 n.22.

[53] TEX. CIV. PRAC. & REM. CODE § 18.001(b).

addressed the issue have reached the same conclusion,[54] although as we have said, there has been disagreement over the effect of section 41.0105 on the evidence at trial, the issue to which we now turn.

D

Haygood argues that even if section 41.0105 precludes recovery of expenses a provider has no right to be paid, evidence of such expenses is nonetheless admissible at trial. "Evidence which is not relevant is inadmissible."[55] This includes evidence of a claim of damages that are not compensable.[56] Since a claimant is not entitled to recover medical charges that a provider is not entitled to be paid, evidence of such charges is irrelevant to the issue of damages.

The question remains whether such evidence has any other probative value. A few courts in other jurisdictions have expressed concern that limiting the evidence to amounts that have been or must be paid provides the jury an unfairly low benchmark with which to gauge the seriousness of the plaintiff's injuries and awarding non-economic damages, such as for physical pain and mental anguish.[57] But there is no unfairness if reimbursable amounts are reasonable for the services

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[54] *Arango v. Davila*, Nos. 13-09-00470-CV, 13-09-00627-CV, 2011 WL 1900189, at *9 (Tex. App.–Corpus Christi May 19, 2011, no pet. h.); *Frontera Sanitation, L.L.C. v. Cervantes*, No. 08-08-00330-CV, 2011 WL 1157559, at *5 (Tex. App.–El Paso Mar. 30, 2011, no pet. h.); *Progressive Cnty. Mut. Ins. Co. v. Delgado*, 335 S.W.3d 689, 392 (Tex. App.–Amarillo 2011, no pet. h.); *Pierre v. Swearingen*, 331 S.W.3d 150, 155-156 (Tex. App.–Dallas 2011, no pet. h.); *Tate v. Hernandez*, 280 S.W.3d 534, 540-541 (Tex. App.–Amarillo 2009, no pet.); *Matbon, Inc. v. Gries*, 288 S.W.3d 471, 481-482 (Tex. App.–Eastland 2009, no pet.).

[55] TEX. R. EVID. 402.

[56] *E.g.*, *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988) ("[T]he introduction of evidence on [non-compensable] damages . . . is improper as a matter of law . . . ."); *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001) (same).

[57] *Wills v. Foster*, 892 N.E.2d 1018, 1031-1032 (Ill. 2008); *Covington v. George*, 597 S.E.2d 142, 144-145 (S.C. 2004); *Leitinger v. DBart, Inc.*, 736 N.W.2d 1, 14 (Wis. 2007).

provided. In this case, Medicare, as required by federal law, determined that the charges it reimbursed were reasonable, given customary and prevailing rates where Haygood was treated. Even so, Haygood argues, if he were uninsured, his medical expenses would not be subject to adjustments or credits, and evidence of more expensive treatment would suggest to the jury that his injuries were more serious. It is unfair, he contends, to treat insured and uninsured claimants differently. Haygood's solution is to allow the jury to consider evidence of non-recoverable economic damages in setting non-economic damages. But we think that any relevance of such evidence is substantially outweighed by the confusion it is likely to generate, and therefore the evidence must be excluded.[58]

Haygood argues that if the Legislature had intended to allow evidence of amounts actually paid to be offered at trial, it would also have had to amend sections 41.012 and 18.001 of the Civil Practice and Remedies Code. Section 41.012 states that "[i]n a trial to a jury, the court shall instruct the jury with regard to Sections 41.001, 41.003, 41.010, and 41.011"[59] — that is, the jury must be instructed on the standards for recovery of exemplary damages and the factors to be considered in setting any award. But an instruction on the limit on recovery of medical expenses would be necessary only if evidence of amounts charged were admitted along with evidence of amounts paid or to be paid. The absence of a statutorily required jury instruction suggests that the Legislature intended either that juries not be given the only evidence relevant to recovery or that they be given

[58] TEX. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.").

[59] TEX. CIV. PRAC. & REM. CODE § 41.012.

only evidence relevant to recovery. Since the jury cannot determine what expenses were necessary absent evidence relevant to recovery, we think the Legislature must have intended the latter. As for section 18.001, as already explained, it merely provides for any dispute over reasonable and necessary expenses to be teed up by affidavit, and says nothing about whether unpaid expenses are reasonable and necessary.

The dissent argues that the jury should consider only evidence of charges billed, without adjustments or credits required by insurers. Evidence of expenses paid or to be paid, the dissent urges, should be presented to the trial court post-verdict by the defendant. A fundamental rule is that "[t]o recover damages, the burden is on the plaintiff to produce evidence from which the jury may reasonably infer that the damages claimed resulted from the defendant's conduct."[60] The only justification the dissent has for shifting the burden of proof to the defendant is that section 41.0105's limitation on damages is like the monetary caps imposed by other statutes. But imposing a monetary cap never requires the court to resolve a disputed fact; limiting the recovery of expenses to those actually paid often does. For one thing, parties may dispute whether expenses are necessarily related to a plaintiff's injuries. In *Texarkana Memorial Hospital v. Murdock*, for example, we held that there was evidence that only some but not all of the plaintiff's medical expenses found by the jury were related to her injuries.[61] The issue could not simply be redetermined by the trial court; the case had to be retried to the jury.[62] Also, the parties may disagree whether any part of some providers'

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[60] *Texarkana Mem'l Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 838 (Tex. 1997).

[61] *Id.* at 840-841.

[62] *Id.* at 841.

charges is reasonable. If the jury awards less than the total of all charges, the trial court may have no way of knowing which charges the jury found reasonable and which it did not. In all these situations, a requirement that the trial court resolve disputed facts in determining the damages to be awarded violates the constitutional right to trial by jury. "In enacting a statute, it is presumed that . . . compliance with the constitutions of this state and the United States is intended; . . . a just and reasonable result is intended; [and] a result feasible of execution is intended . . . ."[63] The dissent's construction of section 41.0105 is contrary to all three presumptions.

Accordingly, we hold that only evidence of recoverable medical expenses is admissible at trial. We disapprove the cases that have reached conflicting decisions.[64] Of course, the collateral source rule continues to apply to such expenses, and the jury should not be told that they will be covered in whole or in part by insurance. Nor should the jury be told that a health care provider adjusted its charges because of insurance.

* * *

[63] TEX. GOV'T CODE § 311.021.

[64] *Arango v. Davila*, Nos. 13-09-00470-CV, 13-09-00627-CV, 2011 WL 1900189 (Tex. App.–Corpus Christi May 19, 2011, no pet. h.); *Frontera Sanitation, L.L.C. v. Cervantes*, No. 08-08-00330-CV, 2011 WL 1157559 (Tex. App. –El Paso Mar. 30, 2011, no pet. h.); *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926 (Tex. App.–Dallas 2009, pet. denied); *Gore v. Faye*, 253 S.W.3d 785 (Tex. App.–Amarillo 2008, no pet.).

We agree with the opinion of the court of appeals, and therefore its judgment is

Affirmed.

Nathan L. Hecht
Justice

Opinion Delivered: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0377

AARON GLENN HAYGOOD, PETITIONER,

v.

MARGARITA GARZA DE ESCABEDO, RESPONDENT

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

Argued September 16, 2010

JUSTICE LEHRMANN, joined by JUSTICE MEDINA, dissenting

Today, the Court holds that a claimant may neither recover amounts written off and never paid, nor introduce evidence of such amounts during trial. I agree with the Court that section 41.0105 reflects the Legislature's intent to restrict the amount of past medical expenses that may be recovered. However, I disagree with the Court's conclusion that the Legislature intended to prohibit the introduction of evidence of amounts that are written off and never paid, as they represent collateral source benefits. Neither the "express terms" of the statute, which speak only to a claimant's *recovery* of past medical expenses, "[n]or [any] necessary implications" support such a conclusion. *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) (citation omitted). Furthermore, one consequence of the Court's decision is that juries may deliver insupportably

divergent results as between those plaintiffs who are insured and those who are not, resulting in inconsistent appellate review of damages awards in some tort cases. I would hold that the court of appeals erred to the extent it held that section 41.0105 affects the admissibility of evidence of past medical expenses. It suggested a remittitur, but based on improper grounds. Therefore, I would reverse the court of appeals' judgment and remand to that court.

I. ANALYSIS

I agree with the Court that section 41.0105 abrogates the collateral source rule as a rule of recovery by proscribing damages awards for amounts written off and never paid. While the precise issue was not before us, we implied as much in *Daughters of Charity Health Services of Waco v. Linnstaedter*, 226 S.W.3d 409, 410 (Tex. 2007). However, while the Court's reasoning as to recovery is solidly grounded, its holding as to the admissibility of evidence of adjusted charges finds scant support in the statute's language, is contradicted by the statute's legislative history, and runs counter to long-standing common law.

It is not the prerogative of the Court to second-guess the Legislature's policy choices. Rather, it is the Court's duty to discern and implement the law in accordance with, not in contravention of, the Legislature's intent. Here, the Court ignores the obvious conflict between section 41.0105's title and its text. In doing so, the Court reaches its conclusion without utilizing either the statute's legislative history or any one of the enumerated statutory construction aids. *See* TEX. GOV'T CODE § 311.023. When a statute's text is only amenable to one reasonable interpretation we eschew extrinsic sources. When a statute is subject to more than one reasonable interpretation, however, its history provides valuable insight. The Court's unwillingness to consult

the drafting history of section 41.0105—even in the face of two competing, yet reasonable, interpretations—shakes the foundations of its decision. It is clear, in my opinion, that section 41.0105 was intended to limit a claimant's recovery of past medical expenses without disturbing the long-standing prohibition on introducing evidence of collateral source benefits such as medical charges that are written off and never paid. The legislative history of section 41.0105 supports this conclusion.

A. Evidence of Past Medical Expenses

The collateral source rule has applied in Texas since 1883. *Tex. & Pac. Ry. Co. v. Levi & Bro.*, 59 Tex. 674, 676 (1883). Under the common law, a tortfeasor was not entitled to a liability offset for proceeds procured as a result of the injured party's independently bargained-for agreement with an insurance company or other source of benefits. *See Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999); *see also Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980). The rule was predicated on the notion that a tortfeasor should not benefit from an agreement to which the tortfeasor is not privy. *Brown*, 601 S.W.2d at 934. The collateral source rule has been applied to all manner of benefits, including payments received under a worker's compensation policy, *see Exxon Corp. v. Shuttlesworth*, 800 S.W.2d 902, 907–08 (Tex. App.—Houston [14th Dist.] 1990, no writ), income received as part of veterans' benefits, *see Montandon v. Colehour*, 469 S.W.2d 222, 229–30 (Tex. Civ. App.—Fort Worth 1971, no writ), and Social Security disability payments, *see Traders and Gen. Ins. Co. v. Reed*, 376 S.W.2d 591, 593–94 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.). In this sense, the collateral source rule was a rule of recovery.

But the collateral source rule also has an evidentiary aspect; the defendant may not introduce evidence at trial of collateral sources of compensation for a plaintiff's injuries. *See, e.g.*, *Taylor v. Am. Fabritech*, 132 S.W.3d 613, 626 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (holding that governmental assistance payments made to plaintiff were a collateral source and that trial court erred when it allowed evidence of such payments); *Exxon Corp.*, 800 S.W.2d at 907–08 (excluding evidence of worker's compensation benefits). As a rule of evidence, the collateral source rule has excluded such things as evidence of payments and downward adjustments in accordance with Medicare guidelines. *See Matbon, Inc. v. Gries*, 288 S.W.3d 471, 480–82 (Tex. App.—Eastland 2009, no pet.); *Wong v. Graham*, No. 03-00-00440-CV, 2001 WL 123932, at *11 (Tex. App.—Austin Feb. 15, 2001, no pet.) (not designated for publication); *see also Briese v. Tilley*, No. C 08-4233 MEJ, 2010 WL 3749442 slip op. at 7–10 (N.D. Cal. Sept. 23, 2010).

1. Is the rule implicated?

The Court concludes that the collateral source rule is not implicated by statutory or contractual adjustments to medical charges because the discounted amounts are "a benefit to the insurer," not the insured. ___ S.W.3d ___, ___. While I agree the discounting of medical charges benefits insurers, I disagree that the rule is not otherwise implicated. Although medical expenses that are discounted and written off are not direct, out-of-pocket payments made on the plaintiff's behalf, the discount would not have occurred but for the claimant's efforts.[1] That is to say, if Haygood had not been covered by Medicare or some private insurer, he would have been

[1] Medicare recipients become eligible for benefits either by contributing to Social Security for a specified period or by paying premiums. *See* 42 U.S.C. §§ 402(a), 426, 426–1, 1395c, 1395j, 1395o (2010).

responsible for the full charges that were billed, and Margarita Garza de Escabedo would have become liable for them as the result of her negligence. *See* George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L. J. 101, 104 (2005–06). Even if Haygood had private insurance coverage, he might have been liable for the full charges if his insurer disputed the charges or the medical providers did not have a contractual relationship with Haygood's insurers.[2] The same rationale undergirding the collateral source rule's application to payments made by third-party providers applies equally to write-offs secured as a result of a contractual relationship with an insurance provider or rules governing programs like Medicare. The collateral source rule is clearly implicated when a tortfeasor would otherwise obtain a windfall from the injured party's efforts. *See Brown*, 601 S.W.2d at 934–35; *see also* RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979). I would therefore hold that amounts written off and never paid pursuant to an insurance contract, Medicare, or Medicaid guidelines are collateral benefits.

2. Legislature's intent

I agree with the Court to the extent it concludes that the Legislature did not intend to abrogate the rule as it relates to *payments* made by collateral sources. Consequently, my analysis is confined to whether the Legislature intended to abrogate the common law prohibition of evidence of amounts written off and never paid that may be ascribed to collateral sources. In construing a

[2] In some cases, a covered patient will receive medical services from an out-of-network medical provider. The insurance company will make payment to the provider for less than the full charges; however, the provider is not obligated to accept the insurer's payment as satisfaction of the entire amount. In what is known as "balance billing," the provider seeks the balance of the charges from the patient. *See Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 282–83 (5th Cir. 2008) (applying Louisiana law).

statute, we always strive to give effect to the Legislature's stated intent. TEX. GOV'T CODE § 311.021; *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631–32 (Tex. 2008). "The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, ___ S.W.3d ___, ___ (Tex. 2011) (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008)). When the Legislature's intent is not apparent from the plain meaning of a statute's language, we may resort to other construction aids, including legislative history. TEX. GOV'T CODE § 311.023(3); *see also Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867–68 (Tex. 2009). We further presume that the Legislature is aware of existing law when it enacts legislation. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877–78 (Tex. 2001).

The plain language of section 41.0105 does not support the Court's conclusion that the Legislature intended to alter the status quo with regard to the admissibility of evidence. The statute's unambiguous text, which states that "*recovery* of medical or health care expenses incurred," refers only to a limitation on recovery, and makes no mention of evidence. TEX. CIV. PRAC. & REM. CODE § 41.0105 (emphasis added). The collateral source rule's prohibition on the introduction of evidence of payments by insurers as well as other collateral benefits, *e.g.*, written off medical charges, has long been firmly embedded in our common law. The Legislature was undoubtedly aware of the collateral source rule when it passed section 41.0105. *See Palacios*, 46 S.W.3d at 877–78. Therefore, had the Legislature intended to abrogate even a portion of the rule's evidentiary component, it would have explicitly done so in the text of the statute. Two provisions in chapter 41,

which expressly limit the evidence that the trier of fact may consider in determining the amount of exemplary damages, stand as further proof that when the Legislature intends to alter the admissibility of evidence it unequivocally does so. *See* TEX. CIV. PRAC. & REM. CODE §§ 41.008(e), .011(b).[3] Haygood contends that the Legislature would not have included the word "evidence" in the title unless it intended to limit the evidence that can be introduced during trial. While I disagree with Haygood's proposed interpretation of section 41.0105, at a minimum, the conflict between section 41.0105's text and its title renders the statute susceptible to more than one reasonable interpretation. Thus, the use of statutory construction aids, including legislative history, is warranted. *Id*. at § 311.023(3). The lengthy and complicated legislative history of section 41.0105 clearly militates against Haygood's and, ultimately, the Court's characterization of the Legislature's intent in passing section 41.0105. The Legislature worked through several iterations of draft bills before settling on the current statute. The first iteration of section 41.0105, which was included as part of a broader effort to reform medical malpractice laws, would have allowed "a defendant physician or health care provider [to] introduce evidence in a health care liability claim of any amount payable to the claimant as a collateral benefit." Tex. H.B. 3, 78th Leg., R.S. (2003). The proposed legislation would have defined "collateral source benefit[s]" as "benefit[s] paid or payable to or on behalf of a claimant under [] the Social Security Act . . .; [] a state or federal income replacement, disability, workers' compensation, or other law that provides partial or full income

[3] Section 41.008(e) states that "[t]he provisions of this section may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction"; section 41.011(b) states that "[e]vidence that is relevant only to the amount of exemplary damages that may be awarded is not admissible during the first phase of a bifurcated trial."

replacement; or [] any insurance policy, other than a life insurance policy, including an accident, health, or sickness insurance policy; and [] a disability insurance policy." *Id.* There was no question at all that the bill would have abrogated the collateral source rule as a rule of evidence, but its application was limited to health care liability claims under former article 4590i. This proposed language survived the merging of House Bill 3, whose application was limited to medical malpractice claims, and House Bill 4, an omnibus civil justice reform bill. Tex. H.B. 4, 78th Leg., R.S. (2003). However, an amendment to House Bill 4 stripped from it the language abrogating the evidentiary aspect of the collateral source rule.

When House Bill 4 reached the Senate State Affairs Committee, it expanded section 41.0105's application beyond health care liability claims. The Senate further renamed the proposed statute "Evidence Relating to Amount of Economic Damages," and included the following language: "[a] defendant may introduce evidence of any amount payable to the claimant as a collateral benefit arising from the event in the cause of action." Tex. C.S.H.B. 4, 78th Leg., R.S. (2003). Just like the initial version of section 41.0105 proposed in the House, the State Affairs Committee's proposed statute would have undoubtedly abrogated the collateral source rule both as a rule of recovery *and* a rule of evidence. But the final enrolled version of the bill amended the proposed statute once more, this time deleting the provisions concerning evidence of collateral sources. Despite the language of the bill being expressly limited to recovery of past medical expenses, it retained its title from the State Affairs Committee: "Evidence Relating to Amount of Economic Damages." Tex. H.B. 4, 78th Leg., R.S. (2003). The legislative history of section 41.0105 clearly illustrates that its title is nothing more than a remnant from proposed versions that failed to pass.

Furthermore, reading section 41.0105 in context with other laws concerning the proof and presentation of damages evidence supports my conclusion that section 41.0105 did not abrogate the collateral source rule's application as a rule of evidence. At the time section 41.0105 was enacted, section 41.012 directed that a court should instruct the jury with regard to several other provisions of chapter 41 establishing criteria and evidence to be considered in awarding exemplary damages. TEX CIV. PRAC. & REM. CODE § 41.012. For instance, section 41.012 requires the jury to be instructed with regard to section 41.011, which limits the evidence that the trier of fact can consider in determining the amount of exemplary damages. Section 41.012 also requires that the jury be instructed with regard to section 41.003, under which exemplary damages may be awarded only if the claimant establishes by clear and convincing evidence that the claimant's harm resulted from fraud, malice, gross negligence, or as otherwise specified by statute. If the Legislature intended to limit the evidence placed in front of the jury, as opposed to a plaintiff's recovery, it likely would have amended section 41.012 and also expressly directed that the jury be instructed with regard to section 41.0105. *See id.*

Significantly, the Legislature also chose not to amend section 18.001 of the Code, which has long governed procedures for proving damages in personal injury cases. Under that section, an uncontroverted affidavit in proper form attesting

> that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

TEX. CIV. PRAC. & REM. CODE § 18.001. If the Legislature intended that evidence of reasonable and necessary damages would no longer be admissible, it likely would have excluded medical services from section 18.001. The Legislature's decision to leave these sections unaltered, thus maintaining the status quo regarding evidence to a substantial degree, is telling. Furthermore, "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." *Cash Am.*, 35 S.W.3d at 16 (citation omitted). Here, neither the statute's words nor its context express clear legislative intent to modify the collateral source rule's evidentiary aspect. The legislative history of section 41.0105 likewise nullifies any argument that abrogation is necessarily implicit in the statute's language.

Finally, the Court's approach, which permits evidence of adjusted charges pursuant to an insurance agreement or Medicare and Medicaid requirements, will likely cause untenable and unjust results. *See* TEX. GOV'T CODE § 311.021(3) ("[I]t is presumed that [the Legislature intended] a just and reasonable result"). An uninsured plaintiff who receives medical care or an insured plaintiff who received medical care out-of-network is liable for the full amount billed. Under the Court's interpretation of section 41.0105, both plaintiffs would be entitled to recover the full amounts billed—assuming the jury finds them reasonable and necessary. However, insured plaintiffs would only be entitled to recover the aggregate of their payments plus the payments made by their insurance providers. Because the extent of the plaintiff's medical charges may affect the jury's calculation of non-economic damages, an uninsured plaintiff or an insured plaintiff who receives care out-of-network may be awarded significantly higher non-economic damages than an insured

plaintiff. This would be the case even though they were billed the exact same amount for the exact same medical care to treat the exact same injuries.

Moreover, the severity of the plaintiff's injury is a factor that enters into the review of the legal and factual sufficiency of evidence supporting mental anguish damages. *See Fifth Club, Inc. v. Ramirez,* 196 S.W.3d 788, 797–798 (Tex. 2006); *D. Burch, Inc. v. Catchings*, 2009 WL 2481862, at *4 (Tex. App.—Dallas 2009, pet. denied). In *Burch*, for example, the court considered the amounts billed by various medical providers in evaluating the factual sufficiency of the evidence supporting the amount of mental anguish damages awarded. Consequently, insured plaintiffs whose medical charges are written off and never paid may find it more difficult to establish the sufficiency of evidence supporting the amount of any mental anguish damages awarded.

B. Application of Section 41.0105

Having determined that Section 41.0105 precludes a plaintiff from recovering past medical expenses that are discounted and written off, but does not abrogate the collateral source rule as it applies to the admissibility of evidence of such amounts, I now turn to the statute's application. The Legislature's limitation of a plaintiff's recovery for past medical expenses through section 41.0105 is not novel. The Civil Practice and Remedies Code contains several similar examples of limitations on a plaintiff's recovery. *See* TEX. CIV. PRAC. & REM. CODE § 74.303 (limiting total recovery for wrongful death or survival action on a healthcare liability claim to $500,000, not including past and future medical expenses); *id.* § 75.004 (limiting liability in certain premises liability suits to $500,000 per person and $1 million in the aggregate); *id.* § 108.002 (limiting personal liability in suits against public servants to $100,000 where act or omission occurs during the course and scope

of the public servant's employment). Section 41.0105's limitation on a claimant's recovery is analogous to these and other statutory damages caps. Like other statutory damages caps, Section 41.0105 should be implemented by the trial court post-verdict. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671, 677–79 (Tex. App.—Dallas 2004) (applying Chapter 74 statutory damages caps), *rev'd on other grounds*, 271 S.W.3d 238 (Tex. 2008); *Signal Peak Enterprs. of Tex., Inc. v. Bettina Invs., Inc.*, 138 S.W.3d 915, 926–29 (Tex. App.—Dallas 2004, pet. struck) (holding that trial court should reform judgment to comply with statutory damages caps on exemplary damages).

Thus, I agree with the courts of appeals that have approved of the implementation of the section 41.0105 cap through a post-verdict modification. *See Matbon*, 288 S.W.3d at 481–82; *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 931 (Tex. App.—Dallas 2009, pet. denied); *Gore v Faye*, 253 S.W.3d 785, 789–90 (Tex. App.—Amarillo 2008, no pet.). Under that procedure, the defendant would include with any post-verdict motion any evidence of discounts, credits, and write offs, as well as amounts actually paid by the patient and third parties. The trial court then would have the opportunity to evaluate the evidence, and if need be, reform the jury's verdict to reflect past medical expenses that were billed to the claimant, amounts actually paid, and amounts written off by the provider and never paid.

Escabedo argues that implementing section 41.0105 post-verdict will not work. But the Legislature has adopted a scheme that necessitates the post-verdict adjustment of damages in other provisions of the Civil Practice and Remedies Code. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 41.008 (applying limitation on plaintiff's recovery of exemplary damages post-verdict). When the

Legislature enacted liability caps on a plaintiff's recovery in wrongful death and survival suits in health care liability claims, it also required the following jury instruction: "Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law." *Id.* § 74.303(e)(1); *see also id.* § 41.008(e). Thus, in other contexts in which the Legislature has placed a ceiling on a plaintiff's recovery, it has chosen not to apply the cap as a restriction on the amount of damages the jury can award. Instead, the jury determines damages and enters its verdict, then the trial court enforces the limitations when it renders judgment on the verdict.

I likewise am unpersuaded by Escabedo's argument that post-verdict modification could run afoul of our decisions in *Crown Life Insurance, Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). Escabedo raised a hypothetical at oral argument in which a claimant receives treatment from two providers, one of whom has a contractual agreement with the hospital and one of whom does not. In the hypothetical, the jury is permitted to hear evidence of the total amount billed by both providers, as I propose, but the jury awards the plaintiff less than that amount. While Escabedo's hypothetical could conceivably lead to a *Casteel*/*Harris County* issue, that likelihood can be accounted for through the submission of carefully tailored jury questions. *See Greer v. Buzgheia*, 46 Cal. Rptr. 3d 780, 785–86 (Cal. Ct. App. 2006) (rejecting defendant's motion for post-verdict reduction in damages awarded by jury because defendant failed to object to failure to segregate damages in verdict form). This post-verdict mechanism, though cumbersome, has been used by a number of California courts for over twenty years, and the case law does not reflect any pervasive problems with the process. *See, e.g., Olsen*

v. Reid, 79 Cal. Rptr. 3d 255, 256–57 (Cal. Ct. App. 2008); *see id.* 263–65 (Moore, Acting P.J., concurring).

II. CONCLUSION

For these reasons, I am compelled to respectfully dissent. I would hold that section 41.0105 does not affect the admissibility at trial of evidence of discounts, credits, adjustments to medical bills, or amounts actually paid but disallows the recovery of the discounted portion as a past medical expense. The court of appeals suggested a remittitur reflecting the discounts, but based on improper grounds. I would therefore remand to the court of appeals.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0387

CAROL SEVERANCE, PETITIONER,

v.

JERRY PATTERSON, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE; GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS; AND KURT SISTRUNK, DISTRICT ATTORNEY FOR THE COUNTY OF GALVESTON, TEXAS, RESPONDENTS

CERTIFIED QUESTION ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Argued November 19, 2009

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

JUSTICE MEDINA delivered a dissenting opinion, in which JUSTICE LEHRMANN joined.

CHIEF JUSTICE JEFFERSON did not participate in the decision.

This case comes before us in the form of certified questions from the United States Court of Appeals for the Fifth Circuit. Pursuant to article V, section 3-c of the Texas Constitution and Texas Rule of Appellate Procedure 58.1, we answer the following questions:

1. Does Texas recognize a "rolling" public beachfront access easement, *i.e.*, an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line,

without proof of prescription, dedication or customary rights in the property so occupied?

2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the [Open Beaches Act]?

3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas's law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?

Severance v. Patterson, 566 F.3d 490, 503–04 (5th Cir. 2009), *certified questions accepted*, 52 Tex. Sup. Ct. J. 741 (May 15, 2009).[1] The central issue is whether private beachfront properties on Galveston Island's West Beach are impressed with a right of public use under Texas law without proof of an easement.

Oceanfront beaches change every day. Over time and sometimes rather suddenly, they shrink or grow, and the tide and vegetation lines make corresponding shifts. Beachfront property lines retract or extend as previously dry lands become submerged by the surf or become dry after being submerged. Accordingly, public easements that burden these properties along the sea are also dynamic. They may shrink or expand gradually with the properties they encumber. Once established, we do not require the State to re-establish easements each time boundaries move due to gradual and imperceptible changes to the coastal landscape. However, when a beachfront vegetation line is suddenly and dramatically pushed landward by acts of nature, an existing public

[1] We received amicus briefs from the Texas Landowners Council; the Texas Wildlife Foundation; the Surfrider Foundation; the Galveston Chamber of Commerce; Matthew J. Festa, Professor, South Texas College of Law; and Property Owners in Surfside Beach, Texas.

easement on the public beach does not "roll" inland to other parts of the parcel or onto a new parcel of land. Instead, when land and the attached easement are swallowed by the Gulf of Mexico in an avulsive event, a new easement must be established by sufficient proof to encumber the newly created dry beach bordering the ocean. These public easements may gradually change size and shape as the respective Gulf-front properties they burden imperceptibly change, but they do not "roll" onto previously unencumbered private beachfront property when avulsive events cause dramatic changes in the coastline.

Legal encumbrances or reservations on private property titles on West Beach in Galveston Island dating from original land grants during the Republic of Texas or at the inception of the State of Texas could provide a basis for a public easement by custom or reveal inherent restrictions on the titles of the privately owned portions of these beaches. Under Mexican law, which governed Texas prior to 1836, colonization of beachfront lands was precluded for national defense and commercial purposes without approval of the "federal Supreme Executive Power" of Mexico, presumably the Mexican President. However, in 1840 the Republic of Texas, as later confirmed by the State of Texas, granted private title to West Galveston Island without reservation by the State of either title to beachfront property or any public right to use the now privately owned beaches. Public rights to use of privately owned property on West Beach in Galveston Island, if such rights existed at that time, were extinguished in the land patents by the Republic of Texas to private parties. In some states, background principles of property law governing oceanfront property provide a basis for public ownership or use of the beachfront property. Such expansive principles are not extant in the origins of Texas. Indeed, the original transfer by the Republic to private parties forecloses the

argument that background principles in Texas common law provide a basis for impressing the West Beach area with a public easement, absent appropriate proof.

The Texas Open Beaches Act (OBA) provides the State with a means of enforcing public rights to use of State-owned beaches along the Gulf of Mexico and of privately owned beach property along the Gulf of Mexico where an easement is established in favor of the public by prescription or dedication, or where a right of public use exists "by virtue of continuous right in the public." TEX. NAT. RES. CODE §§ 61.012, .013(a). When promulgated in 1959, the OBA did not purport to create new substantive rights for public easements along Texas's ocean beaches and recognized that mere pronouncements of encumbrances on private property rights are improper. Because we find no right of public use in historic grants to private owners on West Beach, the State must comply with principles of law to encumber privately owned realty along the West Beach of Galveston Island.

I. Background

In April 2005, Carol Severance purchased three properties on Galveston Island's West Beach. "West Beach" extends from the western edge of Galveston's seawall along the beachfront to the western tip of the island. One of the properties, the Kennedy Drive property, is at issue in this case.[2] A rental home occupies the property. The parties do not dispute that no easement has ever been established on the Kennedy Drive property. A public easement for use of a privately owned parcel

[2] Severance owned three properties on West Beach—on Gulf Drive, Kennedy Drive and Bermuda Beach Drive. Her original lawsuit included all three properties, but she only appealed the trial court's judgment dismissing her claims as to two properties. After oral argument to this Court on the certified questions, Severance sold one of two remaining homes at issue in a FEMA-funded buy-out program. Only the Kennedy Drive property remains subject to this litigation.

seaward of Severance's Kennedy Drive property preexisted her purchase. That easement was established in a 1975 judgment in the case of *John L. Hill, Attorney General v. West Beach Encroachment, et al.*, Cause No. 108,156 in the 122nd District Court, Galveston County, Texas. Five months after Severance's purchase, Hurricane Rita devastated the property subject to the easement and moved the line of vegetation landward. The entirety of the house on Severance's property is now seaward of the vegetation line. The State claimed a portion of her property was located on a public beachfront easement and a portion of her house interfered with the public's use of the dry beach. When the State sought to enforce an easement on her private property pursuant to the OBA, Severance sued several State officials in federal district court. She argued that the State, in attempting to enforce a public easement, without proving its existence, on property not previously encumbered by an easement, infringed her federal constitutional rights and constituted (1) an unreasonable seizure under the Fourth Amendment, (2) an unconstitutional taking under the Fifth and Fourteenth Amendments, and (3) a violation of her substantive due process rights under the Fourteenth Amendment.

The State officials filed motions to dismiss on the merits and for lack of jurisdiction. The district court dismissed Severance's case after determining her arguments regarding the constitutionality of a rolling easement were "arguably ripe," but deficient on the merits. Not presented with the information concerning the Republic's land grant, the court held that, according to Texas property law, an easement on a parcel landward of Severance's property pre-existed her ownership of the property and that after an easement to private beachfront property had been established between the mean high tide and vegetation lines, it "rolls" onto new parcels of realty

according to natural changes to those boundaries. *Severance v. Patterson*, 485 F. Supp. 2d 793, 802–04 (S.D. Tex. 2007). Severance only appealed her Fourth and Fifth Amendment challenges to the rolling easement theory. On appeal, the United States Court of Appeals for the Fifth Circuit determined her Fifth Amendment takings claim was not ripe, but certified unsettled questions of state law to this Court to guide its determination on her Fourth Amendment unreasonable seizure claim. *Severance*, 566 F.3d at 500.

A. Texas Property Law in Coastal Areas

We have not been asked to determine whether a taking would occur if the State ordered removal of Severance's house, although constitutional protections of property rights fortify the conclusions we reach. The certified questions require us to address the competing interests between the State's asserted right to a migratory public easement to use privately owned beachfront property on Galveston Island's West Beach and the rights of the private property owner to exclude others from her property. The "law of real property is, under [the federal] Constitution, left to the individual states to develop and administer." *Phillips Petrol. Co. v. Mississippi*, 484 U.S. 469, 484 (1988) (quoting *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, ___ U.S. ___, 130 S. Ct. 2592, 2612 (2010) ("The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established."); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 377 (1977) (explaining that "subsequent changes in the contour of the land, as well as subsequent transfers of the land, are governed by the state law" (citation omitted)).

Texas has a history of public use of Texas beaches, including on Galveston Island's West Beach. *See, e.g.*, *Matcha v. Mattox*, 711 S.W.2d 95, 99 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (holding that "[n]o one doubts that proof exists from which the district court could conclude that the public acquired an easement over Galveston's West Beach by custom"), *cert. denied*, 481 U.S. 1024 (1987); *Feinman v. State*, 717 S.W.2d 106, 113 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (discussing evidence presented at the trial court that showed "public use of West Beach since before Texas gained its independence from Mexico"). These rights of use were proven in courtrooms with evidence of public enjoyment of the beaches dating to the nineteenth century Republic of Texas. But that history does not extend to use of West Beach properties, recently moved landward of the vegetation line by a dramatic event, that before and after the event have been owned by private property owners and were not impressed with pre-existing public easements. On one hand, the public has an important interest in the enjoyment of Texas's public beaches. But on the other hand, the right to exclude others from privately owned realty is among the most valuable and fundamental of rights possessed by private property owners.

1. Defining Public Beaches in Texas

The Open Beaches Act states the policy of the State of Texas for enjoyment of public beaches along the Gulf of Mexico. The OBA declares the State's public policy to be "free and unrestricted right of ingress and egress" to State-owned beaches and to private beach property to which the public "has acquired" an easement or other right of use to that property. TEX. NAT. RES. CODE § 61.011(a). It defines public beaches as:

> any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom. This definition does not include a beach that is not accessible by a public road or public ferry as provided in Section 61.021 of this code.

Id. § 61.001(8).[3] Privately owned beaches may be included in the definition of public beaches. *Id.* The Legislature defined public beach by two criteria: physical location and right of use. A public beach under the OBA must border on the Gulf of Mexico. *Id.* The OBA does not specifically refer to inland bodies of water. Along the Gulf, public beaches are located on the ocean shore from the line of mean low tide to the line of vegetation, subject to the second statutory requirement explained below. *Id.* The area from mean low tide to mean high tide is called the "wet beach," because it is under the tidal waters some time during each day. The area from mean high tide to the vegetation line is known as the "dry beach."

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[3] In 2009, Texas voters approved an amendment to the Constitution to protect the public's right to "state-owned beach[es]" of the Gulf of Mexico. TEX. CONST. art. I, § 33. It protects public use of public beaches which, like the OBA, are defined as State-owned beaches and privately owned beachland "to which the public has acquired a right of use or easement . . . ." Although not at issue in this case, the amendment provides:

> Section 1. Article I, Texas Constitution, is amended by adding Section 33 to read as follows:
>
> Sec. 33. (a) In this section, "public beach" means a state-owned beach bordering on the seaward shore of the Gulf of Mexico, extending from mean low tide to the landward boundary of state-owned submerged land, and any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired a right of use or easement to or over the area by prescription or dedication or has established and retained a right by virtue of continuous right in the public under Texas common law.
>
> (b) The public, individually and collectively, has an unrestricted right to use and a right of ingress to and egress from a public beach. The right granted by this subsection is dedicated as a permanent easement in favor of the public.
>
> (c) The legislature may enact laws to protect the right of the public to access and use a public beach and to protect the public beach easement from interference and encroachments.
>
> (d) This section does not create a private right of enforcement.

The second requirement for a Gulf-shore beach to fall within the definition of "public beach" is the public must have a right to use the beach. This right may be "acquired" through a "right of use or easement" or it may be "retained" in the public by virtue of continuous "right in the public since time immemorial." *Id*.

The wet beaches are all owned by the State of Texas,[4] which leaves no dispute over the public's right of use. *See Luttes v. State,* 324 S.W.2d 167, 169, 191–92 (Tex. 1958); TEX. NAT. RES. CODE §§ 61.011, .161 (recognizing the public policies of the public's right to use public beaches and the public's right to ingress and egress to the sea). However, the dry beach often is privately owned and the right to use it is not presumed under the OBA.[5] The Legislature recognized that the existence of a public right to an easement in privately owned dry beach area of West Beach is dependant on the government's establishing an easement in the dry beach or the public's right to use of the beach "by virtue of continuous right in the public since time immemorial . . . ." TEX. NAT RES. CODE § 61.001(8). Accordingly, where the dry beach is privately owned, it is part of the "public beach" if a right to public use has been established on it. *See id.* Thus, a "public beach" includes but is broader than beaches owned by the State in those instances in which an easement for

[4] State-owned beaches are the strips of coastal property "between mean low tide and mean high tide, which runs along the entire Gulf Coast, regardless of whether the property immediately landward is privately or state owned." Richard J. Elliott, *The Texas Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 384 (1976).

[5] The OBA includes two stated presumptions for purposes of ingress and egress to the sea. It provides that the title of private owners of dry beach area in Gulf beaches "does not include the right to prevent the public from using the area for ingress and egress to the sea." TEX. NAT. RES. CODE § 61.020(a)(1). In 1991, the OBA was amended to add a second presumption that imposed "on the area a common law right or easement in favor of the public for ingress and egress to the sea." *Id.* § 61.020(a)(2). Although the constitutionality of these presumptions has been questioned, that issue is not before us. *See Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 929–30 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).

public use is established in the dry beach area. *Id*. Public beaches include Gulf-front wet beaches, State-owned dry beaches and private property in the dry beaches on which a public easement has been established.

In this case, before Hurricane Rita, Severance's Kennedy Drive property was landward of the vegetation line. After Hurricane Rita, because the storm moved the vegetation line landward, the property between Severance's land and the sea that was subject to a public easement was submerged in the surf or became part of the wet beach. Severance's Kennedy Drive parcel and her house are no longer behind the vegetation line but neither are they located in the wet beach owned by the State. At least a portion of Severance's Kennedy Drive property and all of her house are now located in the dry beach. The question is did the easement on the property seaward of Severance's property "roll" onto Severance's property? In other words, is Severance's house now located on part of the "public beach" and thereby subject to an enforcement action to remove it under the OBA? From the Fifth Circuit's statement of the case, we understand that no easement has been proven to exist on Severance's property under the OBA or the common law.[6] We also presume that there are no express limitations or reservations in Severance's title giving rise to a public easement. The answer to the rolling easement question thus turns on whether Texas common law recognizes such an inherent limitation on private property rights along Galveston's West Beach, and if not, whether principles of Texas property law provide for a right of public use of beaches along the Gulf Coast.

[6] That issue is not before us, but it may be addressed in the federal courts.

2. History of Beach Ownership Along the Gulf of Mexico

Long-standing principles of Texas property law establish parameters for our analysis. It is well-established that the "soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State, and constitutes public property that is held in trust for the use and benefit of all the people." *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413 (Tex. 1943); *Landry v. Robison*, 219 S.W. 819, 820 (Tex. 1920) ("For our decisions are unanimous in the declaration that by the principles of the civil and common law, soil under navigable waters was treated as held by the state or nation in trust for the whole people."[7]); *De Meritt v. Robison Land Comm'r*, 116 S.W. 796, 797 (Tex. 1909) (holding "[i]n the contemplation of law," soil lying below the line of ordinary high tide, "was not land, but water"); *see also* TEX. NAT. RES. CODE § 11.012(c) ("The State of Texas owns the water and the beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico within the boundaries provided in this section, including all land which is covered by the Gulf of Mexico and the arms of the Gulf of Mexico either at low tide or high tide."). These lands are part of the public trust, and only the Legislature can grant to private parties title to submerged lands that are part of the public trust. *Lorino*, 175 S.W.2d at 414; *see also TH Invs., Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 182–83 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding that lands submerged in the Gulf belong to the State) (citations omitted), *cert. denied*, ___ U.S. ___, 129 S. Ct. 899 (2009).

[7] "The bays, inlets, and other waters along the Gulf Coast which are subject to the ebb and flow of the tide of the Gulf of Mexico are defined as 'navigable waters.'" *Lorino*, 175 S.W.2d at 413 (citing *City of Galveston v. Mann*, 135 Tex. 319 (1940); *Crary v. Port Author Channel & Dock Co.*, 92 Tex. 275 (1898)).

Current title to realty and corresponding encumbrances on the property may be affected in important ways by the breadth of and limitations on prior grants and titles. We review the original Mexican and Republic of Texas grants and patents to lands abutting the sea in West Galveston Island.[8] The Republic of Texas won her independence from Mexico in 1836. Mexico's laws prohibited colonization of land within ten leagues of the coast without approval from the president. General Law of Colonization, art. 4 (Mex., Aug. 18, 1824), *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897 [hereinafter "GAMMEL, THE LAWS OF TEXAS"], at 97, 97 (Austin, Gammel Book Co. 1898).[9] Title to West Beach property was first granted in November 1840 by the Republic of Texas to Levi Jones and Edward Hall in a single patent (the "Jones and Hall Grant"). *See Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 928 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).[10] After admission to the Union in 1845, the State of Texas by legislation in 1852 and 1854 first confirmed the validity of the Jones and Hall Grant and then disclaimed title to those lands. In 1852, the State declared that it "hereby releases and relinquishes forever, all of her title to such lots on Galveston Island as are now in the actual possession and occupation of persons who purchased under the [Jones and Hall Grant]." Act approved Feb. 16, 1852, 4th Leg., R.S., ch. 119, § 1, 1852 Tex. Gen. Laws 142, 142, *reprinted in* 3 GAMMEL, THE LAWS OF TEXAS, at 1020, 1020; Act of Feb. 8, 1854, 5th Leg., R.S., ch. 73, § 1, 1854 Tex. Special Laws 125, 125–26, *reprinted in* 4 GAMMEL,

[8] The briefs and the record do not address the early land grant of Galveston's West Beach.

[9] The Mexican federal government "feared that an influx of foreigners along the border of the United States, or along the coast, might become too powerful, and betray the country to a foreign power." LEWIS N. DEMBITZ, A TREATISE ON LAND TITLES IN THE UNITED STATES § 73, at 558 (1895).

[10] *See also* Jones and Hall Grant Papers, *available at* http://wwwdb.glo.state.tx.us/central/LandGrants/LandGrantsSearch.cfm (search abstract number 121, Galveston County).

THE LAWS OF TEXAS, at 125, 125–26 (confirming the 1840 Jones and Hall Grant and "disclaim[ing] any title in and to the lands described in said patent, in favor of the grantees and those claiming under them").[11] In 1854, the State affirmed its intent to grant ownership of all land in West Beach up to the public trust to Jones and Hall with no express reservation of either title to the property or a public right to use the beaches.[12] The government relinquished all title in the Jones and Hall Grant, without reserving any right to use of the property. The Republic could have reserved the right of the public to use the beachfront property, "but the plain language of the grant shows the Republic of Texas did not do so." *Seaway Co.*, 375 S.W.2d at 929. All the Gulf beachland in West Galveston Island that extended to the public trust was conveyed to private parties by the sovereign Republic of Texas as later affirmed by the State of Texas.

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[11] The act reads: "Be it enacted by the Legislature of the State of Texas, That the patent issued by the Commissioner of the General Land[O]ffice, on the twenty-eighth day of November, eighteen hundred and forty, to Levi Jones and Edward Hall, for lands on Galveston Island, be, and the same is hereby confirmed, and the State of Texas disclaims any title in and to the lands described in said patent, in favor of the grantees and those claiming under them." Act of Feb. 8, 1854, 5th Leg., R.S., ch. 73, § 1, 1854 Tex. Special Laws 125, 125–26, *reprinted in* 4 GAMMEL, THE LAWS OF TEXAS, at 125, 125–26.

[12] There is some historical evidence that the Republic made an abortive attempt to parcel and sell title to lands on West Galveston Island starting in 1837. *See* Act approved June 12, 1837, 1st Cong., 1 Repub. Tex. Laws 267, 267 (1838), *reprinted in* 1GAMMEL, THE LAWS OF TEXAS, at 1327, 1327 (authorizing sales of title to lots on Galveston Island by auction); Annual Report of the Secretary of the Treasury, Nov. 1839, *reprinted in* 3 HARRIET SMITHER, JOURNALS OF THE FOURTH CONGRESS OF THE REPUBLIC OF TEXAS 1839–1840, at 35, 45 (Austin, Texas State Library 1931) (reporting treasury receipts "on account Sales Galveston Island"). In an 1860 mandamus proceeding, in light of then-lingering questions about the validity of Jones and Hall's title to West Beach, a district court directed the land commissioner to issue a single land patent to Jones and Hall for all of West Beach. *See Franklin v. Kesler*, 25 Tex. 138, 142–43(1860) (describing the patent issued pursuant to mandamus). The February 15, 1852 act expressly vested title in those claiming successor title under the Jones and Hall Grant, and the February 8, 1854 act confirms the Jones and Hall Grant in its entirety. Further, *Wilcox v. Chambers* confirmed that if title of coastal lands were granted to foreigners (non-Mexican individuals) prior to 1840, the grants are presumed void absent specific approval by the Mexican President. 26 Tex. 181, 187 (1862).

Legislation and a patent (the "Menard Grant") conveyed oceanfront property on the east side of Galveston Island to private parties in 1836 and 1838. *Mayor, Aldermen & Inhabitants of the City of Galveston v. Menard*, 23 Tex. 349, 391 (1859).

Having established that the State of Texas owned the land under Gulf tidal waters, the question remained how far inland from the low tide line did the public trust—the State's title—extend. We answered that question in *Luttes v. State*. This Court held that the delineation between State-owned submerged tidal lands (held in trust for the public) and coastal property that could be privately owned was the "mean higher high tide" line under Spanish or Mexican grants and the "mean high tide" line under Anglo-American law.[13] 324 S.W.2d 167, 191–92 (Tex. 1958). The wet beach is owned by the State as part of the public trust, and the dry beach is not part of the public trust and may be privately owned. *See generally id*. Prior to *Luttes*, there was a question whether the public trust extended to the vegetation line. *Luttes* established the landward boundary of the public trust at the mean high tide line. *Luttes*, 324 S.W.2d at 187–88.

These boundary demarcations are a direct response to the ever-changing nature of the coastal landscape because it is impractical to apply static real property boundary concepts to property lines that are delineated by the ocean's edge. The sand does not stay in one place, nor does the tide line. While the vegetation line may appear static because it does not move daily like the tide, it is constantly affected by the tide, wind, and other weather and natural occurrences.

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[13] Severance's parcel is not subject to Spanish or Mexican law. So, we refer to the mean high tide line throughout this opinion. On January 20, 1840, Texas adopted the common law of England as its rule of decision, to the extent it was not inconsistent with the Constitution of the Republic of Texas or acts of its Congress. Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 3, 3–4, *reprinted in* 2 GAMMEL, THE LAWS OF TEXAS, at 177, 177–80; *Miller v. Letzerich*, 49 S.W.2d 404, 408 (Tex. 1932) (explaining that "the validity and legal effect of contracts and of grants of land made before the adoption of the common law must be determined according to the civil law in effect at the time of the grants"). Because the Jones and Hall Grant was made in November 1840, land granted under that patent is governed by the common law. *See* William Gardner Winters, Jr., *The Shoreline for Spanish and Mexican Grants in Texas*, 38 TEX. L. REV. 523 (1960) (discussing the history of Spanish and Mexican land patents and common law basis for shoreline boundaries).

A person purchasing beachfront property along the Texas coast does so with the risk that their property may eventually, or suddenly, recede into the ocean. When beachfront property recedes seaward and becomes part of the wet beach or submerged under the ocean, a private property owner loses that property to the public trust. We explained in *State v. Balli*:

> Any distinction that can be drawn between the alluvion of rivers and accretions cast up by the sea must arise out of the law of the seashore rather than that of accession and be based . . . upon the ancient maxim that the seashore is common property and never passes to private hands . . . . [This] remains as a guiding principle in all or nearly all jurisdictions which acknowledge the common law . . . .

190 S.W.2d 71, 100 (Tex. 1945). Likewise, if the ocean gradually recedes away from the land moving the high tide line seaward, a private property owner's land may increase at the expense of the public trust. *See id.* Regardless of these changes, the boundary remains fixed (relatively) at the mean high tide line. *See Luttes*, 324 S.W.2d at 191–93. Any other approach would leave locating that boundary to pure guesswork. *See Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 n.1 (Tex. 1976).

In 1959, the Legislature enacted the Open Beaches Act to address responses to the *Luttes* opinion establishing the common law landward boundary of State-owned beaches at the mean high tide line. The Legislature feared that this holding might "give encouragement to some overanxious developers to fence the seashore" as some private landowners had "erected barricades upon many beaches, some of these barricades extending into the water." TEX. LEGIS. BEACH STUDY COMM., 57TH LEG., R.S., THE BEACHES AND ISLANDS OF TEXAS [hereinafter "BEACH STUDY COMM., BEACHES AND ISLANDS OF TEXAS"] 1 (1961), *available at* http://www.lrl.state.tx.us/scanned/interim/56/56_B352.pdf; TEX. LEG. INTERIM BEACH STUDY

COMM., 65TH LEG., R.S., FOOTPRINTS ON THE SANDS OF TIME [hereinafter "BEACH STUDY COMM., FOOTPRINTS"] 22 (1969), *available at* http://www.lrl.state.tx.us/scanned/interim/60/B352.pdf. The OBA declared the State's public policy for the public to have "free and unrestricted access" to State-owned beaches, the wet beach, and the dry beach where the public "has acquired" an easement or other right to use that property. TEX. NAT. RES. CODE § 61.011(a). To enforce this policy, the OBA prohibits anyone from creating, erecting, or constructing any "obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public" to access Texas beaches where the public has acquired a right of use or easement. *Id.* § 61.013(a). The Act authorizes the removal of barriers or other obstructions on

> state-owned beaches to which the public has the right of ingress and egress bordering on the seaward shore of the Gulf of Mexico or any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico *if the public has acquired* a right of use or easement to or over the area by prescription, dedication, or has *retained a right by virtue of continuous right in the public*.

Id. §§ 61.012, .013(a) (emphasis added).

The OBA does not alter *Luttes.* It enforces the public's right to use the dry beach on private property where an easement exists and enforces public rights to access and use State-owned beaches. Therefore, the OBA, by its terms, does not create or diminish substantive property rights. BEACH STUDY COMM., FOOTPRINTS 22 (stating that the "statute cannot truly be said to create any new rights"); Richard J. Elliott, *Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 392 (1976) ("In terms of pure substantive law, the Open Beaches Act probably creates no rights in the public which did not previously exist under the common law."). In promulgating the OBA, the Legislature seemed careful to preserve private property rights by emphasizing that the

enforcement of public use of private beachfront property can occur when a historic right of use is retained in the public or is proven by dedication or prescription. *See* TEX. NAT. RES. CODE § 61.013(a), (c). The OBA also specifically disclaims any intent to take rights from private owners to Gulf-shore beach property. *Id.* § 61.023; *see Seaway Co.*, 375 S.W.2d at 930 ("There is nothing in the Act which seeks to take rights from an owner of land."). Within these acknowledgments, the OBA proclaims that beaches should be open to the public. Certainly, the OBA guards the right of the public to use public beaches against infringement by private interests. But, as explained, the OBA is not contrary to private property rights at issue in this case under principles of Texas law. The public has a right to use the West Galveston beaches when the State owns the beaches or the government obtains or proves an easement for use of the dry beach under the common law or by other means set forth in the OBA.[14]

In 1969, the Legislature's Interim Beach Study Committee, chaired by Senator A.R. Schwartz of Galveston County, confirmed the view that:

> [The OBA] does not, and can not, declare that the public has an easement on the beach, a right of access over private property to and from the State-owned beaches bordering on the Gulf of Mexico. *An easement is a property interest; the State can no more impress private property with an easement without compensating the owner of the property than it can build a highway across such land without paying the owner*.

[14] In 1961, The Texas Legislative Beach Study Committee further evidenced its recognition that private property rights exist in the dry beaches by proposing to the 57th Legislature that it come up with practical methods for not only procuring easements for ingress and egress to beaches but also methods of "negotiations with landowners for additional easements" for the "use and pleasure of the public, provided such lands or easements can be obtained without cost to the State." BEACH STUDY COMM., BEACHES AND ISLANDS OF TEXAS xi. If Gulf-front dry beach property were State-owned or already impressed with an easement for public use (as compared to ingress and egress), negotiations to obtain them would not be necessary.

BEACH STUDY COMM., FOOTPRINTS 17. The Interim Beach Study Committee was created, among other reasons, to assure that beach development be undertaken to serve the best interests of the people of Texas and to study methods of procuring right-of-ways for roads parallel to the beaches, easements for ingress and egress to the beach, parking for beach access, methods for negotiating with landowners for additional easements, and rights for landowners to construct works for the protection of their property. *Id.* at 1–2.

B. Background on Severance's Property

Carol Severance purchased the Kennedy Drive property on Galveston Island's West Beach in 2005. The Fifth Circuit explained that "[n]o easement has ever been established on [her] parcel via prescription, implied dedication, or continuous right." 566 F.3d at 494. The State obtained the *Hill* judgment in 1975 that encumbered a strip of beach seaward of Severance's property. Severance's Kennedy Drive parcel was not included in the 1975 judgment. However, the parties dispute whether or not Severance's parcel was ever subject to a public easement.

In 1999, the Kennedy Drive house was on a Texas General Land Office (GLO) list of approximately 107 Texas homes located seaward of the vegetation line after Tropical Storm Frances hit the island in 1998. In 2004, the GLO again determined that the Kennedy Drive home was located "wholly or in part" on the dry beach in 2004, but did not threaten public health or safety and, at the time, was subject to a GLO two-year moratorium order. When Severance purchased the property, she received an OBA-mandated disclosure explaining that the property may become located on a public beach due to natural processes such as shoreline erosion, and if that happened, the State could sue seeking to forcibly remove any structures that come to be located on the public beach. *See* TEX.

NAT. RES. CODE § 61.025. Winds attributed to Hurricane Rita shifted the vegetation line further inland in September 2005. In 2006, the GLO determined that Severance's house was entirely within the public beach.

The moratorium for enforcing the OBA on Severance's properties expired on June 7, 2006. Severance received a letter from the GLO requiring her to remove the Kennedy Drive home because it was located on a public beach. A second letter reiterated that the home was in violation of the OBA and must be removed from the beach, and offered her $40,000 to remove or relocate it if she acted before October 2006. She initiated suit in federal court. The Fifth Circuit certified questions of Texas law to this Court.

II. Dynamic Public Beachfront Easements

The first certified question asks if Texas recognizes "a 'rolling' public beachfront access easement, *i.e.*, an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication, or customary rights in the property so occupied?" 566 F.3d at 504. We have never held that the State has a right in privately owned beachfront property for public use that exists without proof of the normal means of creating an easement. And there is no support presented for the proposition that, during the time of the Republic of Texas or at the inception of our State, the State reserved the oceanfront for public use. In fact, as discussed above, the Texas Legislature expressly disclaimed any interest in title obtained from the Jones and Hall Grant after our State was admitted to the Union. *See* Section I.A.2, *supra*; *see also Seaway Co.*, 375 S.W.2d at 928 ("On November 28, 1840, the Republic of Texas

issued its patent to Levi Jones and Edward Hall to 18,215 acres of land on Galveston Island. This grant covered all of Galveston Island except the land covered by the Menard Grant covering the east portion of the Island."). Therefore, considering the absence of any historic custom or inherent title limitations for public use on private West Beach property, principles of property law answer the first certified question.

Easements exist for the benefit of the easement holder for a specific purpose. An easement does not divest a property owner of title, but allows another to use the property for that purpose. *See Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) (explaining that an easement relinquishes a property owner's right to exclude someone from their property for a particular purpose) (citations omitted). The existence of an easement "in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner." *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974). An easement appurtenant "defines the relationship of two pieces of land"—a dominant and a servient estate. *See* 7 THOMPSON ON REAL PROPERTY § 60.02(f)(1), at 469 (David A. Thomas, ed. 2006). Because the easement holder is the dominant estate owner and the land burdened by the easement is the servient estate, the property owner may not interfere with the easement holder's right to use the servient estate for the purposes of the easement. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1963) (citation omitted); *Vrazel v. Skrabanek*, 725 S.W.2d 709, 711 (Tex. 1987).

Easement boundaries are generally static and attached to a specific portion of private property. *See Holmstrom v. Lee*, 26 S.W.3d 526, 533 (Tex. App.—Austin 2000, no pet.) ("Once established, the location or character of the easement cannot be changed without the consent of the

parties."); *see also* 7 THOMPSON ON REAL PROPERTY § 60.04(c)(1)(ii), at 538–40. "As a general rule, once the location of an easement has been established, neither the servient estate owner nor the easement holder may unilaterally relocate the servitude." JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:13, at 7-30 (2009). Therefore, a new easement must be re-established for it to encumber a part of the parcel not previously encumbered. *See id.*

While the boundaries of easements on the beach are necessarily dynamic due to the composition of the beach and its constantly changing boundaries, easements for public use of privately owned dry beach do not necessarily burden the area between the mean high tide and vegetation lines when the land originally burdened by the easement becomes submerged by the ocean. They do not automatically move to the new properties; they must be proven.

Like easements, real property boundaries are generally static as well. But property boundaries established by bodies of water are necessarily dynamic. Because those boundaries are dynamic due to natural forces that affect the shoreline or banks, the legal rules developed for static boundaries are somewhat different. *See York*, 532 S.W.2d at 952 (discussing erosion, accretion, and avulsion doctrines affecting property boundaries and riparian ownership in the Houston Ship Channel).

The nature of littoral property boundaries abutting the ocean not only incorporates the daily ebbs and flows of the tide, but also more permanent changes to the coastal landscape due to weather and other natural forces.[15] Shoreline property ownership is typically delineated by boundaries such

[15] "Riparian" means "[o]f, relating to, or located on the bank of a river or stream (or occasionally another body of water, such as a lake)." BLACK'S LAW DICTIONARY 1352 (8th ed. 2004). "Littoral" means "[o]f or relating to the coast or shore of an ocean, sea, or lake." BLACK'S LAW DICTIONARY 952 (8th ed. 2004).

as the mean high tide and vegetation lines because they are easy to reference and locate. Sand and water are constantly moving and changing the landscape whether it is gradual and imperceptible or sudden and perceptible.

Courts generally adhere to the principle that littoral property owners gain or lose land that is gradually or imperceptibly added to or taken away from their banks or shores through erosion, the wearing away of land, and accretion, the enlargement of the land. *Id.* at 952. Avulsion, as derived from English common law, is the sudden and perceptible change in land and is said not to divest an owner of title. *Id.* We have never applied the avulsion doctrine to upset the mean high tide line boundary as established by *Luttes*.[16] 324 S.W.2d at 191.

Property along the Gulf of Mexico is subjected to seasonal hurricanes and tropical storms, on top of the every-day natural forces of wind, rain, and tidal ebbs and flows that affect coastal properties and shift sand and the vegetation line. This is an ordinary hazard of owning littoral property. And, while losing property to the public trust as it becomes part of the wet beach or submerged under the ocean is an ordinary hazard of ownership for coastal property owners, it is far less reasonable to hold that a public easement can suddenly encumber an entirely new portion of a landowner's property that was not previously subject to that right of use. *See, e.g.*, *Phillips Petrol.*, 484 U.S. at 482 (discussing the importance of "honoring reasonable expectations in property

[16] Some states apply avulsion to determine that the mean high tide line as it existed before the avulsive event remains the boundary between public and private ownership of beach property after the avulsive event; therefore, allowing private property owners to retain ownership of property that becomes submerged under the ocean. *See Walton Cnty. v. Stop the Beach Renourishment*, 998 So. 2d 1102, 1116–17 (Fla. 2008), *aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, ___ U.S. ___, 130 S. Ct. 2592 (2010); *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 520 (Miss. 1986). We have not accepted such an expansive view of the doctrine, but, we need not make that determination in this case.

interests[,]" but ultimately holding the property owner's expectations in that situation were unreasonable). Gradual movement of the vegetation line and mean high tide line due to erosion or accretion have very different practical implications.

Like littoral property boundaries along the Gulf Coast, the boundaries of corresponding public easements are also dynamic. The easements' boundaries may move according to gradual and imperceptible changes in the mean high tide and vegetation lines. However, if an avulsive event moves the mean high tide line and vegetation line suddenly and perceptibly causing the former dry beach to become part of State-owned wet beach or completely submerged, the private property owner is not automatically deprived of her right to exclude the public from the new dry beach. In those situations, when changes occur suddenly and perceptibly to materially alter littoral boundaries, the land encumbered by the easement is lost to the public trust, along with the easement attached to that land. Then, the State may seek to establish another easement as permitted by law on the newly created dry beach to enforce an asserted public right to use private land.

It would be an unnecessary waste of public resources to require the State to obtain a new judgment for each gradual and nearly imperceptible movement of coastal boundaries exposing a new portion of dry beach. These easements are established in terms of boundaries such as the mean high tide line and vegetation line; presumably public use moves according to and with those boundaries so the change in public use would likewise be imperceptible. Also, when movement is gradual, landowners and the State have ample time to reach a solution as the easement slowly migrates landward with the vegetation line. Conversely, when drastic changes expose new dry beach and the former dry beach that may have been encumbered by a public easement is now part of the wet beach

or completely submerged under water, the State must prove a new easement on the area. Because sudden and perceptible changes by nature occur very quickly, it would be impossible to prove continued public use in the new dry beach, and it would be unfair to impose such drastic restrictions through the OBA upon an owner in those circumstances without compensation. *See Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992) (explaining the circumstances from which an action for inverse condemnation may arise).

If the public has an easement in newly created dry beach, as with any other property, the State must prove it. Having divested title to all such West Beach property in the early years of the Republic, the State of Texas can only acquire or burden private property according to the law. Thus, a public beachfront easement in West Beach, although dynamic, does not roll. The public loses that interest in privately owned dry beach when the land to which it is attached becomes submerged underwater. While these boundaries are somewhat dynamic to accommodate the beach's everyday movement and imperceptible erosion and accretion, the State cannot declare a public right so expansive as to always adhere to the dry beach even when the land the easement originally attached to is eroded. This could divest private owners of significant rights without compensation because the right to exclude is one of the most valuable and fundamental rights possessed by property owners. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 634 (Tex. 2004) (referring to the right to exclude as "'one of the most essential sticks in the bundle of rights that are commonly characterized as property'") (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994)). We have never held the dry beach to be encompassed in the public trust. *See Luttes*, 324 S.W.2d at 191–92.

On this issue of first impression, we hold that Texas does not recognize a "rolling" easement on Galveston's West Beach. Easements for public use of private dry beach property do change along with gradual and imperceptible changes to the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property. This holding shall not be applied to use the avulsion doctrine to upset the long-standing boundary between public and private ownership at the mean high tide line. That result would be unworkable, leaving ownership boundaries to mere guesswork. The division between public and private ownership remains at the mean high tide line in the wake of naturally occurring changes, even when boundaries seem to change suddenly.[17] The State, as always, may act within a valid exercise of police power to impose reasonable regulations on coastal property or prove the existence of an easement for public use, consistent with the Texas Constitution and real property law.

The dissent would reach a different result by arguing the public has the right to use the dry beach regardless of the boundaries of private property or the constitutional protections accorded those rights. That approach would raise constitutional concerns. "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' . . . is to use words in a manner that deprives them of all their ordinary meaning." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (citation omitted); *see* Elliott, 28 BAYLOR L. REV. at 385–86 ("Since a simple legislative declaration of policy

[17] We also do not address how artificial accretions or other artificial changes in the coastal landscape affect ownership. *New Jersey v. New York*, 523 U.S. 767, 784 (1998) (explaining the littoral boundaries remained as they were before artificial land-filling increased the surface area of Ellis Island).

[such as declaring a right to an easement across private property], cannot provide the requisite due process, the affirmative policy statement of the Open Beaches Act, without more would appear patently unconstitutional. The legislature has apparently sought to avoid such constitutional problems by qualifying affirmatively-declared public rights with an interesting condition precedent. That condition is that the public must have *already acquired* these identical rights under the common law doctrines of prescription or dedication.").

According to the dissent, an easement could remain in the dry beach even if the land encumbered by the original easement becomes submerged by the ocean and the dry beach is composed of new land that was not previously encumbered by an easement. Its argument is likewise based on the premise that an alleged easement previously established did not just encumber the dry beach portion of Severance's parcel, but that it encumbered the entire lot. This is inconsistent with easement law. *See Holmstrom v. Lee*, 26 S.W.3d 526, 533 (Tex. App.—Austin 2000, no pet.) ("Once established, the location or character of the easement cannot be changed without the consent of the parties."); 7 THOMPSON ON REAL PROPERTY § 60.04(c)(1)(ii), at 538–40. While the specific use granted by an easement is a fundamental consideration, there is no law to support the dissent's contention that an easement forever remains in the dry beach (i.e., can move onto a new portion of the parcel or a different parcel) absent mutual consent. *See* JON W. BRUCE & JAMES W. ELY, THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:13, at 7-30 (2009). This would result in depriving oceanfront property owners of a substantial right (the right to exclude) without requiring compensation or proof of actual use of the property allegedly encumbered whenever natural forces cause the vegetation line to move inland so that property not formerly part of the dry beach becomes

part of the dry beach. This argument blurs the line between ownership and right to use of a portion of a parcel—the dry beach—and is in tension with our decision in *Luttes* that set the boundary between State and privately owned property at the mean high tide line. *See* 324 S.W.2d at 191–92.

The dissent further dismisses Severance's grievance as a gamble she took and lost by purchasing oceanfront property in Galveston and argues that she would not be entitled to compensation even though an easement had never been established on the portion of her parcel that is now in the dry beach. It notes the OBA requirement of disclosure in sales contracts of the risk that property could become located on a public beach and subject to an easement in the future. *See* TEX. NAT. RES. CODE § 61.025. This is incorrect for three reasons. First, beachfront property owners take the risk that their property could be lost to the sea, not that their property will be encumbered by a easement they never agreed to and that the State never had to prove. Second, putting a property owner on notice that the State may attempt to take her property for public use at some undetermined point in the future does not relieve the State from the legal requirement of proving or purchasing an easement nor from the constitutional requirement of compensation if a taking occurs. We do not hold that circumstances do not exist under which the government can require conveyance of property or valuable property rights, such as the right to exclude, but it must pay to validly obtain such right or have a sufficient basis under its police power to do so. *See Nollan*, 483 U.S. at 841–42 (noting that public use of private beaches may be a "good idea" but "if [the state] wants an easement across [private] property, it must pay for it"). As Justice Oliver Wendell Holmes, Jr. explained, "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S.

393, 416 (1922). Third, simply advising in a disclosure that the State may attempt to enforce an easement on privately owned beachfront property does not dispose of the owner's rights.

Our holding does not necessarily preclude a finding that an easement exists. We have determined that the history of land ownership in West Beach refutes the existence of a public easement by virtue of continuous right "in the public since time immemorial, as recognized in law and custom," TEX. NAT. RES. CODE § 61.001(8), and Texas law does not countenance an easement migrating onto previously unencumbered beachfront property due to the Hurricane. We do not have a sufficient record to determine whether an easement has been proven, and the question was not certified. *See id.*

The public may have a superior interest in use of privately owned dry beach when an easement has been established on the beachfront. But it does not follow that the public interest in the use of privately owned dry beach is greater than a private property owner's right to exclude others from her land when no easement exists on that land. A few states have declared that long-standing property principles give the state (and therefore, the public) the right to all beachfront property or the right to use even privately owned beachfront property *ipse dixit*. For example, the Oregon Supreme Court has held that the dry beach was subject to public use because the public use was inherent in the history of title to such lands. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456–57 (Or. 1993) (citing *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969)). The state of Oregon's view is that private property owners along the beach "never had the property interests that they claim were taken" in the dry sand, the area between the high water line and vegetation line. *Id.* at 457. The Court explained "the common-law doctrine of custom as applied to Oregon's ocean

shores . . . is not 'newly legislated or decreed'; to the contrary, to use the words of the *Lucas* court, it 'inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.*, 854 P.2d at 456 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992)). The Supreme Court of Hawaii has held that issuance of a Hawaiian land patent confirms only a limited property interest as compared to typical land patents on the continental United States. S*ee Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246 (Haw. 1995) (noting that "the western concept of exclusivity is not universally applicable in Hawai'i"). New Jersey extends the public trust doctrine to encompass the dry beach as well as the wet beach. *See Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 49 (N.J. 1972) ("[T]he public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference . . . ."); *see also Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984). Unlike the West Beach of Galveston Island, these jurisdictions have long-standing restrictions inherent in titles to beach properties or historic customs that impress privately owned beach properties with public rights.

On the other hand, the Supreme Court of New Hampshire held that a statute that recognized a general recreational easement for public use in the "dry sand area" (comparable to our dry beach), violates the takings provisions of the state and federal constitutions, except for those areas where there is an "established and acknowledged public easement." *Opinion of the Justices*, 649 A.2d 604, 608 (N.H. 1994). The public trust ends at the high water mark and private property extends landward beyond that. *Id.* The Supreme Court of Idaho applied the public trust doctrine to Lake Coeur d'Alene and held that the public trust doctrine was inapplicable in an action to force owners

to remove a seawall. *State ex rel. Haman v. Fox*, 594 P.2d 1093 (Idaho 1979). The private property at issue was obtained by patent from the U.S. Government in 1892 and the seawall was built above the mean high water mark of the lake. *Id.*

A few Texas courts of appeals have reached results contrary to the holding in this opinion. In *Feinman*, the court held that public easements for use of dry beach can roll with movements of the vegetation line. 717 S.W.2d at 110–11. *Feinman* could find no continuous right or custom dating from "time immemorial" or even back to the origins of the Republic or the State of Texas as a basis to encumber private property rights along West Beach. *Id.* *Feinman* states that "[c]ourts have upheld the concept of a rolling easement along rivers and the sea for many years without using the phrase 'rolling easement,'" and cites, but does not discuss, seven cases for its holding.[18] *Id.* at 110. Only one of the opinions is from a Texas court, *Luttes*, and neither it nor the other cited cases discuss rolling or migratory easements. *Luttes* established the landward boundary of title to the public trust along Gulf-front beaches. The *Sotomura* opinion is based on different common law notions of public rights to and limitations on private ownership of beaches in Hawaii, as discussed above. *Cnty. of Haw. v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973). *Feinman* neither addressed the legal significance of the Jones and Hall grant on the question of public encumbrance on private beach properties of Galveston's West Beach nor identified any basis in Texas law or history for a continuous legal right or custom on which to ground the existence of a migratory easement. One

[18] The cited cases are *Barney v. City of Keokuk*, 94 U.S. 324, 339–40 (1876); *Luttes*, 324 S.W.2d 167; *Cnty. of Haw. v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973); *Horgan v. Town Council*, 80 A. 271 (R.I. 1911); *City of Chicago v. Ward*, 48 N.E. 927 (Ill. 1897); *Godfrey v. City of Alton*, 12 Ill. 29, 36 (1850); and *Mercer v. Denne*, [1905] 2 Ch. 538 (Eng.). *Feinman* issued two months after *Matcha* and does not cite it for support.

other appellate decision also recognizes a rolling easement, relying on *Feinman*. *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

The first Texas case to address the concept of a rolling easement in Galveston's West Beach is *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. App.—Austin 1986, writ ref'd n.r.e.). In 1983, Hurricane Alicia shifted the vegetation line on the beach such that the Matchas' home had moved into the dry beach. The court held that legal custom—"a reflection in law of long-standing public practice"—supported the trial court's determination that a public easement had "migrated" onto private property. *Id*. at 101. The court reasoned that Texas law gives effect to the long history of recognized public use of Galveston's beaches, citing accounts of public use dating back to time immemorial, 1836 in this case. However, the legal custom germane to the matter is not the public use of beaches, it is whether the right in the public to a rolling easement has existed since time immemorial. The *Matcha* court's recognition of long-standing "custom" in public use of Galveston's beaches misses the point of whether a custom existed to give effect to a legal concept of a rolling beach, which would impose inherent limitations on private property rights. As explained above, the original patent of Galveston's West Beach from the Republic to Jones and Hall refutes the existence of custom, as private owners who purchased beach properties obtained title without limitation on private rights of ownership and without encumbrances for public use.

We disapprove of courts of appeals opinions to the extent they are inconsistent with our holding in this case. *See Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Feinman*, 717 S.W.2d at 108–11; *Moody v. White*, 593 S.W.2d 372, 379 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Matcha*, 711 S.W.2d at 98–100;

See Neal E. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: The Past and the Future*, 46 BAYLOR L. REV. 1093, 1106–07 (1994) (questioning whether the rolling easement theory should apply to easements by prescription and dedication).

III. Conclusion

Land patents from the Republic of Texas in 1840, affirmed by legislation in the new State, conveyed the State's title in West Galveston Island to private parties and reserved no ownership interests or rights to public use in Galveston's West Beach. Accordingly, there are no inherent limitations on title or continuous rights in the public since time immemorial that serve as a basis for engrafting public easements for use of private West Beach property. Although existing public easements in the dry beach of Galveston's West Beach are dynamic, as natural forces cause the vegetation and the mean high tide lines to move gradually and imperceptibly, these easements do not migrate or roll landward to encumber other parts of the parcel or new parcels as a result of avulsive events. New public easements on the adjoining private properties may be established if proven pursuant to the Open Beaches Act or the common law.[19]

_____

Dale Wainwright
Justice

[19] We have not addressed in this opinion state police power, nuisance or other remedies that may authorize the government to act in the interests of the health, safety and welfare of the public.

OPINION DELIVERED: November 5, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0387

CAROL SEVERANCE, PETITIONER,

v.

JERRY PATTERSON, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE; GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS; AND KURT SISTRUNK, DISTRICT ATTORNEY FOR THE COUNTY OF GALVESTON, TEXAS, RESPONDENTS

CERTIFIED QUESTION ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Argued November 19, 2009

JUSTICE MEDINA, joined by JUSTICE LEHRMANN, dissenting.

Texas beaches have always been open to the public. The public has used Texas beaches for transportation, commerce, and recreation continuously for nearly 200 years.[1] The Texas shoreline

[1] Historical records indicate that a ferry from Galveston Island at San Luis Pass was established in 1836. *Seaway Co. v. Attorney General*, 375 S.W.2d 923, 931 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). To travel between the City of Galveston Island and the ferry, the public traveled by beach route. *Id*. There is evidence of an established stage coach route traveling across the beach, and on May 23, 1838, the Republic of Texas authorized a mail route to run across the beach, which ran every two weeks. *Id*. Until Termini Road was built in 1956, "the only way to travel, except by private road inland within fenced land, was by way of the beach." *Id*. at 932. Testimony from earlier cases indicates that both locals and visitors to Galveston Island used the entire beach, "from the water line to the line of vegetation[,]" for driving, camping, fishing, and swimming. *Id*. (testimony of lifetime resident born in 1879). Cars parked between the dunes for camping. *Id*. at 933. Finally, there is no evidence that fences were ever erected across any part of the beach, only evidence that they were landward of the vegetation line to prevent cattle from going onto the beach. *Id*. (testimony of lifetime resident since 1875 reasoning that there were no fences because "[n]o one would dream any such thing as to block the driveway, . . . and the driveway was in use, I am satisfied, at least more than a hundred years ago"). *Id*.

is an expansive yet diminishing[2] public resource, and we have the most comprehensive public beach access laws in the nation. Since its enactment in 1959, the Texas Open Beaches Act ("OBA") has provided an enforcement mechanism for the public's common law right to access and to use Texas beaches.[3] The OBA enforces a reasoned balance between private property rights and the public's right to free and unrestricted use of the beach.[4] Today, the Court's holding disturbs this balance and jeopardizes the public's right to free and open beaches.

After chronicling the history of Texas property law, the Court concludes that easements defined by natural boundaries are, by definition, dynamic. ___ S.W.3d ___. Yet, in a game of semantics, the Court finds that such dynamic easements do not "roll." *Id*. at ___. The Court further distinguishes between movements by accretion and erosion and movements by avulsion, finding that gradual movements shift the easement's boundaries, but sudden movements do not. The Court's distinction protects public beach rights from so-called gradual events such as erosion but not from

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[2] Not only is Texas's coastline expansive, we also have the highest erosion rate in the nation, affecting "five to six feet of sand annually." Michael Hofrichter, *Texas's Open Beaches Act: Proposed Reforms Due to Coastal Erosion*, 4 ENVT'L & ENERGY L. & POL'Y J. 147, 148 (2009). This erosion rate causes coastal property lines to change annually.

[3] It is important to note that the OBA only applies to public beaches that border the Gulf of Mexico and are accessible by public road or ferry. TEX. NAT. RES. CODE §§ 61.013(c), 61.021.

[4] *See* TEX. NAT. RES. CODE § 61.0184 (providing procedural safeguards for property subject to OBA enforcement actions). It should be noted that while the General Land Office contacted Severance to tell her that it *might* file an enforcement action to remove her encroachment on the public beach, the Office had not yet initiated such an action at the time of the litigation that gave rise to these certified questions. Justice Wiener's dissent in Severance's federal action is particularly worth noting. He maintains that this action "has the unintentional effect of enlisting the federal courts and, via certification, the Supreme Court of Texas, as unwitting foot-soldiers in this thinly veiled Libertarian crusade" whose quest ends with the evisceration of the Open Beaches Act. *Severance v. Patterson*, 566 F.3d 490, 504 (5th Cir. 2009) (Wiener, J., dissenting). He argues further that beyond her claim not being ripe, Severance does not have standing because she attempts "to seek a benefit based on prior state action to which she has not only acceded and thereby forfeited or waived any related claim, but for which she has presumably been remunerated through an intrinsic diminution in the purchase price that she paid when she bought the already burdened beachfront land." *Id.* at 505.

more dramatic events like storms, even though both events are natural risks known to the property owner. Because the Court's vague distinction between gradual and sudden or slight and dramatic changes to the coastline jeopardizes the public's right to free and open beaches, recognized over the past 200 years, and threatens to embroil the state in beach-front litigation for the next 200 years, I respectfully dissent.

I. Texas Coastal Property Ownership

Property lines on the coast are defined by migratory, dynamic boundaries. In *Luttes v. State*, we determined that Anglo-American common law applied to land grants after 1840[5] and thus affixed the mean high tide as the boundary between state and private ownership of land abutting tidal waters. 324 S.W.2d 167 (Tex. 1958). The beach is commonly known to lie between the mean low tide and vegetation line. For over fifty years, the OBA has assimilated that common knowledge as a statutory definition as well. All land seaward of the mean high tide,[6] known as the wet beach, is held by the state in public trust. *Luttes*, 324 S.W.2d at 191–93; *see State v. Balli*, 190 S.W.2d 71, 100 (Tex. 1945) (recognizing the "ancient maxim that seashore is common property and never passes to private hands"). The land between the mean high tide and the vegetation line is the dry beach and may be privately owned. *Luttes*, 324 S.W.2d at 191–93. I agree with the Court that "[w]e have never held

[5] Texas adopted the common law in 1840, which established the mean high tide as the boundary dividing the state-owned seashore from private property. *Luttes*, 324 S.W.2d at 169. For land grants or patents that became effective before 1840, Mexican/Spanish civil law applies, which recognized this tidal boundary to be the mean higher high tide. *Id*. Because the mean high tide is measured with tide gauges and calculates both daily high tides, it provides a more definitive boundary line than the mean higher high tide, which only considers the higher of the two daily tides. *Id*. at 187 (recognizing the difficulty in proving "on such and such an occasion in such and such a year or years one or more 'highest waves' actually reached this or that irregular line on the ground").

[6] "[T]he average of highest daily water computed over or corrected to the regular tidal cycle of 18.6 years." *Luttes* 324 S.W.2d at 187.

the dry beach to be encompassed in the public trust." ___ S.W.3d ___. If this case were a matter of title, *Luttes* would provide the answer: the mean high tide separates public and private property ownership interests. But this case is about the enforcement of a common law easement that preserves the public's right to access the dry beach.

The mean low tide, mean high tide, and vegetation line are transitory.[7] Landowners may own property up to the mean high tide. But the exact metes and bounds of the beachfront property line cannot be ascertained with any specificity at any given time other than by reference to the mean high tide. Through shoreline erosion, hurricanes, and tropical storms, these lines are constantly moving both inland and seaward. In the West Bay system, whence this litigation arose, forty-eight percent of the shoreline is retreating, forty-seven percent is stable and six percent is advancing, at an average rate of -2.9 feet per year.[8] The beaches on west Galveston Island, where Severance's property is located, have even higher retreat rates (a loss of over seven feet per year) because of their exposure

[7] The mean low tide and high tide are averages assessed over a period of years. Their "actual determination at a given point on the coastline requires scientific measuring equipment and complex calculations extending over a lengthy period. Thus, as a practical matter, such physical determination of the landowner's actual boundary is not normally feasible." Richard Elliot, *The Texas Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 385 (1976). "The line of vegetation, on the other hand, is readily determinable with the naked eye at most points along the Gulf beaches." *Id*. However, all three lines are subject to the daily movements of ocean, which shift these lines both gradually and suddenly.

[8] Gibeaut, J. C., Waldinger, Rachel, Hepner, Tiffany, Tremblay, T. A., and White, W. A., 2003, Changes in bay shoreline position, West Bay system, Texas: The University of Texas at Austin, Bureau of Economic Geology, report of the Texas Coastal Coordination Council pursuant to National Oceanic and Atmospheric Administration Award No. NA07OZ0134, under GLO contract no. 02-225R, 27 p. 14.

to winds and waves.[9] Natural erosion from waves and currents causes an overall shoreline retreat for the entire Texas coast.[10]

These natural laws have compelled Texas common law to recognize rolling easements.[11] Easements that allow the public access to the beach must roll with the changing coastline in order to protect the public's right of use. The dynamic principles that govern vegetation and tide lines must therefore apply to determine the boundaries of pre-existing public beachfront easements. *See Matcha v. Mattox*, 711 S.W.2d 95, 100 (Tex. App.—Austin 1986, writ ref'd n.r.e.) *cert. denied*, 481 U.S. 1024 (1987) ("An easement fixed in place while the beach moves would result in the easement being either under water or left high and dry inland, detached from the shore. Such an easement, meant to preserve the public right to use and enjoy the beach, would then cease functioning for that purpose"). "The law cannot freeze such an easement at one place anymore than the law can freeze the beach itself." *Id.*

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[9] *Id.*

[10] *Id.*

[11] Beginning with the recognition that property bounded by navigable waters is subject to the movements of the shoreline, Texas law has accepted the premise that rolling easements are based upon. *See Luttes* 324 S.W.2d at 196; *see also Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976). The Open Beaches Act codified the existing public policy that beaches on the Gulf should be free and unrestricted for the public's use and enjoyment. *See* TEX. NAT. RES. CODE §§ 61.011(a). Finally, case law dealing specifically with the enforcement of a public beachfront easement, explicitly recognizes its rolling nature. *Feinman v. State*, 717 S.W.2d 106, 111 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Matcha v. Mattox*, 711 S.W.2d at 99; *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. App.—Austin 1989, writ denied), *cert. denied*, 493 U.S. 1073 (1990).

II. Texas Recognizes Rolling Easements

The first certified question asks whether Texas recognizes rolling beachfront access easements that move with the natural boundaries by which they are defined. The answer is yes. The rolling easement "is not a novel idea." *Feinman*, 717 S.W.2d at 110. Courts consistently recognize the migrating boundaries of easements abutting waterways to uphold their purpose.[12] *Id*. After all, "an easement is not so inflexible that it cannot accommodate changes in the terrain it covers." *Id*.

The law of easements, Texas law, and public policy support the enforcement of rolling easements. Such easements follow the movement of the dry beach in order to maintain their purpose and are defined by such purpose rather than geographic location. They are therefore affected by changes to the coast but never rendered ineffective by the change. The primary objective is not to ensure the easement's boundaries are fixed but rather that its purpose is never defeated.

A. Texas Easement Law

An easement is a non-possessory property interest that authorizes its holder to use the property of another for a particular purpose. *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 700

[12] This concept has long been recognized by courts across numerous jurisdictions. *See Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324, 339–40 (1876) (finding no taking and public use easement boundaries moved after city filled in and expanded street that wharfed out to banks of Mississippi River for public use); *Luttes,* 324 S.W.2d at 167; *Cnty. of Hawaii v. Sotomura*, 517 P.2d 57, 62 (Haw. 1973) (defining seaward property boundary to fall on the "upper reaches of the wash of the waves"); *Horgan v. Town Council of Jamestown*, 80 A. 271, 276 (R.I. 1911) (defining boundaries of public highway abutting waterway to be flexible); *City of Chi. v. Ward*, 48 N.E.927 (Ill. 1897) (upholding a statute mandating that lands shall be held for the use and purposes expressed or intended); *Godfrey v. City of Alton*, 12 Ill. 29, 35 (1850) (finding easement by dedication for public landing must attach to the waterway, "however that may fluctuate," otherwise "its enjoyment would be precarious, and often destroyed"); *Mercer v. Denne*, [1905] 2 ch. 538 (Eng.) (recognizing a public easement by custom for fishermen to dry nets on the new portion of the beach that had been added to the old beach overtime); *Louisiana v. Mississippi et al.*, 516 U.S. 22, 25 (1995) (applying rule that boundaries between states along a river may naturally shift in accordance with changes in the river channel); *Georgia v. South Carolina*, 497 U.S. 376, 403-04 (1990) (same); *Nebraska v. Iowa*, 143 U.S. 359, 360 (1892) (same).

(Tex. 2002). "A grant or reservation of an easement in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner." *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974). However, the burden on the servient estate is secondary to ensuring that the purpose of the easement is reasonably fulfilled. For example, oil and gas leases convey an implied easement to use the surface as reasonably necessary to fulfill the purpose of the lease. *See Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972) (recognizing that the use easement is not limited by fixed boundaries but rather its purpose and use). The purpose of the easement cannot expand, but under certain circumstances, the geographic location of the easement may. *Compare Marcus Cable Assocs.*, 90 S.W.3d at 701 (preventing easement holder from expanding purpose of maintaining electric transmission or distribution line to also include cable-television lines regardless of fact that lines could be run on exact same geographic location) *with Godfrey v. City of Alton*, 12 Ill. 29, (1850) (recognizing that a public easement for a public landing on specific waterway is necessarily "inseparable from the margin of the water, however that may fluctuate").

Easements may be express or implied. Implied easements are defined by the circumstances that create the implication. *Ulbricht v. Friedman*, 325 S.W.2d 669, 677 (Tex. 1959) (finding an implied easement to use lake water for cattle as they were located upland and without any water source). Express easements, however, must comply with the Statute of Frauds, which requires a description of the easement's location. *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983). Under certain circumstances, even express easement boundaries may be altered to maintain the purpose of the easement. *See Kothmann v. Rothwell*, 280 S.W.3d 877, 880 (Tex. App.—Amarillo 2009, no pet.)

(recognizing movement of drainage tracts to maintain easement's purpose despite the expansion of original easement location); *see also* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.1 (2000) (providing that an easement "should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding the creation of the servitude, and to carry out the purpose for which it was created").

Rolling beachfront access easements are implied by prescription or continuous use of the dry beach and are defined by their purpose and their dynamic, non-static natural boundaries. To apply static real property concepts to beachfront easements is to presume their destruction. Hurricanes and tropical storms frequently batter Texas's coast. Avulsive events are not uncommon. The Court's failure to recognize the rolling easement places a costly and unnecessary burden on the state if it is to preserve our heritage of open beaches.

The Court's conclusion that beachfront easements are dynamic but do not roll defies not only existing law but logic as well. The definition of "roll" is "to impel forward by causing to turn over and over on a surface." Webster's Ninth New Collegiate Dictionary (Merriam-Webster Inc. 1983). "Dynamic" means "of or relating to physical force or energy" and "marked by continuous activity or change." *Id*. Both terms express movement, but neither term is limited by speed or degree of movement.

The Court also illogically distinguishes between shoreline movements by accretion and avulsion. On the one hand, the Court correctly declines to apply the avulsion doctrine to the mean high tide. ___ S.W.3d ___. This means a property owner loses title to land if, after a hurricane or tropical storm, such land falls seaward of the mean high tide. On the other hand, this same

hurricane, under the Court's analysis, requires the state to compensate a property owner for the land that now falls seaward of the vegetation line unless it was already a part of the public beachfront easement. Under the Court's analysis, the property line may be dynamic but beachfront easements must always remain temporary; the public's right to the beach can never be established and will never be secure.[13]

The Court's distinctions nullify the purpose of rolling easements. I submit (in accord with several other Texas appellate courts that have addressed the issue of rolling easements) that natural movements of the mean high tide and vegetation line, sudden or gradual, re-establish the dynamic boundaries separating public and private ownership of the beach, as well as a pre-existing public beachfront access easement. So long as an easement was established over the dry beach before the avulsive event, it must remain over the new dry beach without the burden of having to re-establish a previously existing easement whose boundaries have naturally shifted.

Finally, I submit that once an easement is established, it attaches to the entire tract. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1963). Regardless of how many times the original tract is subdivided, the easement remains. *Id*. (enforcing pre-existing implied easement across subsequently divided tracts to fulfill its purpose).

Private ownership of Galveston Island originated in two land grants issued by the Republic of Texas. First, it arose from the Menard Grant in 1838, which covers the east end of the Island. *See Seaway Co.*, 375 S.W.2d at 928; *City of Galveston v. Menard*, 23 Tex. 349, 403–04 (1859). Second,

[13] The Court treats the public's easement as "fixed and definite," which creates "a legal fiction that has no factual basis." Mike Ratliff, *Public Access to Receding Beaches*, 13 HOUS. L. REV. 984, 1014 (1976). Only a "rolling easement will realistically and accurately depict the actual occurrences on the beach." *Id*.

it issued from the Jones and Hall Grant in 1840, which encompasses 18,215 acres, and includes the West Beach, where Severance's property is located. *See Seaway Co.*, 375 S.W.2d at 928 (covering "all of Galveston Island except the land covered by the Menard Grant covering the east portion of the Island").

The Court today reasons that because no *express* easement was made in these original land grants, no public easement can exist over the dry beach. ___ S.W.3d ___. The Court, however, ignores the implied easement arising from the public's continuous use of the beach for nearly 200 years. The state may have relinquished title in these original grants, but it did not relinquish the public's right to access, use, and enjoy the beach. *See* Ratliff, 13 HOUS. L. REV. at 994 (recognizing that until *Luttes* the public, as well as private landowners, believed beaches to be public domain).

By implied prescription, implied dedication, or customary and continuous use, overwhelming evidence exists that Texans have been using the beach for nearly 200 years. *See Seaway Co.*, 375 S.W.2d at 936 (finding that "owners, beginning with the original ones, have thrown open the beach to public use and it has remained open"); *see also supra* n. 1. This evidence establishes that public beachfront access easements have been implied across this Texas coastline since statehood. As long as a dry beach exists, so too must beachfront access easements. Any other result deprives the public of its pre-existing, dominant right to unrestricted use and enjoyment of the public beach.

B. Texas Case Law

The Court states it is "unaware of any case law permitting such an expansive interpretation of easement rights that would so unduly burden the underlying servient estate." ___ S.W.3d ___ (requiring easements to be re-established over new dry beach after each avulsive event). I submit

that Texas case law not only recognizes the existence of public beachfront access easements but further that they "roll" with the movements of their dynamic, natural boundaries.[14]

Before *Luttes*, the public assumed it had unrestricted access to use and enjoy the beach.[15] After *Luttes*, in response to public concern over its right to access Texas beaches, the Texas Legislature passed the OBA to ensure that Texas beaches remained open for public use. Challenged five years later, the Houston Court of Civil Appeals found that a public easement existed on the West Beach of Galveston Island, forcing landowners to remove barriers and structures that prevented the public's access to and use of the public beach. *Seaway Co. v. Attorney General*, 375 S.W.2d at 940; *see also Moody v. White*, 593 S.W.2d 372, 376-79 (finding public easement over dry beach on Mustang Island and requiring removal of structure preventing public access).

In the years following the passage of the OBA, the shoreline naturally and predictably moved both gradually and suddenly. Texas courts have repeatedly held that once an easement is established, it expands or contracts ("rolls"), despite the sudden shift of the vegetation line. *See Feinman*, 717 S.W.2d at 109–10 (after Hurricane Alicia); *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d at 765

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[14] *See Feinman,* 717 S.W.2d at 111 (finding that rolling easement shifted after Hurricane Alicia moved the vegetation line landward causing homes to be seaward of vegetation line and subject to removal under OBA)*; Matcha*, 711 S.W.2d at 98–100 (finding public easement shifts with natural movements of the beach); *Arrington* v. Tex. Gen. Land Office, 38 S.W.3d at 766 (affirming summary judgment for Land Office because once public easement is established "it is implied that the easement moves up or back to each new vegetation line"); *Arrington v. Mattox*, 767 S.W.2d at 958 (affirming that the "easement migrates and moves . . . with the natural movements of the natural line of vegetation and the line of mean low tide"); *Moody*, 593 S.W.2d at 379 (recognizing that the boundary lines shift just like navigable rivers but can "be determined at any given point of time"). *See also Mikeska v. City of Galveston*, 451 F.3d 376, 378 (5th Cir. 2006) (recognizing public beach easement's "natural demarcation lines are not static" but rather "change with their physical counterparts"); *Hirtz v. Texas*, 974 F.2d 663, 664 (5th Cir. 1992) (recognizing location of public beach easement "shifts as the vegetation line shifts").

[15] Ratliff, supra n. 13 at 994.

(after Tropical Storm Frances); *Brannan v. State*, No. 01-08-00179-CV, 2010 WL 375921, *2 (Tex. App.—Houston [1st Dist.] Feb. 4, 2010, pet. filed) (after unusually high tide or "bull tide"); *Matcha*, 711 S.W.2d at 100 (after hurricane of 1983); *Arrington v. Mattox*, 767 S.W.2d at 958 (after Hurricane Alicia). In short, Texas law has adopted "the rolling easement concept." *Feinman*, 717 S.W.2d at 110–11. The Court's refusal to follow existing Texas law means that every hurricane season will bring new burdens not only on the public's ability to access Texas's beaches but on the public treasury as well.

C. Texas Public Policy

The OBA codifies the public's pre-existing right of open access to Texas beaches:

> It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area *extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico*.

TEX. NAT. RES. CODE § 61.011(a) (emphasis added). Migratory boundaries define rolling easements, rather than fixed points. The line of vegetation is "the extreme seaward boundary of natural vegetation which spreads *continuously* inland." TEX. NAT. RES. CODE § 61.001(5) (emphasis added). Public beach means

> any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

TEX. NAT. RES. CODE § 61.001(8). The OBA recognizes the dynamic nature of beach boundaries by defining the public beach by reference to the vegetation line and tide lines, which shift with the movements of the ocean, whether those movements are gradual from erosion or dramatic from storm events. Requiring that existing easements be re-established after every hurricane season defeats the purpose of the OBA: to maintain public beach access.

i. Disclosure of Risk Requirement

For almost twenty-five years, the state has taken the further step of informing beachfront property purchasers of the rolling nature of the easement burdening their property. Amendments to the OBA in 1985 make "pellucid that once an easement on the dry beach is established, its landward boundary may therefore 'roll,' *including over private property*". *Severance v. Patterson*, 566 F.3d 490, 506 (5th Cir. 2009) (Wiener, J., dissenting) (emphasis in original); see also Act of May 24, 1985, 69th Leg., R.S., ch. 350, § 1, 1985 Tex. Gen. Laws 1419 (codified as TEX. NAT. RES. CODE § 61.025). Sellers of property on or near the coastline are required to include in the sales contract a "Disclosure Notice Concerning Legal and Economic Risks of Purchasing Coastal Real Property Near a Beach." TEX. NAT. RES. CODE § 61.025(a). The notice specifically warns that

> If you own a structure located on coastal real property near a gulf coast beach, it may come to be located on the public beach *because of coastal erosion and storm events.* ... Owners of structures erected seaward of the vegetation line (or other applicable easement boundary) or that *become seaward of the vegetation line as a result of natural processes* such as shoreline erosion are subject to a lawsuit by the State of Texas to remove the structures.

TEX. NAT. RES. CODE § 61.025 (a) (emphasis added). The language of the Act itself clearly identifies the line of vegetation as an easement boundary and clearly recognizes the transient nature

of these boundary lines. The vegetation line, "given the vagaries of nature, will always be in a state of intermittent flux[,]" and consequently, "[s]hifts in the vegetation line do not create new easements; rather they expand (or in the case of seaward shifts, reduce) the size and reach of one dynamic easement." *Severance v. Patterson*, 566 F.3d 490, 506 (5th Cir. 2009) (Wiener, J., dissenting). Severance purchased her properties with contracts that notified her of these risks and nature of the rolling easement.

ii. Constitutional Amendment Adopting the Open Beaches Act

In November 2009, Texans adopted a constitutional amendment that mirrors the policy and language of the OBA. The amendment adopts the OBA's definition of "public beach" and reiterates that the public's easement is established under Texas common law. TEX. CONST. art. I, § 33(a). It further acknowledges the permanent nature of the easement. *Id*. at § 33(b). To be consistent with the Texas Constitution, these easements must roll with the natural changes of the beach. The Court's failure to recognize the rolling nature of these easements is thus not only contrary to common law and the public policy of the state but also the will of the people expressed in our constitution.

iii. Presumption of Public Easement Over Dry Beach

Finally, in an OBA enforcement action, there is a presumption that the public has acquired an easement over the dry beach, and a landowner like Severance may present evidence to rebut the presumption. *See* TEX. NAT. RES. CODE § 61.020. The "title of the littoral owner does not include the right to prevent the public from using the area for ingress and egress to the sea[,]" and "there is imposed on the area [from mean low tide to the line of vegetation] a common law right or easement in favor of the public for ingress and egress to the sea." *Id.* Once a public beach easement is

established, it is implied that the easement moves up or back to each new vegetation line, and the state is not required to repeatedly re-establish that an easement exists up to that new vegetation line. *See Arrington v. Tex. Gen. Land Office*, 38 S.W.3d at 766.

III. Rolling Easements Are Creatures of Texas Common Law

The answer to the second certified question is that the common law rather than the OBA is the source of public beachfront access easements. The OBA, however, is consistent with the common law of rolling easements and faithfully articulates the longstanding policy of the state. The OBA is not a rights-creating document but a mechanism for enforcing property rights that the state has previously and independently obtained. *See Arrington v. Mattox*, 767 S.W.2d at 958. Such easements are established by prescription, dedication, or customary and continuous use. Guided by the common law, "[t]he OBA safeguards the public's common law easement[,]" protecting the public's access to public beaches. *Mikeska v. City of Galveston*, 451 F.3d 376, 378 (5th Cir. 2006) (citing TEX. NAT. RES. CODE § 61.001(8)).

IV. No Compensation Owed to Beachfront Property Owners Whose Property Is Encumbered by a Rolling Easement

The third certified question asks whether compensation is owed to landowners whose property becomes subject to a public beachfront access easement after it rolls with natural shifts in the shoreline. When an act of nature destroys a piece of coastal property, no compensation is owed because there is no taking by the government. Likewise, when an act of nature changes the boundaries of the beach, no compensation is owed when the government seeks to protect the already existent public right of access to the beach. The government is merely enforcing an easement whose

boundaries have shifted. The enforcement of rolling easements does not constitute a physical taking nor does it constitute a regulatory taking. Pre-existing rolling easements affect a property right that the landowner never owned, namely, excluding the public from the beach. Because no property is taken, no compensation is owed.

A. No Physical Taking

The Texas Constitution guarantees 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. Texas landowners may assert an inverse condemnation claim "when the government physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property." *Westgate Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992). By enforcing a pre-existing rolling easement, the state is not physically taking private property.

For property purchased after October 1986, landowners were expressly warned that a pre-existing public easement of the dry beach restricts the landowner's right to develop, maintain, or repair structures that would prevent the public from using and accessing the public beach. *See* TEX. NAT. RES. CODE § 61.025. The right to exclude the public from the dry beach was never in the landowner's bundle of sticks when she purchased the property.[16] With such express notice, the state's enforcement of the public easement cannot be said to diminish the landowner's reasonable

[16] Severance purchased her property in 2005, and thus her land sales contract contained this express deed restriction. Severance was also put on notice before the purchase on two separate occasions. In 1999, the General Land Office released a list of homes, including Severance's, that were located seaward of the vegetation line following Tropical Storm Frances. In 2004, the property was again listed as being on the public beach but subject to a two-year moratorium order.

investment-backed expectations. *See Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978). The state owes no compensation for a property right that the landowner does not actually possess.

For property purchased before 1986, enforcement of a pre-existing rolling easement also does not constitute a physical taking. First, rolling easements are rooted in the common law as a single easement with dynamic boundaries. The public beach has been "historically dedicated to the public use." *Brannan*, 2010 WL 375921, at *21. It is not state action that subjects beachfront property to this rolling easement but rather a *force majeure*. *Id*. The state merely enforces what has long been established in the common law. Almost every case addressing this issue agrees there is no taking and that the landowner should bear the risks assumed by purchasing property near the beach. "There is nothing in the [OBA] which seeks to take rights from an owner of land . . . . [I]t merely furnishes a means by which the members of the public may enforce such collective rights as they may have legally acquired by reason of dedication, prescription or which may have been retained by continuous right." *Seaway Co.*, 375 S.W.2d at 930; *see Arrington v. Mattox*, 767 S.W.2d at 958; *Moody*, 593 S.W.2d at 379; *Brannan*, 2010 WL 375921, at *19-20.

B. No Regulatory Taking

The enforcement of rolling easements does not constitute a regulatory taking. "When the owner of real property has been called upon to sacrifice all economically beneficial use in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. *Lucas*

v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1994) (establishing the total takings test).[17] But there are two exceptions. First, if the regulation restricts a use the owner does not have in his title, no taking has occurred. *Id.* at 1027. Second, if state common law nuisance and property principles prohibit the desired use of the land, no taking has occurred. *Id.* at 1029.

The first exception certainly applies to property purchased after 1986. As explained above, the landowner cannot receive compensation for a property right that she never owned. Beachfront property purchasers whose sales contracts contained such a deed restriction never owned the right to exclude the public from using and enjoying the dry beach.

The second exception involves the state's common law nuisance laws and other background property principles that prohibit or restrict the landowner's specific use of property. As explained above, the rolling easement is rooted in background principles of Texas common law and is supported by the OBA and the Texas Constitution. Due to natural processes, as land moves seaward of the vegetation line, that strip of land becomes subject to the pre-existing public easement established by either prescription, dedication, or continuous and customary use. This strip of land is the servient estate, encumbered by the dominant estate, the rolling easement, to reasonably fulfill its stated purpose. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1963). The common law has always restricted a landowner's use of the dry beach. *Arrington v. Mattox*, 767 S.W.2d at 958 (citing Texas cases that found no taking and recognizing "fundamental distinction between a

[17] After the *Lucas* decision, which found a taking, and Hurricane Hugo, the South Carolina Legislature amended their Beach Management Act to incorporate a rolling easement on any lot that moved seaward of the setback line, specifically to avoid takings claims. The easement permits some structures but maintains the right to implement some erosion control methods. National Oceanic and Atmospheric Administration, Erosion Control Easements, http://coastalmanagement.noaa.gov/initiatives/shoreline_ppr_easements.html. (last visited Nov. 3, 2010).

governmental taking of an easement through an act of sovereignty and judicial recognition of a common law easement acquired through historical public use"); *see Lucas*, 505 U.S. at 1028–29 (finding enforcement of existing easement not a taking).

C. Texas Nuisance Law

Texas nuisance laws permit the enforcement of rolling easements without requiring compensation. This area of the law imposes a general limitation on landowners. Property owners may not use their property in a way that unreasonably interferes with the property rights of others. *See Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004). An action that does not begin as a nuisance may nevertheless become a nuisance due to changing circumstances. *See Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 685–86 (Tex. 1975) (finding that heavy rains causing previously discharged pollutants from upstream manufacturing plant to spread more broadly across downstream land to be a nuisance). Movements of the coast change circumstances and thus affect property rights of both private beachfront owners and the public. As a result, a beach house that moves seaward of the vegetation line because of natural changes to the coast becomes a nuisance, restricting the public's ability to use and enjoy the beach.

In this unique area of property law, rolling beachfront easements are unlike any other type of easement abutting a waterway. They are not only subject to the ebb and flow of the tide, but also the ocean's surging waves. The ocean is unlike any other body of water.[18] The primary movement

[18] The Court correctly declines to apply the traditional avulsion rule to the mean high tide boundary established in *Luttes*. I would also extend this to the vegetation line. The reason avulsion does not change title on rivers does not extend to coastline. Generally, avulsive events create an entirely new river bed, and "just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations [or states], not because it is running water bearing a certain geographical name, but because it is water flowing in a given

of the coastline is through hurricanes and tropical storms.[19] Requiring the state to re-establish public beach easements after storms places an unreasonable burden on the state, a burden that was actually assumed by the landowner who purchased property near the beach.

V. Conclusion

The Texas coastline is constantly changing and the risks of purchasing property abutting the ocean are well known. The OBA further mandates the disclosure of these risks in coastal purchase contracts. Insurance is available for some of these risks.[20] It is unreasonable, however, to require the state and its taxpayers to shoulder the burden of these risks. In my view, coastal property is encumbered by a pre-existing rolling easement rooted in the common law. The state is not responsible for the ocean's movement and therefore owes no compensation when enforcing this

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channel, and within given banks, which are the real international boundary." *Nebraska v. Iowa*, 143 U.S. 359, 362 (1892). However, the running water at issue is the Gulf of Mexico, and it does not flow in a given channel *between* banks but rather constantly washes against the beaches. Here, the "stone pillar" is the Gulf of Mexico, and it stands as the boundary, not because of its specific, fixed location, but rather because it is the Gulf. Further, avulsive events on rivers merely cuts a new river bed, separating identifiable land from its original tract. Here, when an avulsive event occurs on the beach, there is no identifiable land. Rather, the previous beach becomes entirely submerged under the Gulf, and land previously above the vegetation line is now seaward of it.

[19] Since 1851, Galveston Island has endured more than fifty tropical storms and at least twenty-three hurricanes. The worst hurricane of the nineteenth century, however, was on October 6, 1837, leaving a two thousand mile destruction path. The Hurricane of 1900, "The Great Storm," still holds title as the deadliest natural disaster to strike the United States. It claimed the lives of at least eight thousand and left thirty thousand homeless. In 1983, Hurricane Alicia eroded fifty to two hundred feet of Galveston's coastline.

[20] The National Flood Insurance Program, and the Texas counterpart, the Texas Windstorm Insurance Association, helps shield beachfront property owners from the risks of a naturally changing coastline. Hofrichter, M., *Texas's Open Beaches Act: Proposed Reforms Due to Coastal Erosion*, 4 ENVT'L & ENERGY L. & POL'Y J. 147, 151 (2009). Also, the U.S. Tax Code provides for certain casualty loss deductions for buildings damages from storms along the coast. *Id*. at 150 (citing I.R.C. § 165).

existing easement. Because the Court requires the state to re-establish its easement after avulsive events and to pay landowners for risks they have voluntarily assumed, I must dissent. I would instead follow the constitution and the long-standing public policy of this state and hold that the beaches of Texas are, and forever will be, open to the public.

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David M. Medina
Justice

Opinion Delivered: November 5, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0387

CAROL SEVERANCE, PETITIONER,

v.

JERRY PATTERSON, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE; GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS; AND KURT SISTRUNK, DISTRICT ATTORNEY FOR THE COUNTY OF GALVESTON, TEXAS, RESPONDENTS

CERTIFIED QUESTION ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

PER CURIAM

CHIEF JUSTICE JEFFERSON did not participate in the decision.

Pursuant to article V, section 3-c of the Texas Constitution and Texas Rule of Appellate Procedure 58.1, this Court agreed to answer questions of state law certified from the United States Court of Appeals for the Fifth Circuit. We issued the opinion on November 5, 2010. We later granted rehearing. While rehearing was pending, Appellant Carol Severance sold the property at issue to the City of Galveston in a Federal Emergency Management Agency buyout program for homes damaged by Hurricane Ike. Appellees contend that Severance's sale of the real property renders moot both the underlying lawsuit and our consideration of the certified questions on

rehearing, and warrants vacating the original opinion. Severance disputes these contentions. The parties have notified the United States Court of Appeals for the Fifth Circuit of the sale.

The determination whether the federal lawsuit is moot must be made by the Fifth Circuit. We abate our consideration on rehearing of the certified questions pending this mootness determination.

OPINION DELIVERED: July 29, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0396

REID ROAD MUNICIPAL UTILITY DISTRICT NO. 2, PETITIONER,

v.

SPEEDY STOP FOOD STORES, LTD., RESPONDENT

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

Argued October 12, 2010

JUSTICE JOHNSON delivered the opinion of the Court.

JUSTICE WILLETT filed a concurring opinion, in which JUSTICE LEHRMANN joined.

JUSTICE GUZMAN did not participate in the decision.

In this case we address two evidentiary questions. The first is whether an employee of the corporate general partner of a limited partnership qualifies to testify about the fair market value of partnership property under either the Property Owner Rule or Texas Rule of Evidence 701. The second is whether the condemning authority in a condemnation proceeding adopted the damages opinion of an appraiser by presenting the appraiser's testimony and written appraisal in the special commissioners' hearing.

Under the record before us, we answer the first question "No," the second question "Yes," and affirm the judgment of the court of appeals.

I. Background

Speedy Stop Food Stores, Ltd. is a Texas limited partnership that owns and operates convenience stores in Texas. Reid Road Municipal Utility District sought to acquire a waterline easement across land in Harris County owned by Speedy Stop (the Property).[1] The District and Speedy Stop were unable to agree on compensation for the easement, so the District initiated condemnation proceedings. *See* TEX. PROP. CODE § 21.012(a). At the special commissioners' hearing the District introduced testimony of, and a written appraisal by, David Ambrose. Ambrose, a state-certified appraiser, evaluated Speedy Stop's damages at $9,342. Speedy Stop did not appear at the hearing so Ambrose's testimony and appraisal were the only evidence presented. The commissioners awarded Speedy Stop $9,342.

Speedy Stop timely objected to the commissioners' award, transforming the matter from an administrative proceeding to a civil suit. *See id.* § 21.018(b); *Denton County v. Brammer*, 361 S.W.2d 198, 200 (Tex. 1962). The trial court granted partial summary judgment in favor of the District on the taking predicates, leaving the amount of compensation as the only contested issue. After the deadline to designate experts passed without Speedy Stop having designated a damages expert, the District filed a motion for summary judgment as to damages pursuant to Texas Rule of Civil Procedure 166a(i). *See* TEX. R. CIV. P. 166a(i).

[1] Chevron USA, Inc., was initially named as a party to the proceedings, but was dismissed after it filed a disclaimer of interest in the Property.

In response to the District's motion, Speedy Stop filed the affidavit of Carlton LaBeff. LaBeff is the vice president of C.L. Thomas, Inc., the corporate general partner of Speedy Stop. Speedy Stop timely identified LaBeff as a person with knowledge of relevant facts but did not designate him as an expert. In his affidavit LaBeff averred, among other matters, that he (1) had been involved with the acquisition and sale of all Speedy Stop convenience stores since 1982; (2) "for several years" had been in charge of all real estate acquisitions and sales for Speedy Stop; (3) was responsible for dealing with easement issues at all Speedy Stop convenience stores and fast food restaurants; (4) maintained familiarity with realty values in Harris County through various means in order to fulfill his job duties; (5) was aware of how a utility easement can affect the value of commercial property such as the tract at issue; and (6) was "making this affidavit on behalf of the owner, as the owner's representative and as the owner." In the affidavit, LaBeff did not set out facts showing that he had personal knowledge of the Property, nor did he say that he had personal knowledge of or familiarity with it. LaBeff did not give an opinion of the Property's value before or after the easement was taken. Instead, he set out his conclusion that the easement reduced the fair market value of the Property by $62,000.

In its written response to the motion for summary judgment, Speedy Stop attached Ambrose's written appraisal and a transcript of his testimony before the commissioners to LaBeff's affidavit, claiming that Ambrose's appraisal and testimony were admissions by the District. The District objected to LaBeff's affidavit and Ambrose's appraisal and testimony. As to LaBeff's affidavit the District argued that: (1) the time for designating experts had expired and Speedy Stop had not designated LaBeff as an expert witness; (2) LaBeff was not qualified to render an opinion

on the property's value because he was not a licensed real-estate appraiser; and (3) LaBeff's methodology did not satisfy the reliability requirement for valuing the easement. The District argued that Ambrose's appraisal and testimony were not admissible because: (1) testimony at an administrative hearing is not admissible as proof of facts in the de novo trial proceeding; (2) Ambrose was not designated as an expert; and (3) Ambrose's testimony was hearsay and not an admission by the District because he was not an agent of the District.

The trial court sustained the District's objections to both LaBeff's affidavit and Ambrose's testimony and appraisal. It then granted the District's motion for summary judgment and entered judgment awarding Speedy Stop damages of one dollar. *See State v. Jackson*, 388 S.W.2d 924, 926 (Tex. 1965) (holding that because the property owner adduced no evidence relating to the issue of value in the condemnation proceeding, "the trial court was necessarily constrained to instruct the jury to return a verdict for nominal damages").

The court of appeals reversed, holding that the Property Owner Rule applies to corporate entities. 282 S.W.3d 652, 657-58. Applying the Property Owner Rule, the court of appeals held that LaBeff was a designated agent familiar with the market value of the Property and the trial court abused its discretion by striking his affidavit. The court of appeals did not reach Speedy Stop's assertion that Ambrose's opinion and appraisal constituted an admission by the District as to damages. We granted the District's petition for review. 53 Tex. Sup. Ct. J. 569 (April 12, 2010).

We agree with Speedy Stop in part as to the Property Owner Rule, and in whole as to its contention that Ambrose's testimony and appraisal constitute an admission by the District. As to LaBeff's damages opinion, we believe the better rule is to treat organizations the same as natural

persons for purposes of the Property Owner Rule, with certain restrictions on whose testimony can be considered as that of the property owner. We hold that the Property Owner Rule is limited to those witnesses who are officers of the entity in managerial positions with duties related to the property, or employees of the entity with substantially equivalent positions and duties. Further, the Property Owner Rule falls within the ambit of Texas Rule of Evidence 701 and therefore does not relieve the owner of the requirement that a witness must be personally familiar with the property and its fair market value, but the Property Owner Rule creates a presumption as to both.

LaBeff, however, was not an employee or officer of Speedy Stop. Nor did his affidavit set out facts showing he was personally familiar with the Property and its value and that his opinion was not substantively an expert opinion based on specialized knowledge, skill, experience, training, or education. Thus, the trial court did not abuse its discretion by excluding his opinion as to the Property's diminution in value. On the other hand, the District's actions before the special commissioners evidenced its belief in the truth of Ambrose's opinion and appraisal as to Speedy Stop's damages. Thus, Ambrose's damages opinion and his appraisal were admissible as adoptive admissions by the District under Texas Rule of Evidence 801(e)(2)(B) and they were some evidence of Speedy Stop's damages.

II. Analysis

A. LaBeff's Affidavit

The District asserts that the trial court properly excluded LaBeff's affidavit and the court of appeals erred by holding that it was admissible under the Property Owner Rule. The District urges that corporate employees cannot be treated as "owners" for purposes of testifying about the value

of corporate property, and even if they can be, LaBeff was not an employee of the Property's owner. The District also argues that allowing everyone familiar with property to testify to its value under Texas Rule of Evidence 701 will negate the protections provided by rules and procedures requiring timely disclosure of experts and their opinions.

Speedy Stop first argues that regardless of the Property Owner Rule, LaBeff's affidavit was improperly excluded because Rule 701 allows admission of his testimony. It next argues that the court of appeals was correct: LaBeff's affidavit was improperly excluded because he was designated as an agent for the owner of the Property and his affidavit was admissible because of the Property Owner Rule.

We agree with the District that the trial court did not abuse its discretion by excluding LaBeff's affidavit. We first address the issue of whether LaBeff's affidavit was admissible under Rule 701 even though he was not designated as an expert witness.

1. Rules 701 and 702

Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

TEX. R. EVID. 702. In contrast, Rule 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

TEX. R. EVID. 701. We will discuss each rule in turn.

a. Rule 702

For purposes of Rule 702, a witness is testifying as an expert witness when the witness's testimony, in substance, is based on special knowledge, skill, experience, training, or education in a particular subject. *See, e.g.*, *Seale v. Winn Exploration Co., Inc.*, 732 S.W.2d 667, 669 (Tex. App.—Corpus Christi 1987, writ denied); *Perry v. Tex. Mun. Power Agency*, 667 S.W.2d 259, 264 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Montgomery Ward & Co. v. Levy*, 136 S.W.2d 663, 669 (Tex. Civ. App.—Fort Worth 1940, writ dism'd).

But not all witnesses who are experts necessarily testify as experts. A witness may have special knowledge, skill, experience, training, or education in a particular subject, but testify only to matters based on personal perception and opinions. *See generally* John F. Sutton, Jr. & Cathleen C. Herasimchuk, *Article VII: Opinions and Expert Testimony*, 30 HOUS. L. REV. 797, 826-27 (1993) (explaining that "[a] witness with specialized training or experience is not limited to giving opinion testimony as a Rule 702 'expert'" and that "[i]f his opinion rests on firsthand knowledge . . . then testimony under Rule 701 is also permissible"). If so, the witness's testimony is not expert testimony for purposes of Rule 702, and the witness need not be designated or identified as such. *See id.* at 827 (noting that a witness's "potential qualifications as an expert did not prevent him from testifying within the narrower confines of Rule 701"). But generally a witness testifying to the fair market value of property—even a hired expert with no knowledge of the property apart from that gained because of the controversy involved in the litigation—will be testifying based on some degree of familiarity with the property. If the witness has been hired as an expert, the familiarity will most frequently have been gained during the process of formulating the witness's opinion.

The line between who is a Rule 702 expert witness and who is a Rule 701 witness is not always bright. But when the main substance of the witness's testimony is based on application of the witness's specialized knowledge, skill, experience, training, or education to his familiarity with the property, then the testimony will generally be expert testimony within the scope of Rule 702.[2] A witness giving such testimony must be properly disclosed and designated as an expert and the witness's testimony is subject to scrutiny under rules regarding experts and expert opinion. *See Seale*, 732 S.W.2d at 669; *Perry*, 667 S.W.2d at 264; *see also Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). Any other principle would allow parties to conceal expert testimony by claiming the witness is one whose opinions are merely for the purpose of explaining the witness's perceptions and testimony. *See generally* Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that courts "should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process").

Accordingly, we do not categorically agree with Speedy Stop's contention that all persons with personal knowledge of real property can give opinion testimony as to the market value of that property without the testimony being considered and identified as expert testimony. Such a holding

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[2] Prior to a 2000 amendment to the Federal Rules of Evidence, Rules 701 and 702 of the Texas and Federal Rules of Evidence were almost identical. Federal Rule 701, however, was amended to prohibit lay opinion testimony "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701 (amended Dec. 1, 2000). The Advisory Committee Note explains that the change was made "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." FED. R. EVID. 701 advisory committee's notes. Texas Rule of Evidence 701 has not been similarly amended, but the same concern—that expert testimony will be offered as evidence without meeting the reliability requirements of Rule 702—underlies our opinion.

would allow circumvention of discovery and disclosure rules that allow parties to prepare for trial and protect themselves from trial by ambush. Instead, we hold that subject to the provisions of Rule 701, as we discuss below, a witness who will be giving opinion evidence about a property's fair market value must be disclosed and designated as an expert pursuant to discovery and other applicable rules.[3] *See* TEX. R. EVID. 702; TEX. R. CIV. P. 195.1-.4.

b. Rule 701

Speedy Stop argues that Rule 701 permits any person to testify regarding the value of real property so long as the witness is familiar with its value, and LaBeff was such a witness. We do not completely agree with this argument, but agree that one key to admissibility of LaBeff's affidavit under Rule 701 is his personal familiarity with both the property and its value. And we further believe that Rule 701 encompasses the Property Owner Rule, which is based on the presumption that a property owner is familiar with her property and its value. We need not address Rule 701 apart from the Property Owner Rule in depth, however, because while LaBeff's affidavit demonstrates his expertise in real estate matters and general familiarity with Speedy Stop's property, it does not set out facts demonstrating that he was personally familiar with the Property and its fair market value, nor does it demonstrate that his opinion is not substantively based on his specialized knowledge, experience, training, and expertise. *See* TEX. R. EVID. 702.

LaBeff did not specify in his affidavit that he was familiar with the Property, nor did he state that he was familiar with its value. His affidavit was dedicated to detailing his experience,

[3] We do not address the District's contention that LaBeff would not have qualified as an expert because he was not licensed as an appraiser, except to state that Rule 702 does not require a witness to have any particular license to qualify as an expert.

knowledge, and expertise in real estate and real estate values, including easements, and his general familiarity with Speedy Stop's business. His valuation opinion, taken from a two-page, single spaced affidavit that set out his experience, education, and general knowledge of real estate values was succinct and clear about the basis of his opinion:

> It is my opinion *based upon my knowledge, background, education and experience* that the difference in the fair market value of the property in question (which is the subject matter of the lawsuit) immediately before and immediately after the condemnation of this easement, was $62,000. Further, it is my opinion as the owner of the property in question that the difference in value, immediately before and immediately after the condemnation, was $62,000, all because of the condemnation and the easement which resulted from the condemnation (emphasis added).[4]

LaBeff's affidavit shows that his damages opinion, in substance, was based on his expertise—his "knowledge, background, education and experience"—not his personal familiarity with the Property. As such, and because he was not timely disclosed as an expert, the trial court did not abuse its discretion in excluding his opinion of damages under Rule 701.

We next consider Speedy Stop's argument that if Rule 701 did not allow the trial court to consider LaBeff's affidavit, the Property Owner Rule did. We conclude that it did not.

2. The Property Owner Rule

a. General Rule

Generally, a property owner is qualified to testify to the value of her property even if she is not an expert and would not be qualified to testify to the value of other property. *See Porras*, 675

[4] The District argues that LaBeff's testimony was conclusory and he did not properly arrive at his damages estimate. We need not address the argument in light of our determination that the trial court did not abuse its discretion by excluding his affidavit.

S.W.2d at 504. The rule is based on the presumption that an owner will be familiar with her own property and know its value. *See id.*

A business organization has the power "to take action necessary or convenient to carry out its business and affairs," including the power to own and hold property. TEX. BUS. ORGS. CODE § 2.101. An organization takes action through its agents. *See Bennett v. Reynolds*, 315 S.W.3d 867, 883 (Tex. 2010); *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997). An agent's act on behalf of the organization is the act of the organization itself. *Hammerly*, 958 S.W.2d at 391. Therefore, when an entity's agent testifies to the market value of the organization's property, the legal effect is that the actual owner of the property is testifying. *See id.*

In support of its position, the District cites *Mobil Oil Corp. v. City of Wichita Falls*, 489 S.W.2d 148 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.). In *Mobil Oil Corp.*, the court stated that the parties "failed to cite any authority to the effect that a designated agent of a corporation is an 'owner.'" *Id.* at 150. The court then concluded, citing case law from other states, that a "designated agent of a corporation cannot testify as to the value of the property of such corporation unless he first qualifies as an expert." *Id.* Speedy Stop argues that the witness in *Mobil Oil Corp.* was an independent appraiser as opposed to an agent of the corporation and the court's statements discussing the Property Owner Rule were dicta. But regardless of the witness's relation to the corporation, to the extent that *Mobil Oil Corp.* holds contrary to the rule we express today, we disapprove of it.

Through their employees, entities are as capable of knowing the market value of their property as are individuals. Many entities may have more knowledge of the fair market value of

their property than would an individual because organizations frequently have employees whose duties require that they not only be personally acquainted with the entity's properties, but also require the employees to obtain and maintain current valuations of the entity's property for business reasons. LaBeff's affidavit demonstrates such a situation. Although his affidavit did not show he had personal knowledge of the Property, it showed that his job duties required him to remain aware of general market conditions for real estate and convenience stores, and that he dealt with easement issues relating to Speedy Stop's property. Thus, we see no good reason to conclude that business organizations are any less familiar with the value of their property than are individual property owners, or to preclude them from coming within the Property Owner Rule and its presumption that a property owner is familiar with its property and the property's value. *See Libhart v. Copeland*, 949 S.W.2d 783, 798 (Tex. App.—Waco 1997, no writ); *Taiwan Shrimp Farm Village Ass'n, Inc. v. U.S.A. Shrimp Farm Dev., Inc.*, 915 S.W.2d 61, 71 (Tex. App.—Corpus Christi 1996, writ denied).

However, we recognize that an entity necessarily testifies through its agents and representatives and that applying the Property Owner Rule and its presumptions to every employee or representative of an entity could result in abuse of the rule.

b. An Entity's Testimony Under the Property Owner Rule

There must be some limit on who is permitted to testify on an entity's behalf under the Property Owner Rule. Otherwise, as the District points out, an entity might identify various employees and other persons in discovery as having knowledge of relevant facts, then after discovery has closed, pick a person who has not been deposed to testify to the value of the property at issue. Such a situation could allow trial by ambush by allowing circumvention of the means by which

witnesses and opinions are to be timely disclosed, such as requirements of discovery rules and scheduling orders.

Some jurisdictions extend the Property Owner Rule to corporations, but permit only an officer or director of the corporation to testify on the corporation's behalf on the theory that the representative of the property owner must be someone who controls and manages the corporation. *Weber v. W. Seattle Land & Improvement Co.*, 63 P.2d 418, 420-21 (Wash. 1936); *see also Tennessee v. Livingston Limestone Co.*, 547 S.W.2d 942, 943-44 (Tenn. 1977); *M.A. Realty Co. v. State Rds. Comm'n*, 233 A.2d 793, 796 (Md. 1967). However, there may be instances where officers or directors, especially of larger corporations or business entities, have limited or no knowledge about specific company property and its value. Those circumstances do not seem to warrant the blanket application of a presumption that an officer or director has knowledge of an entity's property and its market value.

Other jurisdictions allow shareholders to testify to fair market value on behalf of a corporate property owner. *See Tokles & Son, Inc. v. Midwestern Indem. Co.*, 605 N.E.2d 936, 941 (Ohio 1992). But shareholders of a corporation are not owners of corporate assets. *See Tenneco, Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 645 (Tex. 1996) (citing *McClory v. Schneider*, 51 S.W.2d 738, 741 (Tex. Civ. App.—Amarillo 1932, writ dism'd)). Nor are shareholders generally considered to be agents of the corporation absent some basis other than their shareholder status. *See Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (noting that an agency is the consensual relationship between two parties where one, the agent, acts on behalf of the other, the principal, and is subject to the principal's control). And for the same reasons we discuss above regarding officers

and directors of entities, application of a blanket presumption that shareholders have knowledge of all a corporation's property and its value is unwarranted. In some instances allowing shareholders to testify to the value of a corporation's property may be appropriate; in some instances it may not. For example, in *Maxey v. Texas Commerce Bank of Lubbock* the sole shareholder, who was also the president of a closely held corporation, was allowed to testify as to the value of the corporation's property. 571 S.W.2d 39, 46 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.).

We believe the better approach is to look both to the position of the witness and to the substance of the witness's duties instead of looking only at the witness's title or status. Limiting the class of employees qualified to testify under the Property Owner Rule accommodates the interests of both the entity and parties opposing the entity. The entity can prove the value of its property through certain categories of employees whose positions and duties warrant applying a presumption that they are familiar with the entity's property and its value, but the adverse party is not disadvantaged by having to depose, investigate and prepare for multiple witnesses whose knowledge and testimony may not be relevant on the value issue.

A reasonable balance as to who may testify under the Property Owner Rule on behalf of an entity is struck by allowing such testimony only from an officer in a management position with duties that at least in some part relate to the property at issue, or an employee of the entity in a substantially equivalent position. *See Redman Homes, Inc.*, 920 S.W.2d at 669; *Porras*, 675 S.W.2d at 504.

c. Application to LaBeff

LaBeff was not an employee of Speedy Stop; he was an officer for Speedy Stop's general partner, C.L. Thomas, Inc. C.L. Thomas was not the owner of Speedy Stop's property. *See* TEX. BUS. & ORGS. CODE § 152.101 ("Partnership property is not property of the partners."); § 153.003(a) (stating that rules governing general partnerships also apply to limited partnerships absent conflict); *see also Stanley v. Reef Sec., Inc.*, 314 S.W.3d 659, 664 (Tex. App.—Dallas, 2010 no pet.); *Siller v. LPP Mortg., Ltd.*, 264 S.W.3d 324, 329 (Tex. App.—San Antonio, 2008 no pet.). Even though LaBeff had general knowledge of Speedy Stop's property, he did not fall into the category of entity representatives to whom the Property Owner Rule applies. He did not qualify to testify to the value of the Property under the Property Owner Rule, and the trial court did not abuse its discretion by excluding his affidavit to the extent it offered his opinion as to Speedy Stop's damages.

B. Ambroses's Appraisal Testimony and Affidavit

Speedy Stop also offered Ambrose's appraisal and testimony that the District introduced before the special commissioners. Speedy Stop contended that this evidence, although comprising out-of-court statements offered for their truth, was nevertheless admissible as an admission by the District. *See* TEX. R. EVID. 801(e)(2). The District objected, arguing the trial court should exclude this evidence because the testimony of witnesses in an administrative proceeding is not admissible in a de novo appeal to the trial court; neither party timely designated Ambrose as an expert; and his testimony was not an admission by the District because Ambrose was not an agent of the District. The trial court sustained the District's objections and excluded Ambrose's testimony and appraisal from evidence.

Speedy Stop argues that Ambrose's opinions before the commissioners are admissions by the District, and as such are admissible as non-hearsay. The court of appeals did not address this issue, but rather than remanding to the court of appeals for it to do so, we address it in the interest of judicial economy. *See* TEX. R. APP. P. 53.4; *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (addressing and deciding an issue not addressed by the court of appeals); *see also Little v. Tex. Dep't of Criminal Justice*, 148 S.W.3d 374, 384 (Tex. 2004) (recognizing the Court's authority to consider an issue not decided by the court of appeals).

Ambrose was hired by the District to estimate the amount of compensation due to Speedy Stop and provide a written appraisal of the Property. In the hearing before the special commissioners he was called as a witness by the District and the substance of his testimony was that Speedy Stop's damages were $9,342 for the taking. The District also referred the commissioners to Ambrose's written appraisal, which was to the same effect.

Certain out-of-court statements offered for their truth are not hearsay. *See* TEX. R. EVID. 801(e). Among those are admissions by a party-opponent, which include:

> (A) the party's own statement in either an individual or representative capacity;
> (B) a statement of which the party has manifested an adoption or belief in its truth;
> (C) a statement by a person authorized by the party to make a statement concerning the subject;
> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or
> (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

TEX. R. EVID. 801(e)(2).

The District argues that Ambrose's testimony is not an admission under the agency prong of Rule 801(e)(2)(D) because there is no proof that Ambrose was the District's agent or employee. We agree there is no evidence Ambrose was the District's employee. But even assuming there was no evidence of an agency relationship either,[5] Rule 801(e)(2)(B) allows for admissions by a party-opponent when the party-opponent has manifested an adoption or belief in the statement's truth. TEX. R. EVID. 801(e)(2)(B).

It has long been the rule that "[w]here a party has used a document made by a third party in such way as amounts to an approval of its contents, such statement may be received against him as an admission by adoption." *See Tex. Reciprocal Ins. Ass'n v. Stadler*, 166 S.W.2d 121, 125 (Tex. 1942) (citing *Thornell v. Mo. State Life Ins. Co.*, 249 S.W. 203 (Tex. Comm'n App. 1923, judgm't adopted)). The court in *East Tennessee Natural Gas Co. v. 2.67 Acres in Smyth County, Va.*, No. 4:02-CV-00220, 2006 WL 1171943 (W.D. Va. Apr. 28, 2006), addressed a situation similar to that which we consider. In that case the plaintiff, East Tennessee Natural Gas Company, hired an appraiser to determine the value of land prior to the hearing before a special commission. *Id.* at *2. Ultimately the gas company did not introduce the appraisal at the hearing because it did not agree with the appraiser's value. *Id.* The property owner sought to introduce the appraisal against the gas

[5] Of course, had an agency relationship been established, Ambrose's affidavit would be admissible under Rule of Evidence 801(e)(2)(D). *See, e.g.*, *Tex. Comm'n on Human Rights v. Kinnear*, 986 S.W.2d 828, 833-34 (Tex. App.—Beaumont 1999) (upholding a decision to exclude expert testimony where the expert was not shown to be an agent), *rev'd in part on other grounds*, 14 S.W.3d 299 (Tex. 2000); *Handel v. Long Trusts*, 757 S.W.2d 848, 850-51 (Tex. App.—Texarkana 1988, no writ) (refusing to admit testimony as an admission by party-opponent where the record did not show the extent of an agency relationship); *see also Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980) (holding expert's accident report was admissible under Federal Rule of Evidence 801(d)(2)(C) where it determined the expert to be an agent of the party), *superseded on other grounds by rule as stated in Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002).

company, but the gas company objected on hearsay grounds. *Id.* at *11. The gas company argued that the appraisal could not be an admission by party-opponent pursuant to Federal Rule of Evidence 801(e)(2)[6] because the appraiser was not an agent of the gas company and the gas company never authenticated or adopted the appraisal. *Id.* The court held that the gas company did not adopt the appraisal, reasoning that because the gas company "chose not to offer it before the Commission, then it seems logical that the [gas company] did not want to adopt or authenticate the appraisal." *Id.* And "without the [gas company's] adoption or authentication, the appraisal amounts to an out of court statement which the [property owners] were offering to prove its truth." *Id.*

Although the court in *East Tennessee Natural Gas Co.* excluded the appraisal, the court's reasoning suggests that had the gas company sought to offer the appraisal before the commission, the court would have concluded that the gas company adopted the appraiser's valuation as true. *See id.* That is the situation before us in this case. The District presented both Ambrose's testimony and his appraisal to the commissioners as evidence of Speedy Stop's damages.

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[6] Texas Rule of Evidence 801 is almost identical to its Federal counterpart. The federal rule provides that admissions by party-opponents are not hearsay if:

> The statement is offered against a party and is
> (A) the party's own statement, in either an individual or a representative capacity, or
> (B) a statement of which the party has manifested an adoption or belief in its truth, or
> (C) a statement by a person authorized by the party to make a statement concerning the subject, or
> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID. 801(e)(2). Where the Federal Rules of Evidence are similar, we may look to federal case law for guidance in interpreting the Texas evidentiary rules. *See E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 555-57 (Tex. 1995) (consulting federal case law when interpreting Texas Rule of Evidence 702); *Bradley v. State ex rel. White*, 990 S.W.2d 245, 248-49 (Tex. 1999) (discussing Federal Advisory Committee Notes and federal case law when interpreting Texas Rule of Evidence 605 because it "is identical to its federal counterpart").

Speedy Stop cites *Yarbrough's Dirt Pit, Inc. v. Turner*, 65 S.W.3d 210 (Tex. App.—Beaumont 2001, no pet.), in support of its contention that Ambrose's appraisal was an admission by the District. There the court of appeals considered the effect of deposition testimony of a witness hired and designated by Yarbrough as an expert witness on the subject matter involved in the suit:

> Based on his designation by Yarbrough as an expert witness and the tenor of the deposition questions submitted to him, Nalle was specifically authorized to speak on behalf of Yarbrough about the fault of the parties. We hold that a conclusion of an expert witness hired by an opposing party to speak on the subject matter on behalf of the party opponent is admissible against the party opponent, and the conclusion may be relied on in a motion for summary judgment even if the opposing expert witness does not disclose the bases for the conclusion adverse to the expert's client.

Id. at 214. The circumstances in *Yarbrough's* are different from those before us, and we need not decide whether the conclusion of an expert hired and designated by a party is always admissible against that party. But we agree with Speedy Stop that in this case the District manifested its belief in and approval of Ambrose's opinion as to Speedy Stop's damages: it called him as a witness to testify to the special commissioners regarding that opinion and proffered his written appraisal to them in support of his testimony. *See* TEX. R. EVID. 801(e)(2)(B). Thus, the appraisal is admissible against the District as an admission by adoption. *See* TEX. R. EVID. 801(e)(2)(B); *see also Stadler*, 166 S.W.2d at 125. Our conclusion is also supported by other cases in a variety of different contexts. *See Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1355 (5th Cir. 1983) (holding that because the plaintiff's expert witness based his opinions regarding lost wages upon the assumption that the plaintiff was not a "Jones Act seaman," the plaintiff was precluded from presenting a theory of recovery resting on the Jones Act); *Buckley v. Airshield Corp.*, 116 F. Supp. 2d 658, 664 (D. Md.

2000) (holding that party adopted documents as true by submitting them as exhibits in a separate case); *Harris v. United States*, 834 A.2d 106, 117 (D.C. 2003) ("Submission of documents to a court also suggests adoption of the documents."); *see also* KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 261, at 211 (6th ed. 2006) ("When a party offers in evidence a deposition or an affidavit to prove the matters stated therein, the party knows or should know the contents of the writing so offered . . . . Accordingly, it is reasonable to conclude that the writing so introduced may be used against the party as an adoptive admission in another suit.").

Rule 801(e)(2) provides that admissions of a party-opponent are admissible non-hearsay. TEX. R. EVID. 801(e)(2). And because the evidence was an admission by the District, as opposed to testimony by a witness called by Speedy Stop, Speedy Stop was not required to identify Ambrose as an expert before his opinion could be admitted. *See Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007) ("*[A]ny* statement by a party-opponent is admissible against that party."). Further, admissions by a party opponent can occur outside a judicial proceeding and are not inadmissible simply because they occur in an administrative hearing such as was involved here. *See* TEX. R. EVID. 801(e)(2) (permitting as evidence statements made out of court); *Bay Area Healthcare Grp., Ltd.*, 239 S.W.3d at 235. The trial court erred by excluding Ambrose's affidavit and appraisal.

Ambrose's testimony as to damages and his written appraisal comprised some evidence of damages. The trial court erred by excluding them and thus it erred by granting the District's motion for summary judgment.

III. Conclusion

The trial court did not abuse its discretion by excluding the damages opinion LaBeff expressed in his affidavit. However, the court erred by excluding Ambrose's testimony and appraisal as to Speedy Stop's damages.

We affirm the court of appeals' judgment reversing the judgment of the trial court and remanding the case for further proceedings.

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Phil Johnson
Justice

OPINION DELIVERED: March 11, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0396

REID ROAD MUNICIPAL UTILITY DISTRICT NO. 2, PETITIONER,

v.

SPEEDY STOP FOOD STORES, LTD., RESPONDENT

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

Argued October 12, 2010

JUSTICE WILLETT, joined by JUSTICE LEHRMANN, concurring.

The Court addresses application of Texas Rule of Evidence 701 and the Property Owner Rule when a business organization owns the property condemned by the government. It holds that when a business entity owns the property, a natural person can testify as to its value under the Property Owner Rule if the person is "an officer in a management position with duties that at least in some part relate to the property at issue, or an employee of the entity in a substantially equivalent position."[1] The Court concludes that the Property Owner Rule does not apply because LaBeff was not an officer or employee of the limited partnership that owned the property; rather, he was an officer of the corporation serving as the general partner of the limited partnership.

[1] ___ S.W.3d at ___.

The Court further holds that one key to whether LaBeff's affidavit was admissible under Rule 701 was "his personal familiarity with both the property and its value."[2] The Court notes the lack of proof in this regard. The opinion, as I read it, leaves open the question whether LaBeff's affidavit would have been admissible under Rule 701 (but not the Property Owner Rule) if he had such personal knowledge, even though he was not an officer of the limited partnership that owned the property.

Limited partnerships, including real-estate limited partnerships, are popular investment vehicles.[3] They commonly consist of passive limited partners[4] and a general partner that is a corporation.[5] Since limited partnerships are managed by the general partner or partners,[6] there is no particular reason for a limited partnership to have any managerial employees—or indeed any employees at all. Therefore, the Court's treatment of the Property Owner Rule means that many, if

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[2] *Id.* at ___.

[3] *See* 19 ROBERT W. HAMILTON ET AL., BUSINESS ORGANIZATIONS § 13.2 (Tex. Practice 2004) ("The limited partnership offers certain advantages that may make it an attractive choice of business entity. . . . [P]artnership tax treatment for federal income tax purposes may provide significant tax savings when compared with the tax treatment of either a C corporation or an S corporation.").

[4] *Id.* § 13.1 ("Limited partners are, at least in the statutory default mode, passive investors whose liability is limited to their capital contributions.").

[5] *Id.* §§ 1.8 ("In practice today, most limited partnerships have only a single general partner and that partner is usually a nominally capitalized limited liability entity such as a corporation or limited liability company."); 13.2 ("The principal disadvantage of the limited partnership form as compared with a corporation or a limited liability company relates to the liability of the owners. The general partners of a limited partnership are personally liable for partnership obligations. To minimize this disadvantage, limited partnerships are often formed with a corporate or limited liability company general partner . . . ."); 14.7 ("Corporate or limited liability ("LLC") general partners are frequently used to avoid exposing individuals or other entities to liability as general partners [of a limited partnership].").

[6] *Id.* § 13.1 ("General partners of a limited partnership, like partners of a general partnership, have managerial rights . . . ."); TEX. BUS. ORG. CODE §§ 153.102, .152.

not most, limited partnerships could never proffer a witness on the value of their real estate holdings under the Property Owner Rule.

Yet the Court does contemplate application of the Property Owner Rule to a managing officer of the entity owning the property or an employee of the entity in a "substantially equivalent" position. In the case of a limited partnership, I would hold that a managing officer of the corporate general partner with duties relating to the property may testify as to the value of partnership property without being qualified as a expert witness, provided the officer is familiar with the specific property in issue and its value. Such a rule would provide some parity of treatment of limited partnerships and corporations in condemnation proceedings. I do not think it matters whether this rule is seen as an application of the Property Owner Rule or Rule 701 or both. Regardless, in this case LaBeff did not meet the personal knowledge requirement and his affidavit was properly excluded, as the Court holds.

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Don R. Willett
Justice

OPINION DELIVERED: March 11, 2011

IN THE SUPREME COURT OF TEXAS

444444444444
NO. 09-0399
444444444444

BP AMERICA PRODUCTION COMPANY, ATLANTIC RICHFIELD COMPANY AND VASTAR RESOURCES, INC., PETITIONERS,

v.

STANLEY G. MARSHALL, JR., ROBERT RAY MARSHALL, CATHERINE IRENE MARSHALL F/K/A CATHERINE I.M. HASHMI, AND MARGARET ANN MARSHALL F/K/A MARGARET A.M. JEFFUS, BY AND THROUGH DAVID JEFFUS, AS INDEPENDENT EXECUTOR OF THE ESTATE OF MARGARET MARSHALL, RESPONDENTS

444444444444444444444444444444444444444444444444444444
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS
444444444444444444444444444444444444444444444444444444

Argued December 7, 2010

JUSTICE LEHRMANN delivered the opinion of the Court.

JUSTICE GREEN did not participate in the decision.

This case involves two related oil and gas mineral lease disputes that were jointly tried. One of the disputes is between petitioners BP America Production Co., Atlantic Richfield Co., and Vastar Resources, Inc. (collectively "BP"), the lessee and operator, and respondents the Marshall family, Stanley, Robert, Catherine, and Margaret Marshall, the lessors. The other is a dispute between BP's successors-in-interest, petitioners Wagner Oil Co. f/k/a Duer Wagner & Co., Jacque Oil & Gas

Limited, Duer Wagner, Jr., Duer Wagner III, Bryan C. Wagner, James D. Finley, Dennis D. Corkran, David J. Andrews, H.E. Patterson, Brent Talbot, Scott Briggs, and Gysle R. Shellum (collectively "Wagner"), and another lessor, respondents Vaquillas Ranch Co., Ltd., Vaquillas Unproven Minerals, Ltd., and Vaquillas Proven Minerals, Ltd. ("Vaquillas")[1]. We are asked to determine whether limitations barred the Marshalls' fraud claim against BP, and whether Vaquillas lost title by adverse possession after Wagner succeeded to BP's interests, took over the operations, and produced and paid Vaquillas royalties for nearly twenty years.

Based in part upon jury findings that BP had made fraudulent representations about its good-faith efforts to develop a well on the Marshall lease that the Marshalls could not have discovered before limitations expired, the trial court rendered judgment for the Marshalls. It also rendered judgment for Wagner that Wagner had acquired the Marshall and Vaquillas leases by adverse possession. The court of appeals affirmed the judgment against BP in most respects, and reversed the trial court's judgment for Wagner. 288 S.W.3d 430, 438. We reverse the court of appeals' judgment and render judgment for Wagner and BP. We hold that because the Marshalls' injury was not inherently undiscoverable and BP's fraudulent representations about its good faith efforts to develop the well could have been discovered with reasonable diligence before limitations expired, neither the discovery rule nor fraudulent concealment extended limitations. Accordingly, the Marshalls' fraud claims against BP were time-barred. We further hold that by paying a clearly

[1] The following entities submitted amicus briefs: the Texas Oil & Gas Association, Kelly Hart & Hallman LLP, and the Texas Land & Mineral Owners Association.

labeled royalty to Vaquillas, Wagner sufficiently asserted its intent to oust Vaquillas to acquire the lease by adverse possession.

I. BACKGROUND

At the time of the dispute, fifty percent of the minerals under 17,712 acres in the Slator Ranch were owned by Tenneco and later assigned to Wagner; the other fifty percent were owned by a number of individuals and entities, including the Marshalls and the Vaquillas companies. The Marshalls owned approximately 1/16 and Vaquillas owned approximately 1/4 of the minerals. In the 1970s, BP[2] obtained oil and gas leases on the Slator Ranch from Tenneco, Vaquillas, the Marshalls, and other mineral owners not party to this dispute. Their leases had a standard sixty-day savings clause providing that the lease would continue past the expiration date so long as BP was engaged in good-faith drilling or reworking operations designed to produce paying quantities of oil or gas with no cessation of operations for more than sixty days.

The primary terms of the Marshalls' and Vaquillas's leases were set to expire on July 11, 1980. Two weeks before the expiration date, BP drilled a well, the J.O. Walker No. 1. BP continued to work on the J.O. Walker No. 1 for the rest of the year, testing several zones in the well. Seeing no production from the well after the lease expiration date, Stanley Marshall, a member of the Marshall family, contacted BP and was informed that the lease was kept alive by continuing operations. A few days later, H.F. Young, the BP landman who spoke with Marshall, sent him a three-page letter purporting to document BP's continuous operations. BP listed a number of

[2] The leases were executed by Atlantic Richfield Co. (ARCO), an entity later acquired by BP. Given the number of entities involved in the dispute, we refer to ARCO as BP to avoid confusion.

activities conducted on J.O. Walker No. 1, implying that good-faith efforts were continuing to invoke the sixty-day savings clause and retain the lease. The Marshalls, satisfied with BP's response, did not investigate further. During the same period, Vaquillas representatives likewise inquired into the status of its lease, and received a copy of the same letter from Young.

On March 25, 1981, BP entered into a series of agreements with Sanchez-O'Brien Oil & Gas Corporation by which Sanchez-O'Brien eventually became the operator on a portion of the Slator Ranch. The same day, BP decided to permanently plug and abandon the J.O. Walker No. 1 as unproductive. Sanchez-O'Brien drilled its first, undisputedly productive, well in April 1981. Then, in August 1994, Sanchez-O'Brien transferred its portion of the lease through a series of assignments to Fina Oil & Chemical Co., and ultimately to Wagner.

It is undisputed that there have been continuous operations on the lease from the day Sanchez-O'Brien began operations to the present. At the time it obtained assignment of the Marshalls' and Vaquillas's leases from BP, Wagner was already operating in other portions of the Slator Ranch and held leases to fifty percent of the minerals. Wagner regularly paid royalties upon obtaining the assignment.

In 1997, Vaquillas sued its lessee Wagner, BP, and other entities alleging breach of implied covenants to reasonably develop and market hydrocarbons under the lease. During the course of discovery, Vaquillas's experts came to believe that its original lease with BP, Wagner's predecessor-in-interest, terminated in early January 1981 because BP had abandoned any real efforts to rework the well and would not have expected it to produce in paying quantities when it continued operations in February and March. Since drilling on the Sanchez-O'Brien well did not commence until April

13, 1981, more that sixty days later, Vaquillas asserted that the title to the leasehold reverted back to Vaquillas. Vaquillas amended the lawsuit to seek a declaration of title to the mineral interest, contending that Wagner did not have title to the lease because the lease expired before BP transferred its interest in the leasehold to Wagner.

In 2001, the Marshalls intervened in the suit against BP and Wagner, similarly alleging that their lease had terminated in 1981 and adding that BP had defrauded them by purposefully concealing facts and circumstances demonstrating that the lease had already terminated. Vaquillas settled its claims against BP and proceeded to trial only against Wagner. The Marshalls conceded that Wagner's possession of the Marshall and Vaquillas leaseholds during the ten years following the alleged lapse in operations constituted adverse possession and proceeded to trial only on their fraud claims against BP. They contended that because BP fraudulently concealed that the lease had expired, the four-year statute of limitations for fraud claims should be extended to the time they could have reasonably discovered the fraud — June 2000, when BP released internal documents on the J.O. Walker No. 1. The Marshalls argued BP knew by the lease expiration date that the well was incapable of production and continued operations in bad faith until it could sell the lease to Sanchez-O'Brien.

At trial, the jury found in favor of the Marshalls and against BP, and the court rendered judgment on the verdict. The Marshalls were granted: (1) a declaration that the Marshall lease with BP had terminated; (2) a declaration that BP's property interest had terminated and reverted to the Marshalls; (3) a court-ordered accounting and a transfer of an overriding royalty interest; (4) past compensatory damages of $1,127,749.00 for each Marshall family member based upon the jury's

fraud finding; (5) attorney's fees; and (6) prejudgment and post-judgment interest. In the dispute between Vaquillas and Wagner, the jury found that: (1) Wagner had adversely possessed the leasehold; (2) Wagner was a bona fide purchaser; and (3) the failure of Vaquillas to timely file suit against Wagner was not excused. The trial court rendered judgment for Wagner against the Vaquillas Companies and granted a directed verdict for Wagner against the Marshalls, ruling that Wagner had adversely possessed the mineral interest covered by its lease as to the Marshalls.

The court of appeals held there was legally sufficient evidence to support the jury's finding that BP committed fraud against the Marshalls and Vaquillas, both affirmatively and by nondisclosure, and fraudulently concealed the facts necessary for Vaquillas and the Marshalls to know they had a cause of action for fraud until June 29, 2000. 288 S.W.3d at 452. With respect to limitations, the court of appeals reasoned,

> The discovery rule applies only to a limited category of cases, including cases involving fraud or fraudulent concealment. (Citations omitted). Accordingly, BP America's argument based on whether the nature of the injury is inherently discoverable and the injury itself is objectively verifiable is inapplicable. Because BP America does not challenge the jury's finding relating to the date of discovery, which is within the applicable limitations period, we overrule this portion of issue three. We need not address BP America's claim that the Marshalls did not prove fraudulent concealment because the application of the discovery rule alone is sufficient to defeat BP America limitations defense.

288 S.W.3d at 452. The court reversed the judgment awarding title to the leases to Wagner by adverse possession. *Id.* We granted BP's and Vaquillas's petitions for review. 54 Tex. Sup. Ct. J. 1, 2 (Oct. 1, 2010).

II. LIMITATIONS

BP challenges the court of appeals' ruling[3] that the Marshalls' fraud claim was not barred by limitations. BP asserts that the court of appeals erred in holding that the discovery rule exception to limitations applied to the Marshalls' claims. We agree that the discovery rule exception did not operate to defer accrual of the cause of action; however, this does not end our analysis. We must also consider whether limitations were tolled by BP's fraudulent concealment of the cessation of good faith operations. We consider each doctrine in turn.

A. The discovery rule

We have recognized two doctrines that may apply to extend the statute of limitations. *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455-56 (Tex. 1996). Under the first, the discovery rule, the cause of action does not accrue until the injury could reasonably have been discovered. *See id.*; *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) (citing *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994)), for the proposition that deferring accrual and thus delaying the commencement of the limitations period differs from suspending or tolling the running of limitations once the period has begun). The discovery rule is applied categorically to instances in which "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable."[4] *Altai*, 918 S.W.2d at 456. An injury is not inherently

[3] We address the dispute between BP and the Marshalls first, turning to the dispute between Vaquillas and Wagner in section III.

[4] We have occasionally distinguished between cases involving allegations of "fraud and fraudulent concealment [and cases] to which the discovery rule applies." *See, e.g., S.V. v. R.V.*, 933 S.W.2d at 6. BP reads our decisions to preclude the application of the discovery rule in all fraud cases and argues that the court of appeals therefore erred in its application. We first note that the discovery rule delays the accrual of a cause of action, rather than tolling the statute of limitations after a cause of action has accrued. *See id.* However, because we agree with BP that the discovery rule

undiscoverable when it is the type of injury that could be discovered through the exercise of reasonable diligence. *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734–35 (Tex. 2001). Recognizing the social benefit in granting repose after a reasonable time, we have described the rule as a "'very limited exception to statutes of limitations.'" *Id.* at 734 (quoting *Altai*, 918 S.W.2d at 455–56).

In *Wagner & Brown*, we held that the discovery rule categorically does not apply to defer the accrual of royalty owners' claims for underpayments. *Id.* at 737. We reasoned that the injury was not inherently undiscoverable because royalty owners can timely discover such injuries through the exercise of due diligence. *Id.* We noted that, even though information that would have revealed the injury may not have been available from public records, it was nevertheless available from several other sources, including the lessee, its general partner, and gas purchasers. *Id.* Similarly, in *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998), we held that the discovery rule does not apply to claims arising from damage to a common oil and gas reservoir. Noting that several sources of information about common reservoirs and operations are available to royalty owners, including Railroad Commission records, we held that such damage is categorically not inherently undiscoverable. *Id.*

Information disclosing a lessee's failure to continue good faith efforts to develop an oil and gas lease is available from the same sources recognized in *Wagner & Brown* and *HECI*, including public records. In this case, the Marshalls' expert testified that he determined BP operations in

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does not apply to the Marshalls' claim since their injury could have been discovered through the exercise of reasonable diligence, we do not decide whether the discovery rule would prevent accrual of a cause of action in instances where the fraud alleged is not aimed at concealing wrongdoing until limitations has run. *See id.*

continuing to rework J.O. Walker No. 1 were not in good faith based on the well log and the plugging report filed with the Railroad Commission within the limitations period. While the J.O. Walker No. 1 well log contained highly technical information regarding the resistivity, conductivity, and spontaneous potential at various intervals in the formation, it was this information regarding the reservoir's geology that led the Marshalls' expert to conclude that BP's continued activities on the well were not in good faith. Although the expert came to this conclusion after being provided with internal BP documents indicating BP's efforts to keep the lease alive, the log and the report were alone sufficient to discover what the expert ultimately concluded — that BP's efforts to obtain production at shallow intervals after other intervals proved unsuccessful were not in good faith. The expert acknowledged that anyone would have been able to obtain copies of the log and the report from the Commission records and reach the same conclusions. Although technical, the public documents concerning BP's operations were available to the Marshalls. While the Marshalls did not examine them until internal BP documents put this publicly available log information in context with BP's efforts to keep the lease alive by continued operations, they could have. It is not significant that BP's internal documents helped the Marshalls discover the injury in this case, as the information was otherwise discoverable. Because the Marshalls had a duty to exercise reasonable diligence in protecting their mineral interests, and since the low probability of success of BP's continued operations could have been discovered with the exercise of reasonable diligence, the injury was not inherently undiscoverable. *See S.V. v. R.V.*, 933 S.W.2d at 4. Accordingly, the discovery rule did not delay the accrual of the Marshalls' cause of action against BP. *See id.*

B. Fraudulent concealment

The second doctrine that may extend the limitations period in this case is fraudulent concealment, an equitable doctrine that, unlike the discovery rule, is fact-specific. In this case, the jury found that BP fraudulently concealed the cessation of good faith operations on the J.O. Walker No. 1 well, and that BP also fraudulently concealed the facts necessary for the Marshalls to know they had a cause of action available. It further found that the Marshalls did not have knowledge "that would have required a reasonable and prudent person to make inquiry that . . . would have led to the discovery of" the cessation or operations or BP's commission of fraud until June 2000.

A defendant's fraudulent concealment of wrongdoing may toll the statute of limitations after the cause of action accrues. *See Kerlin v. Sauceda*, 263 S.W.3d 920, 925 (Tex. 2008); *HECI* , 982 S.W.2d at 886. A party asserting fraudulent concealment must establish an underlying wrong, and that "the defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff." *Earle v. Ratliff*, 998 S.W.2d 882, 888 (Tex. 1999); *Weaver v. Witt*, 561 S.W.2d 792, 793 (Tex. 1977) (per curiam). Fraudulent concealment only tolls the running of limitations until the fraud is discovered or could have been discovered with reasonable diligence. *Kerlin*, S.W.3d at 925.

The Marshalls argue that only a reasonably diligent inquiry is required, and that they reasonably relied on representations in Young's letter that operations continued in good faith. We disagree. We have repeatedly held that reasonable diligence obliges owners of property interests to make themselves aware of pertinent information available in the public record. For example, in *HECI*, we held that oil and gas lessors had an obligation to exercise reasonable diligence in

determining whether adjoining operators had inflicted damage to a common reservoir. 982 S.W.2d at 886. We reasoned that materials publicly available from the Railroad Commission were "a ready source of information" that lessors could have reasonably explored to discover harm inflicted to their property. *Id*. at 887. And in *Kerlin*, we held that a deed holder's descendants who had not received any royalties for minerals on the property, but who had been given notice that deeds executed by their predecessors contained a royalty reservation, could have discovered the existence of their claims for unpaid royalties by investigating public records of case settlements and conveyances. 263 S.W.3d at 926.

Because the Marshalls were obliged to perform additional investigation to protect their interests, if the Marshalls could have discovered BP's wrongdoing by reviewing information available in the public record, or through means other than BP's representations before limitations expired, they did not exercise reasonable diligence in relying on BP's representations and limitations barred their claim. The Marshalls argue that since memoranda indicating BP's intentions in developing the well could only be obtained from the company's internal records, the Marshalls could not have reasonably discovered a cause of action for fraud until June 2000, when those records were produced to them in the Vaquillas lawsuit. BP responds that the Marshalls could have discovered any cessation of good faith operations and the existence of a cause of action against BP from publicly available sources before limitations had run.

The record in this case indicates that BP made verbal representations and sent the Marshalls a letter asserting it conducted continuous operations on the J.O. Walker No. 1 well. The letter described a number of BP's activities on the well, including testing the pressure and monitoring

water flow in efforts to obtain production. The letter also detailed recompletion efforts without stating they occurred at a shallower depth, the Upper Wilcox, after BP did not find the Lower Wilcox and lost hope of production from the Middle Wilcox, the depth it initially attempted to develop.

Also contained within the record are internal BP memoranda indicating that the company had little expectation that continuing operations would prove successful. The Marshalls argue that listing the operations in Young's letter without stating they had a low possibility of success was fraudulent. They point out that Young's letter disclosed that on December 4 the well "flowed frac water to pit for two hours," while failing to disclose that the well "blew down to zero in one minute" and began producing water[5] created a false impression that the well had a chance at being productive. Had BP disclosed that the well blew down to zero in such a short time, the Marshalls argue that they would have questioned BP's good faith in continuing operations on January 7, 1981. Moreover, the Marshalls' expert testified that BP failed to disclose that it originally targeted the Lower Wilcox in drilling the well, and began operations at the Middle and Upper Wilcox intervals only after no Lower Wilcox deposits were found. The expert testified that BP's efforts to recomplete the well at the Upper Wilcox depth were not in good faith because a reasonable and prudent operator would know at that point that the well was never going to produce in paying quantities. The Marshalls also argue that the letter misleadingly listed operations to recomplete the well without mentioning BP was targeting a different interval, the Upper Wilcox. Had BP disclosed that it was conducting operations

[5] At trial, the Marshalls' expert explained that the disclosure was misleading because it created an impression that the only water coming from the well was the water pumped into the ground during recompletion, and concealed the fact that the well began producing its own water and was incapable of sustaining sufficient pressure to bring gas to the surface.

at a new depth, the Marshalls contend that they would have been more inclined to question whether such efforts were conducted in good faith.

However, to obtain the benefit of tolling based on fraudulent representations, the Marshalls had to establish that their reliance on the information BP provided was reasonable, and reliance is not reasonable when information revealing the truth could have been discovered within the limitations period. *See Arabian Shield Dev. Co. v. Hunt,* 808 S.W.2d 577, 584–85 (Tex. App.—Dallas 1991, writ ref. n.r.e.). As we have noted, the information BP failed to disclose to the Marshalls was independently available from the Railroad Commission no later than October 1982, when BP filed the well log for J.O. Walker No. 1. While the Marshalls are correct in pointing out that the well log did not list BP's operations in the Upper Wilcox, the plugging report filed with the Commission's Corpus Christi district office on October 6, 1981, well within the limitations period, did. These public documents, the well log and the plugging report, read together, would have led the Marshalls to discover that BP conducted operations at an interval incapable of production. Moreover, Stanley Marshall testified that he was a sophisticated lessor who subscribed to industry publications, worked as a driller when he was younger, and thus understood the oil and gas industry. Consequently, as a matter of law, the Marshalls would have been able to discover BP's fraud though the use of reasonable diligence. We therefore hold that the Marshalls' claims are barred by the statute of limitations, and reverse and render for BP.

III. ADVERSE POSSESSION

In the dispute between Wagner and Vaquillas, Wagner challenges the reversal of the trial court's judgment that Wagner acquired title to the Vaquillas lease by adverse possession. In support

of the court of appeals' judgment, Vaquillas argues that Wagner could not adversely possess the leasehold because its possession did not meet the requirements for adverse possession between cotenants. Vaquillas further argues that Wagner's possession had to take place after Vaquillas's cause of action accrued in June 2000, the date the jury found BP's fraud reasonably could have been discovered. We disagree with both propositions.

Under Texas law, adverse possession requires "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." TEX. CIV. PRAC. & REM. CODE § 16.021(1). The statute requires visible appropriation; mistaken beliefs about ownership do not transfer title until someone acts on them. *Tran v. Macha*, 213 S.W.3d 913, 914 (Tex. 2006); *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985); *see also Natural Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 198 (Tex. 2003) (holding that "a record titleholder's ignorance of what it owns does not affect the running of limitations").

"A mineral estate, even when severed from the surface estate, may be adversely possessed under the various statutes of limitations," so long as the statutory requirements are met. *See Pool*, 124 S.W.3d at 192–93. Here, Wagner argued it established adverse possession under the three-, five-, and ten-year statutes of limitations. The issue was submitted to the jury, and the jury determined that Wagner's possession was sufficient to meet all three. Vaquillas does not challenge the jury's finding that Wagner possessed the leasehold for the requisite time. The three-year statute of limitation states that the suit "to recover real property held by another in peaceable and adverse possession under title or color of title" must be brought "not later than three years after the day the

cause of action accrues." TEX. CIV. PRAC. & REM. CODE § 16.024. The five-year statute requires the owner to bring suit within five years to recover property held by another in peaceable and adverse possession who cultivates, uses, or enjoys the property, pays taxes, and claims under a duly registered deed. *Id.* § 16.025(a). The ten-year statute requires suit "to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property." *Id.* § 16.026(a).

Vaquillas does not dispute that Wagner paid applicable taxes and claimed the lease under a duly registered deed. Vaquillas's suit was filed in 1997, well over ten years after the good faith operations allegedly ceased in January 1981. During that time, Sanchez-O'Brien, its successors-in-interest, and then Wagner[6] claimed the lease, produced oil and gas, sold it, and paid Vaquillas a royalty. Because the statute provides that the possessor may tack the time it held the leasehold with its predecessors-in-interest, Wagner would meet the ten-year statute of limitations by tacking its period of possession with Sanchez-O'Brien's and Fina's, so long as its actions met all other requirements of adverse possession. *See id.* § 16.023. Accordingly, we need not consider the three- and five-year statutes of limitations.

The statute also requires that the possession be inconsistent with and hostile to the claims of all others. *Id.* § 16.021(1). The "possession must be of such character as to indicate *unmistakably* an assertion of a claim of exclusive ownership in the occupant." *Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex. 1990) (quoting *Rick v. Grubbs*, 214 S.W.2d 925, 927 (Tex. 1948); *McDonnold v.*

[6] Sanchez-O'Brien obtained an assignment from BP and drilled a productive well in April 1981. It and its successor-in-interest continued operations until August 1994, when Wagner acquired the leasehold. The parties do not dispute that all lessees conducted continuous good faith operations since April 1981.

Weinacht, 465 S.W.2d 136, 141 (Tex. 1971). In an adverse possession claim between cotenants, the proponent must prove ouster — unequivocal, unmistakable, and hostile acts the possessor took to disseize other cotenants. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 756 (Tex. 2003); *Todd v. Bruner*, 365 S.W.2d 155, 159–60 (Tex. 1963). Cotenants must surmount a more stringent requirement because acts of ownership "which, if done by a stranger, would per se be a disseizin" are not necessarily such when cotenants share an undivided interest. *Todd*, 365 S.W.2d at 160 (internal citation omitted).

A. Adverse possession between cotenants

The court of appeals held that Vaquillas's and Wagner's predecessor-in-interest became cotenants in April 1981, after the lease terminated due to cessation of good-faith operations. 288 S.W.3d at 460; *see Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 421–22 (Tex. 2008) (recognizing that a lessor became an unleased cotenant when the lease lapsed, and was entitled to a share of proceeds from minerals, less the lessor's share of the costs of production and marketing). Assuming that the lease had in fact terminated, Wagner then had to show it repudiated Vaquillas's cotenancy interest to assert title by adverse possession. *See King Ranch*, 118 S.W.3d at 756. As a cotenant, Wagner had the right to drill, explore, and produce from the land, owing other cotenants an accounting for their portion of the minerals. *See Byrom v. Pendley*, 717 S.W.2d 602, 605 (Tex. 1986). In order to obtain title by adverse possession, Wagner had to show unmistakable and hostile acts that would put other cotenants on notice of its intent to oust them from the leasehold. *See Todd*, 365 S.W.2d at 159–160; *Poenisch v. Quarnstrom*, 361 S.W.2d 367, 369 (Tex. 1962) (citation omitted).

The ouster standard that applies to cotenants differs from the adverse possession requirement courts impose between strangers because cotenants have rights to ownership and use of the property a stranger would not have. *See Pool*, 124 S.W.3d at 198 (noting that the finding of adverse possession is premised on the fact the parties were not cotenants). Vaquillas argues that Wagner could not show ouster because its actions in drilling, producing, and paying royalties were consistent with its rights as a cotenant and thus could not be unmistakably exclusive and hostile. We disagree that payment of royalties is consistent with the relationship between cotenants.

The test for establishing adverse possession, both between strangers and cotenants, is whether the acts unmistakably assert a claim of "exclusive ownership" by the occupant. *See Rhodes*, 802 S.W.2d at 645 (quoting *Satterwhite v. Rosser*, 61 Tex. 166 (1884)); *Rick*, 214 S.W.2d at 927. In Texas, unleased cotenants are generally entitled to "the value of the minerals taken less the necessary and reasonable cost of producing and marketing the same" as opposed to a fractional royalty from production paid to the lessor. *Cox v. Davison*, 397 S.W.2d 200, 201 (Tex. 1965). In this case, it would mean that, absent a lessor/lessee relationship between Vaquillas and Wagner, Vaquillas would have been entitled to its share of the production for its 1/4 mineral interest in Slator Ranch minerals, minus reasonable costs. Vaquillas's expert testified regarding Wagner's checks, which showed a royalty interest of 4.23 percent and not the cotenant share of approximately 25 percent that Vaquillas would have been entitled to as a cotenant, a significant and noticeable difference. Wagner's payment of royalties — not a cotenant's share — to Vaquillas for the entire time it operated on the lease was thus an unmistakable and hostile assertion of exclusive ownership of the leasehold. *See Pool*, 124 S.W.3d at 198.

In *Pool*, we held that producing hydrocarbons and paying a 1/8 royalty rather than a share of production for more than ten years after leases terminated established adverse possession by the lessee. *Id.* at 197–98. In reaching our decision, we expressly noted that the parties were not cotenants, and that production would not be sufficient evidence of disseizin in a cotenancy. *Id.* However, our statements in *Pool* were not meant to imply that adverse possession could never occur between cotenants, but rather to highlight that a stricter ouster standard applies. *Id.*; *see also Todd*, 365 S.W.2d at 160 (holding that "if the acts of the respondents and their predecessors in title are susceptible of explanation consistent with the existence of the common title then such acts cannot . . . give constructive notice to the cotenants out of possession" (citation omitted)). A cotenant's use of the common property is presumed non-adverse unless the cotenant repudiates the title of its cotenant. *See Todd*, 365 S.W.2d at 156, 161.

Under *Pool*, drilling, production, and other routine operations by a cotenant would be consistent with a cotenancy and thus not unmistakably hostile. *Pool*, 124 S.W.3d at 197. However, the same cannot be said about Wagner's payment of a royalty rather than a significantly, noticeably larger cotenant's share to Vaquillas. *Id.* It is undisputed that royalty checks were unmistakably labeled as royalties and contained payments of a 4.23 percent royalty interest. The parties agree that Vaquillas accepted the checks, and even challenged their calculations over the course of Wagner's operations.

By paying a royalty, Wagner asserted a lessor-lessee relationship in which Wagner, not Vaquillas, owned the leasehold. *Compare Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 9 (Tex. 2008) (holding that the mineral lessor has only a royalty interest in the minerals),

with Cox, 397 S.W.2d at 201 (holding that an unleased mineral cotenant is entitled to "the value of the minerals taken less the necessary and reasonable cost of producing and marketing the same"). In addition, Vaquillas does not dispute other actions putting it on notice that Wagner acted as a lessee and not a cotenant, including division orders certifying that Vaquillas owned a royalty interest and not a cotenant's share; correspondence from Vaquillas's counsel recognizing a royalty interest; deed records recognizing a royalty interest and not a cotenant's share; and Vaquillas's expert's annual review of production records for tax assessment purposes. Accordingly, we hold that Wagner's payment of a royalty and Vaquillas's acceptance of it establish as a matter of law that Vaquillas was on notice that Wagner claimed to own the leasehold — an unmistakably hostile and unequivocal assertion of title inconsistent with the existence of a cotenant relationship.

B. Knowledge of lease termination

The court of appeals held that the evidence of drilling, production, and even payment of royalties and taxes was legally insufficient to support the jury's verdict for Wagner because Vaquillas did not know the lease had terminated. 288 S.W.3d at 461. Again, we disagree. We have previously held that adverse possession is not dependent on the possessor's intent to assert title hostile to a known true owner, but rather on the "intent to claim the land." *Calfee v. Duke*, 544 S.W.2d 640, 642 (Tex. 1976); *see Tran*, 213 S.W.3d at 915 (holding that hostile use "does not require an intention to dispossess the rightful owner, or even know that there is one").

We note here, as we did in *Pool*, that Wagner was not required to give actual or constructive notice it was no longer claiming an interest under the lease in order to acquire title to the leasehold. *Pool*, 124 S.W.3d at 195. It was not the leases that Wagner's possession must have been adverse

to, but rather Vaquillas's "title to all the minerals after the leases allegedly terminated." *Id.* Wagner, like the lessees in *Pool*, continued to claim rights under the lease, and *that claim* was adverse to Vaquillas's title once the lease terminated. *See id.*

Because Wagner's continued payment of royalties under the lease was an assertion of title, Wagner's claim to be Vaquillas's lessee for the statutorily mandated period ousted Vaquillas from the mineral estate. It is immaterial whether Wagner asserted title with the intent to dispossess Vaquillas. By accepting a clearly labeled and computed royalty, Vaquillas was on notice that Wagner claimed title to the leasehold — an unequivocal claim to ownership unmistakably inconsistent with and hostile to Vaquillas's claim of a cotenant relationship. Accordingly, Wagner acquired the same interest it adversely possessed — a leasehold estate as defined by the original lease. *See Pool*, 124 S.W.2d at 199.

C. Accrual of claims

Finally, Vaquillas argues that Wagner could not prove adverse possession because the statute requires possession to begin after the "cause of action" accrues. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 16.026(a) ("A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property."). Vaquillas argues that since the jury determined that it did not have sufficient knowledge to put it on notice that BP had fraudulently concealed the cessation of good faith efforts to develop the well until 2000, Wagner's adverse possession cause of action likewise did not accrue until June 2000. We do not agree.

The structure of the adverse possession statute indicates that the "cause of action" refers to the suit "to recover real property held by another in peaceable and adverse possession." *See id.* §§ 16.024–026(a). The statute thus requires the accrual of any claim Vaquillas may have had to assert its title to the leasehold against Wagner, rather than accrual of Vaquillas" fraud or lease termination causes of action. Accordingly, the cause of action accrued when Wagner's adverse possession began. *See Horton v. Crawford*, 10 Tex. 382, 390–91 (Tex. 1853) (holding that a cause of action accrues "at the instant of possession taken under the circumstances specified in the statute"); *see also Crow v. Payne*, 242 S.W.2d 824, 825 (Tex. Civ. App.—Amarillo 1951, no writ). Vaquillas's argument that BP's actions in concealing a lapse in production somehow prevented the accrual of Vaquillas's claims against Wagner misconstrues the statute.

Moreover, Vaquillas's argument is contrary to the jury's unchallenged finding that Vaquillas's failure to file suit within the limitations periods was not excused by BP's misrepresentations or Vaquillas's ignorance of the real facts. Given that unchallenged finding, the court of appeals erred in reversing the trial court's judgment recognizing Wagner's title to the leasehold.

IV. CONCLUSION

We reverse the court of appeals' judgment as to both BP and Wagner. We hold that the evidence conclusively established that BP's fraud could have been discovered by the Marshalls through the exercise of reasonable diligence. We further hold that the court of appeals erred in reversing the trial court's judgment awarding title to Vaquillas's leasehold interest to Wagner. Accordingly, we reverse and render for BP and Wagner.

Debra H. Lehrmann
Justice

OPINION DELIVERED: May 13, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0420

ESPERANZA ANDRADE, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF TEXAS, PETITIONER,

v.

NAACP OF AUSTIN, NELSON LINDER, SONIA SANTANA, AND DAVID VAN OS, RESPONDENTS

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

Argued October 12, 2010

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

Technology is changing the way we vote. It has not eliminated controversy about the way votes are recorded and verified. We must decide whether voters have standing to pursue complaints about an electronic voting machine that does not produce a contemporaneous paper record of each vote. Because we conclude that most of the voters' allegations involve generalized grievances about the lawfulness of government acts, and because their remaining claims fail on their merits, we reverse the court of appeals' judgment and render judgment dismissing the case.

I. Background

Voters in different parts of the state utilize a number of different voting systems, all of which must first be certified by the Secretary of State.[1] TEX. ELEC. CODE § 122.001, .031. To obtain certification, voting system manufacturers must submit an application to a board of examiners appointed by the Secretary and the Attorney General. *Id*. § 122.034–.035. After the board prepares a report, *id*. § 122.036, the Secretary conducts a public hearing to provide interested persons an opportunity to express their views about a particular system, *id*. § 122.0371. The Secretary reviews the report, considers public input, and determines whether the system has satisfied the applicable approval requirements. *Id*. § 122.038(a). If so, she certifies the system for use in elections. *Id*. § 122.038(c). For each application, she submits a report explaining whether the system was approved. *Id*. § 122.039. Once a system is certified, local political subdivisions may adopt it for use in elections. *Id*. § 123.001.

Following certification and adoption, additional testing is required for direct recording electronic machines (DREs). DREs are designed "to allow a direct vote on the machine by the manual touch of a screen, monitor, or other device." *Id*. § 121.003(12). DREs store individual votes and vote totals electronically, *id.*, usually in several places within the unit, *see* Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1724 (2005). Immediately after receiving a DRE from a vendor, the election records custodian must perform a hardware diagnostic test and a "public test of logic and accuracy." TEX. ELEC. CODE § 129.021. The latter involves creating a testing board that will then cast votes, verifying that each contest can be voted and is accurately counted. *Id*. § 129.023. The test must evaluate, to the extent

[1] The Secretary of State is the state's chief election officer. TEX. ELEC. CODE § 31.001(a).

possible, undervotes, overvotes, straight-party votes, and crossover votes. *Id*. It must also account for write-in and provisional votes. *Id*. Notice of the test must be published at least forty-eight hours in advance, and the test is open to the public. *Id*. § 129.023(b). The test is successful only if the actual results are identical to the expected results. *Id*. § 129.023(d). Travis County conducts these tests before each early voting period and election day.[2] The Secretary of State may prescribe additional testing. *Id*. § 129.021(4). DREs must also satisfy, to the extent possible, requirements applicable to other electronic voting systems.[3] *Id*. § 129.001(b).

In countywide polling place programs, the Secretary requires an audit of each DRE before, after, and, if feasible, during each election. *Id*. § 43.007(c). The general custodian of election records must secure access control keys or passwords to DREs, and use of such keys and passwords must be witnessed and documented. *Id*. § 129.053. The DRE may not be connected to any external communications network, including the Internet, nor are wireless communications permitted (except under certain limited circumstances). *Id*. § 129.054. The general custodian of election records must create a contingency plan in case of DRE failure. *Id*. § 129.056.

Copies of the program codes, operator manuals, and copies or units of all other software and any other information, specifications, or documentation required by the Secretary must be kept on file with the Secretary. *Id.* § 122.0331(a). The Secretary also requires that DREs meet or exceed

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[2] *See Frequently Asked Questions About eSlate*, TRAVIS COUNTY, http://www.co.travis.tx.us/county_clerk/election/eSlate/faq.asp (all Internet materials as visited June 29, 2011 and available in clerk of Court's file).

[3] An "electronic voting system" is one in which "the ballots are automatically counted and the results automatically tabulated by use of electronically operated apparatus." TEX. ELEC. CODE § 121.003(2). These can include optical scan ballots, a technology familiar to many through its use in standardized testing. *See* Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1721 (2005).

the minimum requirements established by the Federal Election Commission. 1 TEX. ADMIN. CODE § 81.61 (requiring compliance with FEC's Performance and Test Standards for Punch Card, Mark Sense, and Direct Record Electronic Voting Systems). Although DREs must provide contemporaneous printouts of "significant election events,"[4] there is no explicit statutory requirement that DREs provide a contemporaneous paper record of each vote cast. Repeated efforts to pass such legislation have failed, both at the federal[5] and state[6] levels.

The eSlate, a paperless DRE manufactured by Hart Intercivic, is one of a handful of DREs the Secretary has certified. *See Voting Systems*, TEXAS SECRETARY OF STATE, http://www.sos.state.tx.us/elections/laws/votingsystems.shtml. Voters arriving at the polls in counties using the eSlate are given a unique access code. The voter enters the code into the eSlate,

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[4] 1 TEX. ADMIN. CODE § 81.62(a). "Significant election events" include error messages, the number of ballots read for a given precinct, completion of reading ballots for a given precinct, the identity of the input ports used for modem transfers from precincts; users logging in and out from the election system, precincts being zeroed, reports being generated, diagnostics of any type being run, and change to printer status. *Id.* § 81.62(b).

[5] Neither the Voter Confidence and Increased Availability Act of 2003, the Restore Elector Confidence in Our Representative Democracy Act of 2004, the Voter Confidence and Increased Accessibility Act of 2007, nor the Voter Confidence and Increased Accessibility Act of 2009, all of which would have required a voter-verified paper ballot, became law. *See* Voter Confidence and Increased Availability Act of 2009, H.R. 2894, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h111-2894; Voter Confidence and Increased Availability Act of 2009, S. 1431, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s111-1431; Voter Confidence and Increased Availability Act of 2007, H.R. 811, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h110-811; Restore Elector Confidence in Our Representative Democracy Act of 2004, S. 2313, 108th Cong. (2004), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s108-2313; Voter Confidence and Increased Availability Act of 2003, H.R. 2239, 108th Cong. (2003), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h108-2239.

[6] *See* Tex. S.B. 245, 81st Leg., R.S. (2009); Tex. H.B. 3636, 81st Leg., R.S. (2009); Tex. H.B. 112, 81st Leg., R.S. (2009); Tex. H.B. 638, 81st Leg., R.S. (2009); Tex. S.B. 1247, 80th Leg., R.S. (2007); Tex. S.B. 1006, 80th Leg., R.S. (2007); Tex. H.B. 3891, 80th Leg., R.S. (2007); Tex. H.B. 384, 80th Leg., R.S. (2007); Tex. H.B. 123, 80th Leg., R.S. (2007); Tex. H.B. 65, 80th Leg., R.S. (2007); Tex. S.B. 94, 79th Leg., R.S. (2005); Tex. H.B. 3083, 79th Leg., R.S. (2005); Tex. H.B. 2259, 79th Leg., R.S. (2005); Tex. H.B. 1289, 79th Leg., R.S. (2005).

which then displays the ballot. Voters turn a dial to highlight their ballot choice and then press "enter" to make a selection. After a voter completes his selections, the eSlate displays a ballot summary page. If the voter's choices are correctly displayed, the voter presses the "cast ballot" button, and the vote is recorded. *See Voter Instructions*, TRAVIS COUNTY, http://www.co.travis.tx.us/county_clerk/election/eSlate/pdfs/English_Flyer_050923.pdf. Travis County purchased the eSlate system in 2001 and has used it since 2003.

The NAACP of Austin, its president Nelson Linder, Sonia Santana (a Travis County voter), and David Van Os (a candidate for attorney general) (collectively, the voters), sued Esperanza Andrade, the Secretary of State,[7] arguing that her certification of the eSlate violated the Election Code and our constitution. The voters assert that the Secretary's failure to require a contemporaneous paper record of an electronic vote violates their statutory right to a recount and an audit, as well as Texas constitutional guarantees of equal protection, the purity of the ballot box, and the right of suffrage. *See* TEX. CONST. art. I, § 3, art. VI, § 2(c), art. VI, § 4; TEX. ELEC. CODE §§ 122.001, 211.001. The voters sought a declaration that the Secretary acted illegally and an injunction prohibiting the use of paperless election systems without an independent paper ballot mechanism.

The Secretary filed a plea to the jurisdiction and motion for summary judgment, asserting that the voters lacked standing to pursue their claims and that she was immune from suit. The trial

[7] The voters initially sued Roger Williams, who was then Secretary of State. He was succeeded by Phil Wilson, who was automatically substituted in Williams's stead. TEX. R. APP. P. 7.2(a). When Andrade succeeded Wilson, she replaced him as the named party. The voters also sued the Travis County Clerk, but the trial court dismissed her from the case, and she is not a party to this appeal.

court denied the plea and motion, and a divided court of appeals affirmed. 287 S.W.3d 240. We granted the petition for review[8] and now reverse. 53 Tex. Sup. Ct. J. 562 (Apr. 9, 2010).

II. The voters have standing to assert an equal protection claim.

Because the voters seek only declaratory and injunctive relief, and because each voter seeks the same relief, only one plaintiff with standing is required. *See Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 627 (Tex. 1996).[9] Accordingly, we examine whether Sonia Santana, a Travis County resident and registered voter, has standing to pursue the claims she asserts. We may look to the similar federal standing requirements for guidance,[10] and "[o]ur threshold inquiry . . . 'in no way depends on the merits of the [voters'] contention that particular conduct is illegal.'"[11]

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[8] We have jurisdiction over this interlocutory appeal because the justices of the court of appeals disagree on a material question of law. TEX. GOV'T CODE § 22.225(c).

[9] *See also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (holding that the presence of one party with standing satisfies case-or-controversy requirement); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (because union members had standing to challenge statute's constitutionality, court "need not consider the standing issue as to the Union or Members of Congress"); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264, 264 n.9 (1977) (holding that because "at least one individual plaintiff . . . has demonstrated standing," court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit"); *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 189 n.7 (2008); *cf. Corpus Christi People's Baptist Church, Inc. v. Nueces Cnty. Appraisal Dist.*, 904 S.W.2d 621, 624 (Tex. 1995) (declining to address county's standing because no one challenged it and because another party had standing).

[10] *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001).

[11] *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

Generally, a citizen lacks standing to bring a lawsuit challenging the lawfulness of governmental acts.[12] *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001). Thus, "[s]tanding doctrines reflect in many ways the rule that neither citizens nor taxpayers can appear in court simply to insist that the government and its officials adhere to the requirements of law." CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.10 (3d ed. 2008). This pragmatic approach "ensures that 'there is a real need to exercise the power of judicial review' in a particular case, and it helps guarantee that courts fashion remedies 'no broader than required by the precise facts to which the court's ruling would be applied.'" *Lance v. Coffman*, 549 U.S. 437, 441 (2007) (citations omitted). Based partly on the notion of judicial self governance, this rule recognizes that other branches of government may more appropriately decide "abstract questions of wide public significance," particularly when judicial intervention is unnecessary to protect individual rights. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Originally characterized as prudential,[13] the Supreme Court has more recently clarified that the "generalized grievance" bar to standing is constitutional. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (holding that a citizen raising "only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does

[12] Federal law is in accord. *Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

[13] *See Warth*, 422 U.S. at 499 (holding that individuals lack standing "when the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens").

the public at large—does not state an Article III case or controversy").[14] The bar is based not on the number of people affected—a grievance is not generalized merely because it is suffered by large numbers of people. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 91 (3d ed. 2006). As the Supreme Court has noted, "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-88 (1973). Thus, "where a harm is concrete, though widely shared, the Court has found injury in fact." *FEC v. Akins*, 524 U.S. 11, 24 (1998) (citation omitted).

Instead, the proper inquiry is whether the plaintiffs sue solely as citizens who insist that the government follow the law. CHEMERINSKY, CONSTITUTIONAL LAW 91. For example, the Supreme Court has held that citizens lacked standing to sue for a violation of a constitutional provision prohibiting members of Congress from serving in the executive branch. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217-27 (1974). It has also rejected citizen standing in a case seeking to have parts of the CIA Act declared unconstitutional because it violated the Constitution's Statement and Accounts Clause. *United States v. Richardson*, 418 U.S. 166, 179-80 (1974). We have held that a voter and citizen lacked standing to enjoin a purportedly illegal executive order

[14] *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 96 (3d ed. 2006) (noting that "*Lujan* likely means that the bar against generalized grievances will be treated as constitutional and not prudential in the future").

signed by the mayor. *Brown*, 53 S.W.3d at 304. The line between a generalized grievance and a particularized harm is difficult to draw,[15] and it varies with the claims made.

We recognized the principle over a century ago, when we held that a citizen could not, through litigation, challenge San Antonio's decision to build city hall on what was then a military plaza. *City of San Antonio v. Strumburg*, 7 S.W. 754, 755 (Tex. 1888) (holding that "no action lies to restrain an interference with a mere public right, at the suit of an individual who has not suffered or is not threatened with some damage peculiar to himself"). And we have stated the general proposition broadly, applying it to voters: "No Texas court has ever recognized that a plaintiff's status as a voter, without more, confers standing to challenge the lawfulness of government acts." *Brown*, 53 S.W.3d at 302. Instead, "[o]ur decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large." *Id*. But we have also been careful to suggest that challenges to the election process may be different. *Id*. (noting that "[t]his Court has never recognized standing on the basis of the results—as opposed to the process—of an initiative election").

The Secretary urges a blanket rule that would ensure no voter ever has standing to challenge a voting system. We think the Secretary overreaches in that respect. The voters assert a denial of equal protection—a claim voters often have standing to bring. *See Baker v. Carr*, 369 U.S. 186, 206 (1962) (noting that voters have standing to bring equal protection challenges to complain of vote dilution, and observing that "[m]any of the cases have assumed rather than articulated the premise

[15] *See* CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.10 n.26 (3d ed. 2008)(noting the "evanescent, almost magical" distinctions in some such cases).

in deciding the merits of similar claims").[16] For example, the Supreme Court has permitted Virginia residents to sue for a declaration that Virginia's poll tax was unconstitutional. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that poll tax violated the equal protection clause). It has allowed a Hawaii voter to challenge as unconstitutional the state's ban on write-in candidates. *Burdick v. Takushi*, 504 U.S. 428, 430 (1992). It has authorized a voter to challenge Tennessee's durational residence requirement. *Dunn v. Blumstein*, 405 U.S. 330, 333 (1972). Voters residing in racially gerrymandered districts have standing to sue (although voters residing outside those districts do not). *United States v. Hays*, 515 U.S. 737, 744-45 (1995). A voter in Georgia may sue to enjoin that state's allegedly unconstitutional county unit system as a basis for counting votes. *Gray v. Sanders*, 372 U.S. 368, 375 (1963) (holding that "appellee, like any person whose right to vote is impaired, has standing to sue" (citations omitted)). And Tennessee voters may sue to enjoin a statute apportioning legislators among the state's ninety-five counties. *Baker*, 369 U.S. at 206.

In *Baker*, the Supreme Court explained that voters had standing to challenge a state's apportionment scheme because

> [t]he injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* voters in irrationally favored counties. . . . It would not be necessary to decide whether appellants' allegations of impairment of their votes by the [apportionment] will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. *If such impairment does produce a legally*

[16] *See also* CHEMERINSKY, CONSTITUTIONAL LAW 71, 91, 97 (stating that "[i]n general, a person who claims discrimination or a violation of an individual liberty . . . will be accorded standing"); WRIGHT, FEDERAL PRACTICE & PROCEDURE § 3531.10 n.62 (noting that "[o]rdinarily, courts do not even pause to confirm standing in cases of this sort").

> *cognizable injury, they are among those who have sustained it.* They are asserting a 'plain, direct and adequate interest in maintaining the effectiveness of their votes,' not merely a claim of 'the right, possessed by every citizen, to require that the Government be administered according to law . . . .'

369 U.S. at 208 (emphasis added) (citations omitted); *see also* Tokaji, 73 FORDHAM L. REV. at 1752 (noting that "the use of voting machines disfavoring identifiable groups of voters, defined by place of residence, is constitutionally problematic" and noting that such claims are analogous to the "one person, one vote" cases). While equal protections claims involving the use of DREs have been largely unsuccessful,[17] none has been dismissed for lack of standing.[18]

The Secretary argues that because the voters have not shown that their votes actually were miscounted, they have not sustained the kind of concrete, particularized injury standing requires. But the voters' equal protection complaint is that the eSlate is susceptible to fraud and prone to malfunction, depriving them of the ability to determine whether their votes were counted. They

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[17] *See, e.g.*, *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006) (affirming judgment against voter (and others) who alleged that DRE violated equal protection); *Weber v. Shelley*, 347 F.3d 1101, 1106-07 (9th Cir. 2003) (same); *Favorito v. Handel*, 684 S.E.2d 257, 261-62 (Ga. 2009) (same); *Gusciora v. Corzine*, No. MER-L-2691-04, 2010 N.J. Super. Unpub. LEXIS 2319, *332-33 (N.J. Super. Ct. Law Div. 2010) (holding that State's certification of DREs did not violate voters' equal protection or due process rights); *see also Tex. Democratic Party v. Williams*, 285 Fed. App'x. 194, 195 (5th Cir. 2008) (per curiam) (affirming summary judgment in favor of Secretary of State in case involving allegations that eSlate deprived voters of equal protection and due process and violated the Election Code), *cert. denied*, 129 S.Ct. 912 (2009); *Schade v. Md. State Bd. of Elections*, 930 A.2d 304, 328 (Md. 2007) (holding that trial court correctly denied voters'and candidates' requests for preliminary injunction, as state board of elections acted reasonably in certifying DREs that lacked a voter verified paper audit trail). *But see Chavez v. Brewer*, 214 P.3d 397, 408-09 (Ariz. Ct. App. 2009) (holding that plaintiffs' claims that voting machines violated two provisions (the "free and equal election" provision and the "privileges and immunities clause") of the Arizona Constitution survived Arizona rule 12(b)(6) motion to dismiss); *Banfield v. Cortes*, 922 A.2d 36, 42 (Pa. Commw. Ct. 2007) (refusing to dismiss electors' claims that secretary of state had illegally certified DREs).

[18] This is not suggest that the generalized grievance bar does not apply to equal protection claims. It does, and a plaintiff's failure to allege that he has been denied equal treatment will deprive him of standing. *United States v. Hays*, 515 U.S. 737, 743-44 (1995) ("The rule against generalized grievances applies with as much force in the equal protection context as in any other," and "only . . . those persons who are personally denied equal treatment" will have standing (quotations omitted)); *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 647 (Tex. 2004) (holding that "the generalized grievance bar to standing . . . also applies to equal-protection claims like those asserted here").

assert that it is less probable that their votes will be counted than will the votes of residents of other Texas counties or absentee voters in Travis County. It is not necessary to decide whether the voters' claims will, ultimately, entitle them to relief, in order to hold that they have standing to seek it. "If such impairment does produce a legally cognizable injury, they are among those who have sustained it." *Baker*, 369 U.S. at 207-08. Because they assert "a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right, possessed by every citizen, to require that the Government be administered according to law," the voters have standing to pursue their equal protection claim. *Id*. (citations omitted).

The Secretary next asserts that equal protection claims rooted solely in geographical distinctions are insufficient to confer voter standing, citing our decision in *Texas Department of Transportation v. City of Sunset Valley*, 146 S.W.3d 637, 646-647 (Tex. 2004). In that case, we held that a county resident had no standing to bring an equal protection claim on behalf of a class challenging the Department's purported failure to accord one county the same treatment other counties received. We held that state and federal equal-protection guarantees relate to "equality between persons as such, rather than between areas, and . . . territorial uniformity is not a constitutional prerequisite." *Id*. at 646-47 (citation omitted). We noted that when the State exercises governmental powers, it necessarily draws distinctions between geographic areas, and if citizens were entitled to equal treatment every time government money was spent, almost every government program would be unconstitutional. *Id*. at 647. Although framed as a standing question, we ultimately held that the claims failed as a matter of law. *Id*.

Sunset Valley's rule applies to equal protection claims generally, but not to cases involving voting-related equal protection claims. The latter are often based precisely on disparate treatment among voters in different geographical areas. *See, e.g., Dunn*, 405 U.S. at 336 ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *Reynolds v. Sims*, 377 U.S. 533, 563 (1964) ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) ("[A]s nearly as is practicable[,] one man's vote in a congressional election is to be worth as much as another's."); *Gray*, 372 U.S. at 381(1963) (invalidating vote-counting method that weighted rural votes more heavily than urban ones); *see also ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008) (holding that voters had standing to bring equal protection claim challenging voter-identification law due to claim of unequal treatment of in-person voters (who had to show identification) and absentee voters (who did not)); Tokaji, 73 FORDHAM L. REV. at 1748 (noting that "the [Supreme] Court has closely scrutinized certain election practices which deny or dilute the right to vote, especially when they disadvantage an identifiable group of voters based upon wealth or place of residence").

The voters assert that they are forced to use the eSlate while other Travis County voters use an absentee or paper ballot. They also complain that voters in other parts of Texas are not forced to use the eSlate. Without examining the merits of the claim, this disparity gives them standing to sue for an equal protection violation. *Cf. Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

III. The State's regulatory interest justifies this reasonable, nondiscriminatory restriction on the right to vote.

We turn then to the merits of the voters' equal protection challenge, cognizant that the Secretary retains immunity from suit unless the voters have pleaded a viable claim. *See* TEX. CONST. art. I, § 3; *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007) (per curiam) (holding that "'suits for injunctive relief' may be maintained against governmental entities to remedy violations of the Texas Constitution" (quoting *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995))); *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-28 (Tex. 2004).

The voters assert two equal protections claims. Broadly, they complain that voters who cast paper ballots have a greater level of protection against fraud or system malfunction than DRE voters do. The voters do not allege that DREs are less accurate—that they suffer from higher error rates or lead to more invalid ballots—than other voting systems. Instead, they complain that DREs' vulnerabilities make it more likely that votes will be manipulated or lost. More narrowly, the voters make a recount-related claim. Recounts of "regular paper ballots" are conducted manually, by a counting team composed of three individuals. TEX. ELEC. CODE § 214.001–.002. One person reads the ballots; the other two tally the votes. *Id.* § 214.002. Votes from DREs are recounted differently. A person requesting a recount of electronic voting system ballots has three choices: (1) an electronic recount using the same program as the original count; (2) if the program is defective, an electronic recount using the corrected program; or (3) a manual recount. *Id.* § 214.042(a). The voters assert that the paperless computerized voting systems only allow for a retabulation of the votes cast and

recorded, which creates a disparity in the manual recount methodology. Voters not required to use the DRE (absentee, military, or those living in a Texas county that does not use the eSlate) are granted the right to a hand recount of votes, and the voters allege that this recount disparity violates constitutional equal protection guarantees.

The right to vote is fundamental, as it preserves all other rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Bush*, 531 U.S. at 104 ("When the state legislature vests the right to vote . . . in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."). But that does not mean states cannot regulate the franchise. *Burdick*, 504 U.S. at 433 (holding that although voting is a fundamental right, "[i]t does not follow . . . that the right to vote in any manner . . . [is] absolute"); *Dunn*, 405 U.S. at 336 (noting that "the States have the power to impose voter qualifications, and to regulate access to the franchise").

Instead, the Supreme Court has explained that laws impacting the right to vote must be evaluated on a sliding scale: when the law severely restricts the right to vote, the regulation must be narrowly drawn to advance a compelling state interest. *Burdick*, 504 U.S. at 434. But when a state election law provision imposes "'reasonable, nondiscriminatory restrictions'" upon voters' constitutional rights, "'the State's important regulatory interests are generally sufficient to justify' the restrictions."[19] *Id*. at 433-34 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)) (noting that "to subject every voting regulation to strict scrutiny and to require that the regulation be

[19] "[T]he federal analytical approach applies to equal protection challenges under the Texas Constitution." *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 266 (Tex. 2002).

narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently").

So our initial determination depends on the severity of the burden on the right to vote. The United States Court of Appeals for the Ninth Circuit, one of three federal circuit courts to reject equal protection challenges to DREs, has held that the use of paperless, touchscreen voting systems does not severely restrict the right to vote. *Weber v. Shelley*, 347 F.3d 1101, 1106-07 (9th Cir. 2003). As that court noted, DREs "bring[] about numerous positive changes (increasing voter turnout, having greater accuracy than traditional systems, being user-friendly, decreasing the number of mismarked ballots, saving money, etc.)." *Id*. at 1106. That court held that, under *Burdick*, the use of DREs was not subject to greater scrutiny simply because the system may make the possibility of some kinds of fraud more difficult to detect. *Id*. at 1106-07.

> We cannot say that use of paperless, touchscreen voting systems severely restricts the right to vote. No balloting system is perfect. Traditional paper ballots, as became evident during the 2000 presidential election, are prone to overvotes, undervotes, "hanging chads," and other mechanical and human errors that may thwart voter intent. *See generally Bush v. Gore*, 531 U.S. 98 (2000). Meanwhile, touchscreen voting systems remedy a number of these problems, albeit at the hypothetical price of vulnerability to programming "worms." The [DRE] does not leave Riverside voters without any protection from fraud, or any means of verifying votes, or any way to audit or recount. The unfortunate reality is that the possibility of electoral fraud can never be *completely* eliminated, no matter which type of ballot is used. *Cf. Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) ("Voting device malfunction [and] the failure of election officials to take statutorily prescribed steps to diminish what was at most a theoretical possibility that the devices might be tampered with . . . fall far short of constitutional infractions . . . ."). Weber points out that none of the advantages of touch-screen systems over traditional methods would be sacrificed if voter-verified paper ballots were added to touchscreen systems. However, it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-guessing. In this instance, California made a

> reasonable, politically neutral and non-discriminatory choice to certify touchscreen systems as an alternative to paper ballots. Likewise, Riverside County in deciding to use such a system. Nothing in the Constitution forbids this choice.

Id. (footnote omitted).

The Eleventh Circuit came to a similar conclusion. *See Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006). Specifically, in considering whether differing recount mechanisms for DRE votes deprived DRE voters of equal protection, the court noted that "the differences [in] procedures [were] necessary given the differences in the technologies themselves and the types of errors voters are likely to make in utilizing those technologies." *Id*. at 1233. DRE voters were less likely to cast ambiguous votes than were voters using, say, optical scan ballots, on which a voter might leave a stray pencil mark or circle a candidate's name rather than filling in the appropriate bubble. *Id.* (noting that DREs "do not record ambiguous indicia of voter intent that can later be reviewed during a manual recount"); *see also* Tokaji, 73 FORDHAM L. REV. at 1723 (noting that "it is not generally possible to overvote with DRE voting machines"). Moreover, the court noted that DREs had certain benefits, making voting more accessible to disabled voters and preventing some voter errors that were common with optical scan machines. Thus, Florida's regulatory interests justified the manual recount procedures and, "therefore, they do not violate equal protection." *Wexler*, 452 F.3d at 1233.

Adopting the reasoning of *Weber* and *Wexler*, the Georgia Supreme Court has also rejected an equal protection challenge to that state's DRE system,[20] as has the Superior Court of New

[20] *Favorito v. Handel*, 684 S.E.2d 257, 261-62 (Ga. 2009).

Jersey.[21] Additionally, the United States Court of Appeals for the Fifth Circuit recently affirmed a summary judgment in the Secretary's favor, holding that the eSlate did not violate voters' rights under the First and Fourteenth Amendments to the United States Constitution. *See Tex. Democratic Party v. Williams*, 285 Fed. App'x. 194, 195 (5th Cir. 2008) (per curiam) (noting that district court properly applied *Anderson* and *Burdick* balancing test to the constitutional claims raised), *cert. denied*, 129 S.Ct. 912 (2009); *see also Tex. Democratic Party v. Williams*, No. A-07-CA-115-SS (W.D. Tex. August 16, 2007). In that case, voters complained that the eSlate deprived them of the ability to "emphasis vote"; that is, to cast a straight party vote and then also again vote for a particular candidate within that party—to make sure their votes count for these particular candidates. The voters argued that, if they attempted to emphasis vote, the eSlate would de-select, rather than register a vote for, the individual candidate. The trial court held that even assuming that the eSlate impacted voters' ability to cast emphasis votes, the use of DREs was constitutionally permissible. *See Tex. Democratic Party v. Williams*, No. A-07-CA-115-SS (W.D. Tex. August 16, 2007) (noting that the Secretary "made a reasonable, politically neutral, and non-discriminatory choice to certify the eSlate voting machines for use in elections, and nothing in the Constitution forbids this choice" (footnote omitted)).

We agree with the conclusions reached by those courts. DREs are not perfect. No voting system is. We cannot say that DREs impose severe restrictions on voters, particularly in light of the significant benefits such machines offer. *See, e.g.*, *Weber*, 347 F.3d at 1107; *see also* Tokaji, 73

[21] *Gusciora v. Corzine*, No. MER-L-2691-04, 2010 N.J. Super. Unpub. LEXIS 2319, *332-33 (N.J. Super. Ct. Law Div. 2010).

FORDHAM L. REV. at 1741, 1754 (noting that "DREs can reduce uncounted votes and virtually eliminate the 'racial gap' that tends to exist with other types of equipment," "have the potential to expand access for people with disabilities and for voters with limited English proficiency," and "tend[] to considerably reduce the number of uncounted votes"). As the *Wexler* court noted, different recount methodologies are necessary for DREs because ambiguous votes—often scrutinized during recounts—are virtually eliminated. A DRE with a voter-verified paper audit trail may provide more security; it may not.[22] But the equal protection clause does not require infallibility. The Secretary made a reasonable, nondiscriminatory choice to certify the eSlate, a decision justified by the State's important regulatory interests. "[N]othing in the constitution forbids that choice." *Weber*, 347 F.3d at 1107.

IV. The voters remaining claims are barred, either because the voters have no standing to assert them or because they are nonjusticiable.

A. Most of the voters' Article VI, section 4 claims involve generalized grievances about the lawfulness of government acts.

The voters' standing to pursue an equal protection claim does not translate into standing for their remaining claims. Instead, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008)(citations

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[22] One commentator suggests that requiring contemporaneous paper records of DRE votes is problematic:

> First, it relies on the false assumption that paper-based systems are inherently more accurate and reliable than paperless ones. Second, it disregards both long and recent experience demonstrating the vulnerability of paper-based systems to fraud and error. Third, it fails to comprehend the practical problems in actually implementing a system that is capable of printing out a contemporaneous paper record, yet preserves voter privacy and election security.

Tokaji, 73 FORDHAM L. REV. at 1780-81; *see also id.* at 1736 (noting that "many election officials and some civil rights advocates have opposed a contemporaneous paper record requirement, arguing that it is unnecessary, burdensome, and likely to discourage adoption of accessible voting technology").

and quotations omitted). In additional to the equal protection clause, the voters complain that the Secretary has violated two other constitutional provisions. The first, article VI, section 4, states:

> In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

TEX. CONST. art. VI, § 4.

This provision has four requirements: (1) votes shall be by secret ballot, (2) ballots shall be numbered, (3) the Legislature shall enact such other regulations as necessary to detect and punish fraud and preserve the purity of the ballot box, and (4) the Legislature may provide, by law, for the registration of voters in all cities. *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 8 (Tex. 1939).[23] The voters complain that the Secretary has violated the first three provisions.

First, they assert that the eSlate deprives them of a secret ballot. These allegations differ from the general thrust of the voters' claims, in that they do not complain specifically about the lack of a contemporaneous paper record of a vote cast. Instead, although the voters do not dispute that the eSlate permits them to cast secret ballots, they argue that the device is vulnerable to hackers, compromising vote secrecy. They also complain that the eSlate's audio output, available for disabled voters, can be overheard at a significant distance using only a shortwave radio.

Second, the voters allege that the eSlate's lack of a paper ballot violates the constitutional requirement that ballots be numbered. Although the eSlate numbers ballots, the voters contend that

[23] At the time we decided *Wood*, our constitution limited this fourth requirement to cities containing a population of ten thousand inhabitants or more. *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 8 (Tex. 1939). The requirement is now applicable to "all voters." TEX. CONST. art. VI, § 4.

failing to require a paper ballot undermines the framers' intent in drafting the numbering requirement—a requirement they claim was intended to secure the integrity of the election process.

Assuming, as we must, that these allegations are true, they amount only to a generalized grievance shared in substantially equal measure by all or a large class of citizens. *See, e.g., Landes v. Tartaglione*, No. 04-3163, 2004 U.S. Dist. LEXIS 22458, *4-5 (E.D. Pa. Oct. 28, 2004) (holding that voter lacked standing to complain of electronic voting machines that might malfunction or be tampered with), *aff'd*, 153 F. App'x 131(3d Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006). The voters' complaint that the lack of a contemporaneous paper record violates the spirit of the constitution is the kind of "undifferentiated, generalized grievance" about the conduct of government that courts cannot adjudicate. *Lance*, 549 U.S. at 442. The voters' secret ballot allegations involve only hypothetical harm, not the concrete, particularized injury standing requires. *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008).

All voting systems are subject to criminal manipulation, but there is no evidence or allegation that the eSlate has ever been manipulated in any Travis County election. Nor is there any proof that a Travis County disabled voter was deprived of the right to a secret ballot. In fact, the evidence is to the contrary: Travis County adopted the eSlate in part to comply with federal regulations aimed at facilitating the participation of the disabled in the voting process. *See* 42 U.S.C. §§ 15301–15545; *see also* Tokaji, 73 FORDHAM L. REV. at 1803 (noting that disabled voters "have the most to gain from implementation of DRE systems"). Not only does this last allegation fall within the generalized grievance category,[24] but it violates the prudential standing requirement that a plaintiff

[24] *Hays*, 515 U.S. at 745.

"assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. The voters lack standing to bring these claims. *See* WRIGHT, FEDERAL PRACTICE & PROCEDURE § 3531.10 (noting that "absent a more direct individual injury, violation of the Constitution does not itself establish standing").[25]

Finally, the voters assert that the lack of a contemporaneous paper record neither provides a means of detecting and punishing fraud, nor preserves the purity of the ballot box. But we have held that the "purity of the ballot box" provision requires only that *the Legislature* pass laws as necessary to deter fraud and protect ballot purity: "This constitutional provision is addressed to the sound discretion of the Legislature," and "[i]t is not for the courts to attempt to direct what laws the Legislature shall enact to comply with it." *Wood*, 126 S.W.2d at 9. The voters do not complain that the Legislature has failed to do so; to the contrary, they admit that it has. In the trial court, they alleged "[p]laintiffs do not find fault with the Code, or request that the Court rewrite it. The issue here is with the Secretary's application of the discretion provided him [sic] by the legislature." Without more, the voters have not alleged a violation of article VI, section 4.

B. The voters agree that the Legislature has satisfied article VI, section 2(c), and nothing more is required.

Article VI, section 2(c) provides that "suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties all undue influence in elections from power, bribery, tumult, or other improper practice." TEX. CONST. art. VI, § 2(c).

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[25] *See also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.").

The voters' 2(c) claim is difficult to discern. As alleged in their petition, the claim is derivative: they assert that the Secretary's alleged failure to comply with article VI, section 4 violates article VI, section 2(c) as well. In response to the Secretary's jurisdictional plea and motion for summary judgment, the voters mention 2(c) only in passing, and then only to state that "[e]lections should be absolutely free from influences of power and tumult." They assert that the Secretary's certification of easily "hacked" machines destabilizes citizen confidence and weakens democracy.

Assuming all that is true, section 2(c) requires only that the Legislature pass laws to eliminate improper election practices. *Cf. Wood*, 126 S.W.2d at 9. The voters do not dispute that the Legislature has done so. Their complaint is solely with the Secretary's certification of the DRE. Whatever the validity of that argument, it does not state a claim for a violation of section 2(c).

The Secretary then makes the curious argument that if part of what the voters allege is true—that she does not have access to the software and records used in the Travis County system—the voters have pleaded a claim for a violation of the Election Code,[26] which automatically results in a violation of section 2(c). She suggests that a remand on this claim would be appropriate, so that she may controvert this fact issue. She cites no authority for the contention that a violation of the Election Code would violate section 2(c), and the text of 2(c) does not support such an argument. Moreover, the voters have not alleged a violation of those sections of the Election Code. Even if they had, the complaint amounts to a generalized grievance against governmental conduct

[26] *See* TEX. ELEC. CODE § 122.002, .031.

of which they do not approve—a claim the voters lack standing to assert, as more fully discussed below. *Brown*, 53 S.W.3d at 302.

VI. The voters lack standing to pursue their Election Code claims.

In addition to their equal protection recount claim, the voters allege that the Secretary's certification of the eSlate deprives them of their statutory right to a recount, which the Election Code defines as "the process conducted under this title for verifying the vote count in an election." TEX. ELEC. CODE § 211.002. Additionally, although their live pleading is silent on the point, the voters assert on appeal that the Secretary's certification of the eSlate violates the requirement that voting systems be capable of providing records from which the system's operation may be audited, and, therefore, the Secretary acted outside her authority in certifying the system. TEX. ELEC. CODE § 122.001, .032(a). Finally, although the voters did not plead it, the court of appeals noted that the voters' evidence supported a claim that the eSlate does not comply with statutory requirements that the system operate "safely" and "accurately" and that it be "safe from fraudulent or unauthorized manipulation." TEX. ELEC. CODE § 122.001(a)(3), (4); 287 S.W.3d at 253 n.10.

The voters argue that Election Code section 273.081, which authorizes injunctive relief for a person "who is being harmed or is in danger of being harmed by a violation or threatened violation of this code," gives them standing to pursue these claims. TEX. ELEC. CODE § 273.081. That provision, however, does not create standing—it merely authorizes injunctive relief. As we have noted, statutes like this, which permit "'persons aggrieved,' 'persons adversely affected,' [or] 'any party in interest,'" to sue, still require that the plaintiff show how he has been injured or damaged other than as a member of the general public. *Scott v. Bd. of Adjustment*, 405 S.W.2d 55, 56 (Tex.

1966).[27] This is because "[s]uch suits are essentially private in character and are for the protection of private rights." *Id*. at 56.

Here, the voters have made no showing that the Secretary's certification harmed them other than as members of the general public. Accordingly, for much the same reason their article VI claims are barred, the voters lack standing to pursue their Election Code complaints. Those allegations involve only generalized grievances about the lawfulness of government acts. *See, e.g.*, *Favorito*, 684 S.E.2d at 263 (holding that voters' arguments regarding accuracy of recounts on DREs were "merely hypothetical and cannot serve as a basis for declaratory relief"). A desire to have the government act in conformance to the law is not enough,[28] and the voters assert no concrete, particularized harm to justify their claims here.[29] *See Brown*, 53 S.W.3d at 302.

VI. Conclusion

The voters raise legitimate concerns about system integrity and vulnerability. But these are policy disputes more appropriately resolved in the give-and-take of politics. Perhaps the Secretary

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[27] *See also Cox v. Perry*, 138 S.W.3d 515, 518 (Tex. App.—Fort Worth 2004, no pet.) (noting that plaintiff-candidate had no standing under section 273.081 to enjoin alleged Election Code violation, because "[a]ny such harm, in our view, is not distinct from harm to the general public").

[28] *Allen*, 468 U.S. at 754.

[29] Although we have analyzed these claims from the perspective of a plaintiff (Sonia Santana) who is a voter, none of the remaining plaintiffs has standing either. The court of appeals held that the NAACP and its president, Nelson Linder, had standing because NAACP members were registered voters and participants in Travis County elections, as was Linder himself. 287 S.W.3d at 250-51. Their claims fail for the same reasons Santana's do. The remaining plaintiff is David Van Os, a candidate for attorney general in 2006. Van Os asserts only that as a former candidate, it is important to him that every vote be accurately recorded and verified. He also complains that, if he had to request a recount, there would be no way to detect a malfunction. He does not complain that he sought a recount and was unable to receive one. At most, he has alleged a hypothetical harm—one that does not give him standing to pursue his claims.

will decide, as California has, to de-certify certain DREs.[30] Perhaps the Legislature will require a contemporaneous paper record of votes cast,[31] or perhaps Texas will curtail or abandon DRE use altogether.[32] But we cannot say the Secretary's decision to certify this device violated the voters' equal protection rights or that the voters can pursue generalized grievances about the lawfulness of her acts. "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of [the Legislature] and the Chief Executive." *Lujan*, 504 U.S. at 576. We reverse the court of appeals' judgment and render judgment dismissing the case. TEX. R. APP. P. 60.2(c).

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: July 1, 2011

[30] *See* Stuart Pfeifer, *Some Counties Might Sue Over E-Voting Orders*, LOS ANGELES TIMES, May 4, 2004, at B1 (describing secretary of state's decision to decertify paperless Diebold DRE voting machines).

[31] According to the voters, thirty states have statutes mandating contemporaneous paper records of votes cast.

[32] *See* THE PEW CENTER ON THE STATES, BACK TO PAPER: A CASE STUDY (2008) (detailing five states that adopted DREs and then reversed course), *available at* http://www.pewcenteronthestates.org/uploadedFiles/EB21Brief.pdf

IN THE SUPREME COURT OF TEXAS

NOS. 09-0432, 09-0433, 09-0474, 09-0703

IN RE OLSHAN FOUNDATION REPAIR COMPANY, LLC AND
OLSHAN FOUNDATION REPAIR COMPANY OF DALLAS, LTD., RELATORS

ON PETITIONS FOR WRITS OF MANDAMUS

Argued March 23, 2010

JUSTICE WAINWRIGHT delivered the opinion of the Court.

JUSTICE HECHT filed a concurring opinion, in which JUSTICE MEDINA joined.

Olshan Foundation Repair Company filed these petitions for writs of mandamus in four different cases in which three separate trial courts denied Olshan's pleas in abatement, refusing to compel arbitration of consumer claims against it. Three different courts of appeals also declined to order the disputes to arbitration. We consolidated these cases for argument and now issue a consolidated opinion. Because the Texas General Arbitration Act (TAA), and not the Federal Arbitration Act (FAA), governs the arbitration dispute in one of the cases (Waggoner, No. 09-0474), we deny Olshan mandamus relief in that case. We conclude that for the other three cases, the trial courts erred in holding that the TAA governs the arbitrations, there is no evidence that the arbitration agreements were unconscionable as a matter of law, and all other disputed issues are questions for

the arbitrator. Because the trial court erred by denying Olshan's pleas in abatement in the arbitrations governed by the FAA, we conditionally grant mandamus relief in those three actions.

I. Factual and Procedural Background

Olshan is a national company that repairs residential home foundations. In 1998, Craig and Joy Waggoner contracted with Olshan to repair their home's foundation. The Waggoners subsequently discovered new damage to the foundation and hired an engineer, Peter De la Mora, to investigate the problems. In a 2007 report, De la Mora concluded that Olshan had not properly repaired the home. The Waggoners filed suit against Olshan for breach of contract, breach of warranty, negligence, violations of the Texas Deceptive Trade Practices Act, and violations of the Texas Home Solicitation Act.

In three other cases, similar circumstances unfolded. In 2002, Olshan contracted with Vickie and Kenneth Kilpatrick, who filed suit against Olshan in 2007. The Kilpatricks' case was consolidated at the appellate court level with claims brought by Charley and Gladys Tisdale, again with nearly identical facts. In June 2007, Robert and Marta Tingdale, who initially contracted with Olshan in 2004, filed another similar case. All plaintiffs are represented by the same counsel, and each case includes a report from De la Mora opining that Olshan had not properly repaired each home.

The four repair contracts were in writing, and each contained arbitration clauses. The arbitration clauses in Kilpatrick (No. 09-0432), Tisdale (No. 09-0433), and Tingdale (No. 09-0703) provide:

> Notwithstanding, any provision in this agreement to the contrary, any dispute, controversy, or lawsuit between any of the parties to this agreement about any matter arising out of this agreement, shall be resolved by mandatory and binding arbitration administered by the American Arbitration Association ("AAA") **pursuant to the arbitration laws in your state** and in accordance with this arbitration agreement and the commercial arbitration rules of the AAA . . . .

(emphasis added). The arbitration clause in the Waggoner (No. 09-0474) agreement is identical except for the language in bold, which states "**pursuant to the Texas General Arbitration Act**." (emphasis added). None of the agreements addressed in this opinion was signed by the consumers' attorney or exceeded $50,000 in consideration.

Olshan filed a plea in abatement in each case and sought to compel arbitration under the Federal Arbitration Act (FAA). The homeowners responded to the pleas, arguing that: (1) the TAA applies to the agreements to the exclusion of the FAA, rendering the arbitration agreements unenforceable because the agreements were not signed by the homeowners' attorney; and (2) arbitration with the AAA is substantively unconscionable because of the expense required and because the contract itself was undisputably unenforceable under the Texas Home Solicitation Act.

The trial court denied Olshan's plea in the Waggoners' action. It held that the TAA applies to the agreement, and thus the arbitration agreement was unenforceable pursuant to Chapter 171 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 171.002(a)(2) (requiring arbitration agreements in service contracts for less than $50,000 be signed by all parties and their attorneys). The trial court alternatively held that the prohibitive cost of arbitration rendered the agreement to arbitrate unconscionable. Olshan petitioned for mandamus relief with the court of appeals, which was denied. The court of appeals held the TAA was not preempted by the FAA, and

section 171.002(a)(2) of the TAA rendered the agreement unenforceable. It denied Olshan's writ of mandamus without reaching the other issues. In the remaining three actions, the trial courts denied Olshan's pleas in abatement and the courts of appeals denied Olshan's petitions for writs of mandamus.[1]

II. Standard for Mandamus

At the time these petitions were filed, there was no method under Texas procedure for parties to file interlocutory appeals of a trial court's refusal to compel arbitration under the FAA.[2] Olshan sought relief through petitions for writs of mandamus. *See Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992). Mandamus will not issue unless: (1) the trial judge has committed a clear abuse of discretion; and (2) there is no adequate remedy on appeal. *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 422 (Tex. 2010) (per curiam) (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004)). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable it amounts to a clear and prejudicial error of law or it clearly fails to correctly analyze or apply the law. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (citations omitted). The second requirement for mandamus relief, that the relator has no adequate remedy by appeal, "has no

[1] The Tingdale, Kilpatrick and Tisdale trial courts issued memorandum opinions, which are addressed by the courts of appeals, respectively, in No. 10-09-00119-CV, 2009 WL 1886648 (Tex. App.—Waco July 1, 2009, orig. proceeding); Nos. 2-08-336-CV, 2-08-342-CV, 2008 WL 4661815 (Tex. App.—Fort Worth Oct. 2, 2008, orig. proceeding).

[2] The Legislature recently amended the Texas Civil Practice and Remedies Code to allow an interlocutory appeal "to the court of appeals from the judgment or interlocutory order of a district court . . . under the same circumstance that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16." TEX. CIV. PRAC. & REM CODE § 51.016. However, this act is not applicable to appeals of an interlocutory order in an action pending as of September 1, 2009. Act of June 19, 2009, 81st Leg., R.S., ch. 820, § 2, 2009 Tex. Gen. Laws 2061. Because all four actions in this consolidated opinion were pending as of September 1, 2009, section 51.016 does not allow an interlocutory appeal of these causes.

comprehensive definition." *See In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (citing *Prudential*, 148 S.W.3d at 136). However, we have determined that relators have no adequate remedy by appeal when a trial judge erroneously refuses to compel arbitration under the FAA. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001).

This Court must decide whether the trial courts abused their discretion by not compelling arbitration pursuant to the FAA, as requested in Olshan's pleas in abatement. The trial courts abuse their discretion by refusing to compel arbitration if the FAA preempts the TAA and the arbitration agreements are not unconscionable. However, the trial courts did not err by denying Olshan's pleas in abatement if the TAA applies to the agreements or the agreements are unconscionable.

III. Federal Preemption

A. The FAA and Choice of Law

The TAA renders arbitration agreements unenforceable if the agreements containing the arbitration clauses are agreements for services "in which the total consideration to be furnished by the individual is not more than $50,000" and the agreements are not in writing, signed by each party, and each party's attorney. TEX. CIV. PRAC. & REM. CODE § 171.002(a)(2). The homeowners contend that the arbitration agreements are governed by the TAA and are unenforceable for failure to meet the two identified TAA requirements. Olshan argues that the FAA applies to the agreements and preempts the TAA's exemption from coverage under section 171.002(a)(2), making the arbitration clauses enforceable. *See In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (per curiam) (addressing a similar exemption under the TAA for personal injury cases).

Section 2 of the FAA preempts state law that would otherwise render arbitration agreements unenforceable in a contract involving interstate commerce. 9 U.S.C. § 2; *Southland Corp. v. Keating*, 465 U.S. 1, 10–11 (1984). "The Act was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (internal quotations omitted). We have recognized that the FAA preempts parts of the TAA, including section 171.002(a)(2) of the Civil Practice and Remedies Code. *See Jack B. Anglin Co.*, 842 S.W.2d at 271 (discussing FAA's preemption of non-waiver provision of DTPA); *Nexion*, 173 S.W.3d at 69 (Tex. 2005) (discussing FAA's preemption of TAA section 171.002(a)(3)).

But the FAA does not "confer a right to compel arbitration of any dispute at any time." *Volt*, 489 U.S. at 474. The FAA policy is simply to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Id*. at 479. In *Volt*, the Court upheld the application of a California statute that allowed a stay of arbitration proceedings pending resolution of related litigation because the contract also contained a choice-of-law clause providing that "[t]he Contract shall be governed by the law of the place where the Project is located." *Id*. at 470. The Court reiterated that "the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *Id*. at 478 (quoting *Southland Corp.*, 465 U.S. at 10). But the FAA does not prevent

> the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. . . . Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted. . . . By

> permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

Id. at 479 (citations omitted).

Subsequently, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the Court held that the FAA preempted New York's prohibition against arbitral awards of punitive damages despite a choice of law provision in an arbitration agreement that stated the agreement "shall be governed by the laws of the State of New York." 514 U.S. 52, 63–64 (1995). The Court first stressed that the agreement would be enforced as written, stating that "the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages." *Id*. at 58. Where the Court in *Volt* read the choice-of-law provision as definitively choosing state law over federal law, the Court in *Mastrobuono* read the provision differently:

> The choice-of-law provision, when viewed in isolation, may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship.
>
> . . .
>
> At most, [it] introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards.

Id. at 59, 62. Then, using FAA mandated rules of contract construction, the Court concluded that the provision should be read "to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators." *Id*. at 62–64.

Thus, courts treat arbitration agreements as other contracts in applying the legal rules to interpret them. The goal is to discern the true intentions of the parties, as the FAA's primary purpose

is to ensure private agreements to arbitrate are enforced according to their terms, no more, no less. *Volt*, 489 U.S. at 479; *see also Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (Posner, C.J.) ("[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, . . . parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.").

B. This Court's Treatment of Choice-of-Law Provisions Relating to Arbitration Agreements

This Court analyzed contractual language in the context of the relationship between an arbitration clause and a general choice-of-law provision in *In re L & L Kempwood Associates, L.P.*, 9 S.W.3d 125, 127–28 (Tex. 1999) (per curiam). We held that an agreement containing a general choice-of-law provision stating that the entire contract will be governed by "the law of the place where the Project is located," does not preclude application of the FAA. *Id.* The Court observed that the Project was located in Houston, thus the FAA was part of "the law of the place where the Project is located." *Id.*; *see also Capital Income Props. v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992) (per curiam) (stating that "[t]he Federal [Arbitration] Act is part of the substantive law of Texas"). When the language of the provision included federal law, further language specifically excluding application of the FAA is necessary for a court to apply the TAA to the FAA's exclusion. "The choice-of-law provision did not specifically exclude the application of federal law, and absent such an exclusion we decline to read the choice-of-law clause as having such an effect." *L & L Kempwood*, 9 S.W.3d at 127–28. Rather, a general choice-of-law provision "may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to

apply to disputes." *Id*. at 127 n.16 (citing *Mastrobuono*, 514 U.S. at 59–60). Courts apply the FAA unless language in the arbitration agreement indicates its exclusion.

C. The Law the Parties Chose

Three of the arbitration agreements state that disputes arising out of the contract "shall be resolved by mandatory and binding arbitration administered . . . pursuant to the arbitration laws in your state . . . ." Courts rarely read such general choice-of-law provisions to choose state law to the exclusion of federal law. *See Mastrobuono*, 514 U.S. at 59; *L & L Kempwood*, 9 S.W.3d at 127 n.16. Further, just as the FAA is part of the substantive law of Texas, the FAA would be part of the arbitration laws in Texas. *See L & L Kempwood*, 9 S.W.3d at 127 n.15 (quoting *Capital Income Props.*, 843 S.W.2d at 23). The language of the arbitration clause designating arbitration pursuant to "the arbitrations laws in your state" includes the FAA. *See id.* at 127–28. Thus, the FAA applies to the three agreements that include the "arbitration laws in your state" language, and the FAA preempts the provisions of section 171.002(a)(2) of the TAA that would otherwise render the agreements unenforceable. The trial courts abused their discretion in denying Olshan's requests to compel arbitration based on the unenforceability of the arbitration under section 171.002(a)(2) in the Kilpatrick, Tisdale and Tingdale cases.

In contrast, the Waggoner agreement states that disputes arising out of the contract "shall be resolved by mandatory and binding arbitration . . . pursuant to the Texas General Arbitration Act . . . ." This provision distinguishes the Waggoner agreement from the other agreements and the agreements in *L & L Kempwood* and *Mastrobuono*. This is not the same general choice-of-law provision. This provision chooses a state's substantive law, specifically the TAA, to govern disputes

under the agreement. A valid choice-of-law provision makes a conflicts-of-law analysis unnecessary; this provision expresses a preference between federal and state law. *Id.* The FAA is part of the arbitration laws of Texas and can be applied to arbitration administered pursuant to the laws of Texas. However, the FAA is not part of the TAA, at least to the extent the two are inconsistent.

The Fifth Circuit has likewise interpreted an arbitration clause specifically invoking the TAA as designating the TAA to govern all aspects of arbitration under the agreement, to the exclusion of the FAA. *Ford v. Nylcare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243, 246 (5th Cir. 1998) (applying Texas law). The court stated the parties may "specify the law governing interpretation of the scope of the arbitration clause." *Id*. at 248. The focus of the determination is on the parties' choice. Thus, the court held that the parties intended the TAA to govern the scope of the arbitration clause. *Id.* at 249.

The language of the Waggoner agreement also indicates the parties' intention that the TAA govern the scope of their arbitration agreement. The plain language clearly indicates that the parties intend their arbitration to be governed by the TAA rather than merely "the law of the state" or "Texas law." The parties' intention that arbitration be administered pursuant to the TAA would be thwarted if the FAA preempted the TAA's specific provisions. Thus, an agreement specifying that arbitration occur "pursuant to the Texas General Arbitration Act" excludes the FAA's preemption of section 171.002(a)(2) of the TAA.[3]

[3] We do not believe the choice-of-law provision to be ambiguous.

Because the TAA would render the Waggoners' arbitration agreement unenforceable, and because the FAA was not chosen by the parties, the trial court correctly denied Olshan's plea in abatement, seeking to compel arbitration of Waggoner's action against Olshan. However, because the parties in the Kilpatrick, Tisdale, and Tingdale contracts chose to arbitrate pursuant to the laws of Texas, which include the FAA, the FAA preempts section 171.002(a)(2) of the TAA and precludes those requirements from barring arbitration.

IV. Unconscionability

Even though the FAA governs the arbitration agreements in the Kilpatrick, Tisdale, and Tingdale contracts, if those agreements are unconscionable, they are unenforceable. The homeowners contend that the arbitration agreements are unconscionable because "mandatory binding arbitration administered by the American Arbitration Association . . . in accordance with this arbitration agreement and the commercial arbitration rules of the AAA" is prohibitively expensive, preventing their ability to vindicate their claims. Further, they contend the contracts are clearly void because Olshan violated the Home Solicitation Act, exacerbating the unconscionability of the agreement.

A. Unconscionability of Arbitration Agreements

Section 2 of the FAA states arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A central purpose of the FAA is "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted).

Such agreements are enforceable only if they meet "the requirements of the general contract law of the applicable state." *In re Poly-America, L.P.*, 262 S.W.3d 337, 347 (Tex. 2008) (citation omitted). When determining whether an agreement to arbitrate is valid, "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987).

Texas law renders unconscionable contracts unenforceable. *Poly-America*, 262 S.W.3d at 348. Texas further recognizes both substantive and procedural unconscionability. "Substantive unconscionability refers to the fairness of the arbitration provision itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision." *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006). Because the homeowners complain of the prohibitive cost of arbitration, their claim is grounded in substantive unconscionability. Generally, a contract is unconscionable if, "given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *FirstMerit Bank*, 52 S.W.3d at 757 (citing TEX. BUS. & COM. CODE § 2.302 cmt. 1). "The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." TEX. BUS. & COM. CODE § 2.302 cmt. 1 (internal citation omitted).

The U.S. Supreme Court has held that statutory claims may be arbitrated "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (citing *Gilmer*, 500 U.S. at 28). Conversely, an arbitration agreement may render a contract unconscionable if "the existence

of large arbitration costs could preclude a litigant . . . from effectively vindicating [his or her] federal statutory rights in the arbitral forum." *Id.*; *see also Poly-America,* 262 S.W.3d at 355–57; *FirstMerit Bank*, 52 S.W.3d at 756 (citing *Green Tree*, 531 U.S. at 91).

We should be wary of setting the bar for holding arbitration clauses unconscionable too low. First, arbitration is favored in both federal and Texas law, and to conclude that an arbitration agreement is unconscionable based merely on the "'risk' that [the claimant] will be saddled with prohibitive costs" would undermine the "'liberal federal policy favoring arbitration agreements.'" *Green Tree*, 531 U.S. at 91 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *FirstMerit Bank*, 52 S.W.3d at 756. Second, the theory behind unconscionability in contract law is that courts should not enforce a transaction so one-sided, with so gross a disparity in the values exchanged, that no rational contracting party would have entered the contract. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1981). But as we have recognized previously,

> there is nothing *per se* unconscionable about arbitration agreements. In fact, historically, Texas law favors settling disputes by arbitration. Arbitration agreements, like the one here, offer a permissible choice to traditional litigation that does not favor either party. Moreover, assuming unequal bargaining power between [the parties] exists does not establish grounds for defeating an agreement to arbitrate under the FAA.

EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 90–91 (Tex. 1996) (per curiam) (citations omitted). Furthermore, arbitration clauses in consumer contracts reduce merchants' operating costs and produce savings passed on to the consumer in the form of lower prices. Thus, a fairly administered arbitration should not create a gross disparity in the values exchanged. Stephen J. Ware, *Paying the*

Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. DISP. RESOL. 89, 89 (2001); *see generally* Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995). However, we also recognize that arbitration is intended as a lower cost, efficient alternative to litigation. *See Poly-America*, 262 S.W.3d at 347 ("[A]rbitration is intended to provide a lower-cost, expedited means to resolve disputes . . . ."). Where these justifications are vanquished by excessive arbitration costs that deter individuals from bringing valid claims, the unconscionability doctrine may protect unfairly disadvantaged consumers. We agree, as in *Green Tree*, that excessive costs imposed by an arbitration agreement render a contract unconscionable if the costs prevent a litigant from effectively vindicating his or her rights in the arbitral forum. *See Green Tree*, 531 U.S. at 90.

B. Application of the Standard

The party opposing arbitration bears the burden to show that the costs of arbitration render it unconscionable. When "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Green Tree*, 531 U.S. at 92. This Court likewise requires "*some evidence* that a complaining party will likely incur arbitration costs in such an amount as to deter enforcement of statutory rights in the arbitral forum." *Poly-America,* 262 S.W.3d at 356; *accord In re U.S. Home Corp.*, 236 S.W.3d 761, 764 (Tex. 2007); *FirstMerit Bank*, 52 S.W.3d at 756–57.

The Court in *Green Tree* did not explain how detailed the showing of prohibitive expense need be to invalidate an arbitration agreement. *Green Tree*, 531 U.S. at 92 ("How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with

contrary evidence is a matter we need not discuss . . . ."). However, a number of federal courts of appeals, relying on *Green Tree*, have applied a case-by-case analysis of the effect the arbitration clause has on the particular plaintiff's ability to effectively vindicate his rights.[4] The Fourth Circuit's approach in *Bradford v. Rockwell Semiconductor Systems, Inc.* is particularly instructive. 238 F.3d 549 (4th Cir. 2001). The court noted the proper analysis "evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation." *Id.* According to the court, that inquiry requires "a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." *Id*. (quotations omitted). The key factor is not *where* the cost to pursue the claim goes, but *what* the total cost to the claimant to pursue the claim is. The court "fail[ed] to see how a claimant could be deterred from pursuing his statutory rights in arbitration simply by the fact that his fees would be paid to the arbitrator where the overall cost of arbitration is otherwise equal to or less than the cost of litigation in court." *Id*.

Likewise, in *Honrubia Properties, Ltd. v. Gilliland*, the Corpus Christi–Edinburg Court of Appeals essentially accepted *Bradford*'s conceptual framework. Nos. 13-07-210-CV, 13-07-249-CV, 2007 WL 2949567 at *6 (Tex. App.—Corpus Christi-Edinburg Oct. 11 2007, no pet.) (mem.

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[4] *See Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259 (11th Cir. 2003) ("Since *Green Tree*, all but one of the other Circuits that have reconsidered this issue have applied a similar case-by-case approach."); *see also Blair v. Scott Specialty Gases*, 283 F.3d 595, 609–10 (3d Cir. 2002); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001); *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 708 (D.C. Cir. 2001). *But see Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002) (holding that plaintiff employees should not "have to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum").

op.). It considered the party's ability to pay the arbitration fee, the actual amount of the fee in relation to the amount of the underlying claim, and the cost differential between arbitration and litigation in court. *Id.* (citations omitted). Applying the standard, the court held the arbitration agreement was not substantively unconscionable where evidence showed the arbitration would cost approximately $15,000 to $20,283, plus expenses and other possible fees; the claimant was seeking more than $4,000,000 in compensatory and punitive damages; and arbitration costs would range from 11 percent to 15 percent of the claimant's gross income. *Id*. at *7. The claimant failed to submit any evidence pertaining to the expected cost differential between arbitration and litigation. *Id.*

In applying the unconscionability standard, the crucial inquiry is whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, a forum where the litigant can effectively vindicate his or her rights. With this in mind, we agree that the approach taken by the Fourth Circuit in *Bradford* effectively pursues this inquiry. We note all of the analyses previously discussed correctly assume that litigation allows claimants to effectively vindicate their rights, despite the expense. The desire to avoid steep litigation expense—including the costs of longer proceedings, more complicated appeals on the merits, discovery, investigations, fees, and expert witnesses—is the purpose of arbitration in the first place. *See Jack B. Anglin Co.*, 842 S.W.2d at 272–73 ("[T]he purpose of [arbitration is] providing a rapid, inexpensive alternative to traditional litigation . . . ."). In the absence of unusual animus between the parties or external motives, plaintiffs continue to pursue claims when the expected benefits of the lawsuit outweigh the total cost of bringing it. If the total cost of arbitration is comparable to the total cost of litigation, the arbitral

forum is equally accessible.[5] Thus, a comparison of the total costs of the two forums is the most important factor in determining whether the arbitral forum is an adequate and accessible substitute to litigation. Other factors include the actual cost of arbitration compared to the total amount of damages the claimant is seeking and the claimant's overall ability to pay the arbitration fees and costs. These factors may also show arbitration to be an inadequate and inaccessible forum for the particular claimants to vindicate their rights. However, these considerations are less relevant if litigation costs more than arbitration.

C. Sufficiency of the Evidence

Green Tree creates a burden-shifting test in which the "party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs." *Green Tree*, 531 U.S. at 92. Once met, the burden shifts to "the party seeking arbitration [who] must come forward with contrary evidence." *Id*.; *see also Poly-America*, 262 S.W.3d at 348 ("The burden of proving such a ground—such as fraud, unconscionability or voidness under public policy—falls on the party opposing the contract.");

[5] "Total cost" refers to the total cost of pursuing a claim in either forum, notwithstanding who will be financing the claim. Some courts have noted the argument that attorneys will be unwilling to represent plaintiffs on a contingency fee basis in the arbitral forum and that contingent fee arrangements make litigation less expensive for plaintiffs than arbitration. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 664 (6th Cir. 2003); *Poly-America*, 262 S.W.3d at 355. But other commentators argue that there is no reason why plaintiffs cannot secure the same financing when arbitration is mandated if both the value of their claim and the cost to pursue it remain constant. *See* Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 768 (2006) ("On the face of it, there is no reason to expect contingent fee contracts to treat arbitration costs differently than they treat other litigation expenses."). We recognize arbitration is not always a lower-cost, efficient litigation alternative. Forcing consumer plaintiffs into an arbitral forum may affect their ability to pursue remedies when small claims are at issue. However, this does not excuse parties opposing arbitration from providing sufficient evidence to demonstrate that excessive costs make arbitration unconscionable in their particular case.

FirstMerit Bank, 52 S.W.3d at 756 ("Again, since the law favors arbitration, the burden of proving a defense to arbitration is on the party opposing arbitration.").

Evidence of the "risk" of possible costs of arbitration is insufficient evidence of the prohibitive cost of the arbitration forum. *Green Tree*, 531 U.S. at 91 ("The 'risk' that [the plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."). Rather, "both the United States Supreme Court and this Court require specific evidence that a party will actually be charged excessive arbitration fees." *U.S. Home Corp.*, 236 S.W.3d at 764; *see also FirstMerit Bank*, 52 S.W.3d at 757 ("Because the record contains no specific evidence that the [plaintiffs] will actually be charged excessive arbitration fees, we conclude that there is legally insufficient evidence that the plaintiffs would be denied access to arbitration based on excessive costs."). The party opposing arbitration must show the likelihood of incurring such costs in her particular case.

Thus, for evidence to be sufficient, it must show that the plaintiffs are likely to be charged excessive arbitration fees. While we do not mandate that claimants actually incur the cost of arbitration before they can show its excessiveness, parties must at least provide evidence of the likely cost of their particular arbitration, through invoices, expert testimony, reliable cost estimates, or other comparable evidence. *See Poly-America*, 262 S.W.3d at 354–55 (concluding that the plaintiff's "own affidavit and that of an expert witness providing detailed estimates of the likely cost of arbitration in [the plaintiff's] case" constituted sufficient evidence); *Olshan Found. Repair Co. v. Ayala*, 180 S.W.3d 212, 215–16 (Tex. App.—San Antonio 2005, pet. denied) (holding invoice for

party's share of arbitration expenses sufficient). Evidence that merely speculates about the risk of possible cost is insufficient.

D. Application to the Facts

In applying this analysis to the facts at hand, we begin with the agreement itself, which states, "any matter arising out of this agreement shall be resolved by mandatory and binding arbitration administered by the American Arbitration Association . . . in accordance with this arbitration agreement and the commercial arbitration rules of the AAA." According to the commercial arbitration rules, the AAA:

> applies the *Supplementary Procedures for Consumer-Related Disputes* to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices.

AAA Commercial Arbitration Rule R-1 (2007, 2009). The *Supplementary Procedures for Consumer-Related Disputes* have a separate fee schedule for consumer arbitration:

> **Administrative Fees**
>
> Administrative fees are based on the size of the claim and counterclaim in a dispute. They are based only on the actual damages and not on any additional damages, such as attorneys' fees or punitive damages. Portions of these fees are refundable pursuant to the Commercial Fee Schedule.
>
> **Arbitrator Fees**
>
> For cases in which no claim exceeds $75,000, arbitrators are paid based on the type of proceeding that is used. The parties make deposits as set forth below. Any unused deposits are returned at the end of the case.
>
> Desk Arbitration or Telephone Hearing $250 for service on the case

In Person Hearing $750 per day of hearing

For cases in which a claim or counterclaim exceeds $75,000, arbitrators are compensated at the rates set forth on their panel biographies.

Fees and Deposits to be Paid by the Consumer:

If the consumer's claim or counterclaim does not exceed $10,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of $125. This deposit is used to pay the arbitrator. It is refunded if not used.

If the consumer's claim or counterclaim is greater than $10,000, but does not exceed $75,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of $375. This deposit is used to pay the arbitrator. It is refunded if not used.

If the consumer's claim or counterclaim exceeds $75,000, or if the consumer's claim or counterclaim is non-monetary, then the consumer must pay an Administrative Fee in accordance with the Commercial Fee Schedule.[6] A portion of this fee is refundable pursuant to the Commercial Fee Schedule. The consumer must also deposit one-half of the arbitrator's compensation. This deposit is used to pay the arbitrator. This deposit is refunded if not used. The arbitrator's compensation rate is set forth on the panel biography provided to the parties when the arbitrator is appointed.

AAA *Supplementary Procedures for Consumer-Related Disputes*, Administrative Fees, Arbitrator Fees, Fees and Deposits to be Paid by the Consumer (2005, 2010). Thus, for a consumer claim up to $75,000, the most a consumer will have to pay under these rules is $375 for the arbitrator. *Id.*; *see also Green Tree*, 531 U.S. at 95 (Ginsburg, J., dissenting) (describing the AAA's Consumer Arbitration Rules as a model "for fair cost and fee allocation").

[6] "The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees." AAA Commercial Arbitration Rule R-49 (2007, 2009). In 2008, when Olshan sought to compel arbitration, the total initial filing fee and case service fee ranges from $2,550 for claims between $75,000–$150,000 to $8,500 for claims above $500,000. AAA Commercial Arbitration Administrative Fees, Fees (2007).

The homeowners bear the burden to show the likelihood of incurring excessive costs, yet no homeowners provided any concrete idea of the amount of their claims. It is impossible to know how much they will be charged under the AAA rules, even if the fees charged by AAA were excessive. Instead, the homeowners provided two invoices from the AAA for arbitration in, as the homeowners allege, "similar cases" to show the likelihood of excessive litigation costs. The first was a copy of the invoice from the AAA to the Ayalas who were plaintiffs in a different lawsuit against Olshan. It shows that the Ayalas' claim against Olshan was for $200,000, and that the Ayalas' were charged $35,900 to arbitrate that claim. The second was an invoice from the AAA to an anonymous claimant for the arbitration of a construction dispute, a similar type of case using only one arbitrator.[7] The amount of this claim is not stated on this invoice, but based on the administrative fee and case service fee charged by the AAA, we can deduce that it was between $75,000 and $150,000. The anonymous claimants were charged $11,406 to arbitrate.

Merely showing that other claimants have incurred arbitration costs of some amount falls well short of specific evidence that these particular parties will be charged excessive fees. There is no evidence that the homeowners' claims are similar in amount or difficulty as the claims of the Ayalas or the anonymous claimant. In fact, the Ayalas' invoice shows that their claim was for $200,000, while none of the homeowners' claims in this case exceeded $20,000. Moreover, there is no evidence that the homeowners have made any effort to reduce the likely charges through requests for fee waivers, pro bono arbitrators, or even simply requesting a one arbitrator panel. As

[7] It is unclear whether this means that the Ayalas requested three arbitrators. That the cost of the arbitrator to the Ayalas per day of hearing was $3,350, compared to $1,250 per day in the anonymous case, leads us to believe they did.

the court in *In re MHI Partnership, Ltd.* aptly noted, "Substantive unconscionability threatens to become the exception that swallows the rule if all that must be done to avoid arbitration is to assume the most expensive possible scenario." No. 14-07-00851-CV, 2008 WL 2262157 at *7 (Tex. App.—Houston [14th Dist.] May 29, 2008, no pet.) (mem. op.).

Even if we took these invoices as evidence of the likely arbitration charges to the homeowners, they have provided no comparison of these charges to the expected cost of litigation, the amount of their claim, or their ability to pay these costs. *See Green Tree,* 531 U.S. at 90 n.6 (concluding that a party's unsupported statement that she did not have the resources to pay the high costs of arbitration was insufficient); *Bradford*, 238 F.3d at 556 n.5 ("The cost of arbitration, as far as its deterrent effect, cannot be measured in a vacuum or premised upon a claimant's abstract contention that arbitration costs are 'too high.'"). The record contains no specific evidence that the homeowners will actually be charged excessive arbitration fees, and thus there is no legally sufficient evidence that such fees prevent the homeowners from effectively pursuing their claim in the arbitral forum.

E. Unconscionability in Light of the Texas Home Solicitation Act

Finally, the homeowners argue that the arbitration is unconscionable because the parties will expend time, energy, and money needlessly going to arbitration when the arbitrator will find the contract—including the arbitration clause—void, sending the case back to court.[8] They assert that their contract with Olshan violated the Texas Home Solicitation Act (THSA), which would render

[8] The homeowners concede that the arbitrator and not a court decides a contractual defense to the contract as a whole as opposed to a contractual defense to just the arbitration provision. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 647–49 (Tex. 2009).

the agreements, including the arbitration clauses, void. The alleged basis for violation of the THSA is Olshan's failure to include in the agreements certain language regarding cancellation in at least 10-point boldfaced type, where the transactions occurred by personal solicitation outside Olshan's place of business. TEX. BUS. & COM. CODE §§ 601.002(a), .052, .053, .201. Further, the homeowners contend that there is no dispute over whether the contract violates the THSA, and the arbitrator will thus certainly find the contract void.[9]

It is tempting to avoid the unnecessary costs that would accompany an allegedly unnecessary arbitration. But to do so requires the trial court to make a determination of issues relating to the contract generally, even if it seems clear that one party or the other will prevail. As the U.S. Supreme Court stated in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, when the parties have contracted for arbitration of their disputes, a trial court "may consider only issues relating to the making and performance of the agreement to arbitrate." 388 U.S. 395, 404 (1967); *see also Rent-A-Ctr., W., Inc. v. Jackson,* 130 S. Ct. 2772, 2778 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."). There is no way to fashion a standard to determine whether arbitration is unnecessary without giving the trial court some discretion over issues relating to the making and performance of the contract generally—exactly what *Prima Paint*, and later *Buckeye* and *Rent-A-Center*, sought to avoid. Allowing courts to make this determination under an unconscionability analysis would provide an end run around the rule.

[9] Olshan states in its brief and stated at argument to the contrary that it will present certain defenses to this claim. It is neither our province nor the province of the trial court to determine the merits of these defenses when the parties have contracted to arbitrate such disputes.

While in some cases this "rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void[,] . . . it is equally true that [the opposite] approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable." *Buckeye*, 546 U.S. at 448–49. This conundrum is solved with a rule that allocates such decisions to arbitration, which is consistent with the liberal policy favoring arbitration in the FAA, U.S. Supreme Court decisions, and decisions of this Court. The homeowners failed to provide legally sufficient evidence of the prohibitive cost of arbitration to prove unconscionability, and this failure cannot be remedied by allowing the trial court to determine if it believes the contract itself is void.

V. Conclusion

This Court endeavors to interpret agreements, including those to arbitrate, as they are written. When an agreement specifically states that it is to be governed by the Texas General Arbitration Act, we hold that it will be governed by the Act, which may mean that disputes arising from its terms will be excluded from arbitration. Thus, the TAA applies to the arbitration agreement between the Waggoners (No. 09-0474) and Olshan and renders it unenforceable. *See* TEX. CIV. PRAC. & REM. CODE § 171.002(a)(2). The trial court did not err by denying Olshan's plea in abatement, and the court of appeals denied relief. We also deny mandamus relief in the Waggoner case.

However, where an arbitration agreement states that it is to be governed by the law of this state, that law includes the Federal Arbitration Act. Because it is proper to apply the FAA to the Kilpatrick (No. 09-0432), Tisdale (No. 09-0433), and Tingdale (No. 09-0703) agreements that use such language, the FAA preempts the provisions of section 171.002(a)(2) that would otherwise

render those agreements unenforceable. And the parties opposing arbitration in those three cases did not submit legally sufficient evidence that arbitration of their claims would be unconscionable. Therefore, the trial court erred by denying Olshan's pleas in abatement, and we conditionally grant mandamus relief in the Kilpatrick, Tisdale, and Tingdale cases and remand those cases to the trial court for further proceedings consistent with this opinion. We are confident that the trial courts will comply, and the writs will issue only if they fail to do so.

_____
Dale Wainwright
Justice

OPINION DELIVERED: December 3, 2010

IN THE SUPREME COURT OF TEXAS

NOS. 09-0432, 09-0433, 09-0474, 09-0703

IN RE OLSHAN FOUNDATION REPAIR COMPANY, LLC AND
OLSHAN FOUNDATION REPAIR COMPANY OF DALLAS, LTD., RELATORS

ON PETITIONS FOR WRITS OF MANDAMUS

JUSTICE HECHT, concurring, in which JUSTICE MEDINA joined.

I join fully in the Court's opinion and write only with this further observation.

The homeowners contend that the contracts at issue violated the Texas Home Solicitation Act[1] because they did not contain the requisite notice of their right to cancellation and are therefore void by express provision of the Act.[2] In response, Olshan tells us in its briefing only that it "will present its defenses . . . in the arbitral forum". Asked at oral argument what defenses it has to the

[1] Act of May 18, 1973, 63rd Leg., R.S., ch. 246, § 1, 1973 Tex. Gen. Laws 574, codified as TEX. REV. CIV. STAT. ANN. art. 5069-13.01, amended by Act of April 4, 1975, 64th Leg., R.S., ch. 59, § 1, 1975 Tex. Gen. Laws 124, and by Act of May 27, 1995, 74th Leg., R.S., ch. 926, § 1, 1995 Tex. Gen. Laws 4649, recodified by Act of May 24, 1997, 75th Leg., R.S., ch. 1008, § 3, 1997 Tex. Gen. Laws 3091, 3583, as TEX. BUS. & COM. CODE §§ 39.001-.009, and by Act of May 15, 2007, 80th Leg., R.S., ch. 885, § 2.01, 2007 Tex. Gen. Laws 1905, 2026, as TEX. BUS. & COM. CODE §§ 601.001-.205.

[2] Section 601.201, TEX. BUS. & COM. CODE, provides that "[a] sale or contract entered into under a consumer transaction in violation of . . . Subchapter D is void." Section 601.152, in subchapter D, states: "A merchant may not: (1) at the time the consumer signs the contract pertaining to a consumer transaction or purchases the goods, services, or real property, fail to inform the consumer orally of the right to cancel the transaction; or (2) misrepresent in any manner the consumer's right to cancel." The prior versions of the Act contained substantively identical provisions. Former TEX. BUS. & COM. CODE. § 39.008(a)(3)-(4) & (b); TEX. REV. CIV. STAT. ANN. art. 5069-13.03(a)(3)-(4) & (b).

homeowners' contention that their contracts, including the arbitration provisions, are void and unenforceable, counsel answered that "there might be an estoppel defense" because the homeowners did not challenge the validity of the contracts until work was completed. Counsel also argued that even if the contracts are void, the arbitration provision is severable and valid, and the homeowners must still submit their complaints to arbitration. Olshan has cited no authority for either of these arguments.

The homeowners acknowledge that, as the Court notes, the validity of the contracts is a matter for the arbitrator to decide.[3] But the homeowners argue that the invalidity of the contracts is a foregone conclusion and that "the entire process . . . will be a needless waste of time, energy, and money".[4] I agree with the Court that even if this is true, the contracts are not unconscionable. But being led on a wild goose chase,[5] if that is all arbitration comes to, is not without remedy.

If, as the homeowners predict, the arbitrator concludes that the contracts are indeed void, Olshan and its counsel are subject to being sanctioned by the trial court for filing a groundless motion to compel arbitration.[6] The trial court certainly has the authority to sanction frivolous resistance to arbitration, and sanctions are not a one-way ratchet. The court's authority to sanction

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[3] *Ante* at ___ (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)).

[4] *E.g.,* Brief of Real Parties in Interest Kenneth and Vickie Kilpatrick at 21.

[5] *See* WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 4:

"Romeo: Switch and spurs, switch and spurs; or I'll cry a match.

"Mercutio: Nay, if thy wits run the wild-goose chase, I have done; for thou hast more of the wild-goose in one of thy wits than, I am sure, I have in my whole five."

[6] TEX. R. CIV. P. 14; TEX. CIV. PRAC. & REM. CODE §§ 9.001-.014, 10.001-.006.

a frivolous motion to compel is not displaced by the arbitrator's authority to determine the predicate issue–that the contracts are unenforceable. If the dispute returns to the trial court, the homeowners may seek full redress for Olshan's lark.

Nathan L. Hecht
Justice

Opinion delivered: December 3, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0446

DEBBIE STOCKTON, AS PARENT AND NEXT FRIEND OF WILLIAM STOCKTON, A MINOR, PETITIONER

v.

HOWARD A. OFFENBACH, M.D., RESPONDENT

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

Argued March 25, 2010

JUSTICE MEDINA delivered the opinion of the Court.

Texas Civil Practice and Remedies Code section 74.351 requires that an expert report be served on each physician or health care provider against whom a health care liability claim is asserted. TEX. CIV. PRAC. & REM. CODE § 74.351(a). The statute further directs the trial court to dismiss the health care liability claim if this report is not served within 120 days of the suit's filing. *Id.* § 74.351(a), (b). In this appeal, the claimant argues that she was not able to serve the expert report within 120 days because the defendant physician could not be found. She further contends that she diligently searched for the physician and that a due diligence exception should apply to extend the statutory deadline or, alternatively, that the statute is unconstitutional as applied to her

because it was impossible for her to comply with its deadline. The court of appeals concluded that the statute did not provide for an exception to its deadline under these circumstances and was not unconstitutional as applied to her. 285 S.W.3d 517. We agree and affirm.

I

Debbie Stockton filed a health care liability claim against Howard A. Offenbach, M.D., alleging malpractice during the delivery of her son, William. She attached an expert report and curriculum vitae to the petition when it was filed. In her expert's opinion, Offenbach's failure to recommend and perform a caesarian section based on Stockton's risk factors for vaginal delivery resulted in permanent injury to William's left arm at birth.

Stockton alleges that Offenbach was an addict when William was born in July 1989, and the record reflects that he abused prescription drugs for many years. Offenbach subsequently lost his medical license in 2001, and he probably left the state sometime after that. His whereabouts are unknown.

When Stockton filed this claim, she had been looking for Offenbach for several months. She had hired a private investigator and searched various public records to no avail. She had initiated a Rule 202 proceeding seeking information from the hospital where her son was born, but the hospital could not help in locating Offenbach. Stockton also contacted Offenbach's last known liability insurance carrier and provided its adjuster with a copy of the expert report she later attached to her original petition. The carrier also had no information on Offenbach's whereabouts.

Although Stockton did not know where Offenbach might be found, she nevertheless filed her claim on June 13, 2007, and attempted to serve Offenbach at his last known address. That failed,

of course, and Stockton filed a motion for citation by publication on July 24. *See* TEX. R. CIV. P. 109. In a verified motion, Stockton stated that Offenbach no longer resided at his last known address and after "diligent inquiry and reasonable effort" could not be found.

The court, however, did not immediately grant the motion, and several months passed before the court requested additional information. On November 28, 2007, Stockton filed a supplemental motion adding additional detail regarding her efforts to locate Offenbach, and the court granted the motion about three weeks later. Citation by publication finally issued on March 13, 2008, and service was completed on April 9. *See* TEX. R. CIV. P. 116 (requiring publication for four consecutive weeks with first publication to occur at least 28 days before the return day of the citation). The citation advised Offenbach to answer by April 28.

Although Offenbach was still missing, his insurance carrier hired an attorney to defend the suit. This attorney filed Offenbach's answer and later a motion to dismiss. Because Stockton had filed a health care liability claim, she was required by statute to serve Offenbach or his attorney with an expert report within 120 days of filing suit, which in this case was on or before October 11, 2007. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a). Her expert report therefore was due about two months before the trial court authorized service by publication and about six months before such service was completed.

At the hearing on the motion to dismiss, Offenbach's attorney argued that the statute required dismissal because Stockton had not served the expert report within the required 120 days. *See id.* § 74.351(b). Stockton responded that an exception should be made because of the extraordinary difficulty in locating Offenbach. She maintained that it was impossible to serve Offenbach

personally during the 120-day period because he could not be found, pointing out further that the trial court had not granted her motion for substituted service until after the expiration of the 120-day deadline. The trial court agreed that the 120-day deadline should not apply under these circumstances and denied Offenbach's motion to dismiss. At the hearing's conclusion, the court stated that "the intent of the Legislature was fulfilled by both sending the report to the insurance carrier before she filed suit and by filing the report at the time the petition was filed."

II

Offenbach was allowed to appeal the order denying his motion to dismiss, even though the order was interlocutory. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9) (providing for an interlocutory appeal from an order refusing to dismiss under § 74.351(b)). In this appeal, Stockton argued that it was impossible to serve Offenbach within 120 days of filing her claim, that section 74.351 unreasonably prevented her from pursuing her claim, and that if there were no exception to the statutory deadline, the statute was unconstitutional as applied to her. The court of appeals rejected her arguments, concluding that the statute required the dismissal of her case. The court accordingly reversed the trial court's order and remanded the case with instructions to render judgment in accordance with section 74.351(b). 285 S.W.3d at 524.

Stockton next appealed to this Court. Generally, a court of appeals' decision in an interlocutory appeal is final unless an exception applies, such as a dissent or conflict of decisions. TEX. GOV'T CODE § § 22.225(b), (c); 22.001(a)(1)(2); *County of Dallas v. Sempe*, 262 S.W.3d 315, 315 (Tex. 2008) (per curiam). Stockton, however, does not need a dissent or conflict in this instance because the court of appeals disposition of the interlocutory appeal is essentially the final judgment

in the case. Stockton therefore does not have to satisfy the jurisdictional requirements for interlocutory appeals in section 22.225 of the Texas Government Code. *Colquitt v. Brazoria Cnty.*, 324 S.W.3d 539, 542 (Tex. 2010) (per curiam). We have jurisdiction in the appeal and have granted her petition for review.

III

Stockton argues that the court of appeals erred in three respects and that each error is a separate and distinct ground for reversal. First, she contends that the court applied the wrong standard of review. She submits that abuse of discretion is the appropriate standard when reviewing an order, which denies a motion to dismiss under section 74.351(b), and that the court of appeals therefore erred in applying a de novo standard. Next, Stockton argues that the court of appeals erred in construing the statute's 120-day deadline to be absolute and should have instead recognized a "due diligence" exception to the deadline. Finally, she complains that if the deadline is not subject to such an exception, it is unconstitutional, as applied to her, because it was not possible to comply with the deadline in this case. Although we consider her three grounds to be interrelated, we consider each in turn as she has presented the argument.

A

Stockton contends that the trial court had discretion to extend the time for serving the expert report beyond the 120-day deadline and that its decision should therefore be reviewed for abuse of discretion. She further maintains that all of the evidence supports the trial court's decision to extend the expert report deadline, but does not otherwise elaborate on the conclusive nature of this evidence. Offenbach, on the other hand, argues that de novo is the appropriate standard because the trial court

did not have discretion to misapply section 74.351, which under the circumstances of this case did not permit the trial court discretion to extend the 120-day deadline.

A claimant must comply with Chapter 74 of the Civil Practice and Remedies Code, when asserting a health care liability claim. Among the statute's requirements is the expert report requirement, which directs a claimant to "serve" an expert report and the expert's curriculum vitae on each party or party's attorney within 120 days of filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(a).[1] Compliance with this provision is mandatory; the claimant must serve an expert report to proceed with a health care liability claim. *Id.* § 74.351(b). If the claimant has not served the expert report by the statutory deadline and the parties have not agreed to extend that deadline,[2] "the court, on the motion of the affected physician or health care provider, shall, subject to [an exception[3] not relevant here]," dismiss the claim with prejudice. *Id.* § 74.351(b).

Chapter 74 replaced the Medical Liability Insurance Improvement Act, formerly found in article 4590i of the Texas Revised Civil Statutes. Article 4590i required that the expert report be

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[1] Before September 1, 2005, section 74.351 required an expert report to be served "not later than the 120th day after the date the *claim* was filed." Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, (emphasis added), *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590. This version applies in this case because the underlying cause of action accrued before September 1, 2005. *See* Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 2, 2005 Tex. Gen. Laws 1590, 1590. The current version requires the expert report to be served "not later than the 120th day after the date the *original petition* was filed." TEX. CIV. PRAC. & REM. CODE § 74.351 (emphasis added). This change is of no practical significance to the issues before us and thus we refer to the current statute even though the previous version applies in this case.

[2] The statute authorizes an extension of the 120-day period "by written agreement of the affected parties." TEX. CIV. PRAC. & REM. CODE § 74.351(a).

[3] Section 74.351(c) authorizes the trial court to grant the claimant one 30-day extension to cure a deficient expert report, if the deficient report is served by the statutory deadline. TEX. CIV. PRAC. & REM. CODE § 74.351(c). The exception does not apply here because Stockton did not serve a deficient expert report on or before the expiration of the 120-day period.

"furnished" to opposing counsel within 180 days of filing suit, but Chapter 74 shortened the deadline to 120 days and now requires the claimant to "serve" (rather than "furnish") the expert report "on each party or the party's attorney." *Compare* TEX. CIV. PRAC. & REM. CODE § 74.351(a) *with* TEX. REV. CIV. STAT. art. 4590i, § 13.01(d)(1) (repealed). Several courts have interpreted the Legislature's use of the word "serve" to require compliance with Texas Rule of Civil Procedure 21a. *Univ. of Tex. Health Science Ctr. at Houston v. Gutierrez*, 237 S.W.3d 869, 872 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Herrera v. Seton Nw. Hosp*., 212 S.W.3d 452, 459 (Tex. App.—Austin 2006, no pet.); *Kendrick v. Garcia*, 171 S.W.3d 698, 703-04 (Tex. App.—Eastland 2005, pet. denied). Rule 21a authorizes service by one of four methods: (1) in person, by agent, or by courier receipted delivery, (2) by certified or registered mail to the party's last known address, (3) by telephonic document transfer to the recipient's current telecopier number, or (4) by such other manner as the court in its discretion may direct. TEX. R. CIV. P. 21a.

Under an abuse of discretion standard, the appellate court defers to the trial court's factual determinations if they are supported by evidence, but reviews the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009). Whether the statute permits additional time beyond the 120-day deadline or is unconstitutional, as applied, are legal questions. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009) (noting that statutory construction is a legal question). The court of appeals therefore appropriately reviewed the case de novo.

B

Stockton next argues that if the service requirement in Chapter 74 incorporates Rule 21a, it should also incorporate the due diligence doctrine that courts have attached to that rule. Under this doctrine, a plaintiff, who files a petition within the limitations period but does not complete service until after the statutory period has expired, is entitled to have the date of service relate back to the date of filing, if the plaintiff has exercised diligence in effecting service. *Proulx v. Wells*, 235 S.W.3d 213, 214 (Tex. 2007) (per curiam); *Ricker v. Shoemaker*, 16 S.W. 645, 646-47 (Tex. 1891). Stockton submits that in the same way due diligence in the service of process can interrupt the running of the statute of limitations, so too should due diligence in the service of the expert report interrupt the running of the statutory 120-day expert report deadline.

Offenbach responds that Chapter 74's 120-day deadline may be extended under only two circumstances: (1) "by written agreement of the affected parties" or (2) by a court order, which permits the claimant to cure a deficient, but otherwise timely served, expert report. TEX. CIV. PRAC. & REM. CODE § 74.351(a), (c). Neither circumstance applies here. Offenbach concludes therefore that the trial court had no authority or discretion to extend the expert report deadline. Moreover, he submits that a comparison of Chapter 74 to its predecessor, article 4590i, confirms the Legislature's intent to limit trial court discretion over the expert report deadline because the predecessor statute was more lenient in extending that deadline.

Under article 4590i, a plaintiff could obtain an extension, even when no report was provided by the deadline, if the plaintiff could show an "accident or mistake" in failing to furnish a timely report. *See* TEX. REV. CIV. STAT. art. 4590i, § 13.01(g) (repealed). Chapter 74 eliminated this

provision, and Offenbach submits that the only basis for obtaining a court-ordered extension under the current statute is through a motion to cure a timely served, but deficient, expert report. TEX. CIV. PRAC. & REM. CODE § 74.351(c). Moreover, Offenbach submits that implying a due diligence exception to the statutory deadline ignores another part of Chapter 74, which provides that "[i]n the event of a conflict between this chapter and another law, including a rule of procedure or evidence or court rule, this chapter controls to the extent of the conflict." *Id.* § 74.002.

Section 74.001 provides, however, that "[a]ny legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law." *Id.* § 74.001(b). The word "served" is not defined in Chapter 74, but its meaning under common law includes the notions of due diligence and relation back. And if Chapter 74 incorporates these concepts through its use of the word "served", no conflict, as prohibited by section 74.002, would exist. But even assuming that a due diligence exception applies to service completed after Chapter 74's expert report deadline, we are not persuaded that the evidence here is legally sufficient to raise the issue. *See Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam) (holding that due diligence may be lacking as a matter of law based on unexplained lapses in activity).

Stockton knew of the difficulty in serving Offenbach personally, when she filed her claim on June 13, 2007. She accordingly filed a motion for substituted service about 40 days later, seeking the court's permission to cite Offenbach by publication. Had citation promptly issued, sufficient time remained for service by publication before the expiration of the 120-day deadline. *See* TEX. R. CIV. P. 116 (requiring first publication to commence at least 28 days before the return day of the citation).

The record reflects, however, that after filing the motion for substituted service on July 24, nothing was done in the case until November 28, at which time Stockton supplemented her motion. During this four month period, the deadline for serving the expert report passed.

Stockton asks that we view the 120-day period for serving the expert report like a limitations period to which the due diligence doctrine should apply. But using Stockton's analogy to limitations and the due diligence doctrine, her four month inactivity here would be analogous to a plaintiff in a tort action waiting two years for the court to act on a pending motion for substituted service. Recently, we concluded in a tort case that an unexplained eight-month gap in service activity established a lack of diligence as a matter of law. *Ashley v. Hawkins*, 293 S.W.3d 175, 180-81 (Tex. 2009).

Stockton asserts, however, that something was done during this four-month period of apparent inaction. She submits that her attorney's office repeatedly called the trial court clerk to inquire about the order. As proof, Stockton points to the affidavit of Sandra Rylee,[4] who is not identified but presumably is an employee of Stockton's attorney. Rylee avers that she had repeated phone conversations with the court's clerk during and after the 120-day period. The affidavit provides the following explanation of those calls:

> After filing the motion for substitute service's (sic) citation on July 19, 2007, I had repeated phone conversations with the Clerk of the 298th Court over the next several months, following up with the court to see when our order would be signed. It wasn't until November 2007, when we received notice from the court that additional information needed to be provided regarding locating Dr. Offenbach in a supplemental motion, before the judge would sign the order. We provided the

[4] Stockton included this affidavit as an exhibit to her response to Offenbach's motion to dismiss.

> additional information in a supplemental motion for substitute service's (sic) citation on November 20, 2007.
>
> After filing out (sic) supplemental motion, I then followed up on numerous occasions with the court by phone to see when the order would be signed. We received the order saying we could serve by publication on January 24, 2008.

Neither the pending motion nor this affidavit indicate that the trial court was apprised of the 120-day deadline or its significance to the pending motion. Acting under no apparent sense of urgency, the trial court granted the motion for substituted service on December 20, 2007, more than two months after the expiration of the expert report deadline on October 11. And according to Rylee's affidavit, Stockton's attorney did not receive the court's order for over a month after it was signed.

Stockton suggests that the trial court was at fault for the delay, stating that she "was essentially at the mercy of the trial court" and further "that it was the trial court's extended 4-month delay in granting an order for substitute service that prevented Petitioner from serving Respondent by publication." But the record indicates that to be only a part of the problem.

Equally significant is the fact that the motion for substituted service did not convey any sense of urgency by referencing the expert report deadline and requesting immediate relief. Nor is there any evidence that the trial court was otherwise apprised of the service deadline. Moreover, the record does not suggest any obstinance on the trial court's part. To the contrary, once the problem was called to the court's attention, it declined to dismiss Stockton's claim even though the expert

report had not been served timely.[5] Had the deadline been called to the court's attention sooner, we might reasonably assume that it would have acted on the motion promptly. We thus reject the notion that the trial court was solely to blame for the delay in service or that a fact issue was raised concerning Stockton's due diligence in the matter.

C

Finally, Stockton argues that the expert report deadline, as applied to her, violates the open courts provision in the Texas Constitution. TEX. CONST. art. I, § 13. The open courts provision prohibits the Legislature from making "a remedy by due course of law contingent upon an impossible condition." *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex. 1997) (quoting *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex. 1990)). Stockton submits that it was not possible to comply with the statute's deadline because there was no one to serve with the expert report during the first 120 days of her lawsuit. The statute directs that the expert report is to be served on the "party or the party's attorney," TEX. CIV. PRAC. & REM. CODE § 74.351(a), and Stockton submits that a defendant named in a lawsuit does not become a party before service or appearance. *See Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991) (per curiam) (stating that merely being named as a defendant does not make one a party to the lawsuit). Stockton concludes that it was impossible to serve the expert report within 120 days because of the doctor's disappearance and the trial court's delay.

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[5] The trial court had these words at the conclusion of the hearing on the motion to dismiss: "I know the statute says what it says. The Dallas Court probably is going to tell me, nice try, Judge Tobolowsky; we are not going to agree with you. But I am going to deny the motion."

Offenbach responds that there is no evidence that Chapter 74, as applied to Stockton, presented an impossible condition to the pursuit of her claim. Eighty days remained to serve the expert report after she filed her motion for substituted service, yet nothing was done. Offenbach suggests that Stockton's inaction during this period, rather than the statute, caused her to miss the deadline. The court of appeals agreed, concluding there was neither evidence that compliance with section 74.351(a) was impossible nor evidence that the statute prevented Stockton from pursuing her claim. 285 S.W.3d at 524.

We presume that when enacting legislation, the Legislature intends to comply with the state and federal constitutions, TEX. GOV'T CODE § 311.021(1), and "we are obligated to avoid constitutional problems if possible." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004). Thus, if presented with a choice between an impossible condition and a due diligence exception we would, of course, choose the latter. Stockton's argument that the statute is unconstitutional as applied to her then is merely a variation of her preceding argument for a due diligence exception to the expert report deadline. *See Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 785–86 (Tex. 2007) (holding that due diligence is a component of an open courts complaint); *Shah v. Moss*, 67 S.W.3d 836, 847 (Tex. 2001) (same). Despite the statute's apparent inflexible deadline, it cannot apply to create an impossible condition to the pursuit of a health care liability claim. *Diaz*, 941 S.W.2d at 100.

The open court's provision "assures that a person bringing a well-established common-law cause of action will not suffer unreasonable or arbitrary denial of access to the courts." *Yancy*, 236 S.W.3d at 783. "[I]t is, quite plainly, a due process guarantee." *Sax v. Votteler*, 648 S.W.2d 661,

664 (Tex. 1983). But to claim an open court's violation, the person must raise "a fact issue establishing that he did not have a reasonable opportunity" to be heard. *Yancy*, 236 S.W.3d at 785. And "[a] plaintiff may not obtain relief under the open courts provision if he does not use due diligence [in pursuing his claim]." *Shah*, 67 S.W.3d at 847. Our analysis of Stockton's preceding due diligence issue accordingly forecloses her related open courts challenge.

The application of the statute in this case, however, is unfortunate and, in part, a consequence of the Legislature's decision to calculate the 120-day expert report deadline from the date of filing the suit rather than its service on the defendant. The statute appears to assume that serving a physician or other health care provider will be simple and straightforward. That, however, is not always the case, and when complications arise, as here, section 74.351(a) presents a very small window through which to serve both the lawsuit and the expert report.

We understand that the deadline is intended to weed out frivolous health care liability claims early in the proceeding. *See Lewis v. Funderburk*, 253 S.W.3d 204, 205 (Tex. 2008) (noting efforts of Legislature "to stem frivolous suits against health care providers"); *Am. Transitional Care Cntrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001) (noting that one purpose of the expert-report requirement is to deter frivolous claims). That purpose would not be sacrificed, however, by calculating the expert report deadline from the date the physician or other health care provider becomes a party to the proceeding through service or appearance. Calculating the deadline from that date would also better fit the statute's requirement that the expert report is to be served on "each party or the party's attorney." TEX. CIV. PRAC. & REM. CODE § 74.351(a). The Legislature, however, has chosen to commence the 120-day period from the date of filing, and "we are not free

to rewrite the statutes to reach a result we might consider more desirable, in the name of statutory construction." *Public Utility Comm'n of Tex. v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988). When a statute is unambiguous, our role is to apply it as written despite its imperfections. *Leland v. Brandall*, 257 S.W.3d 204, 206 (Tex. 2008); *see also Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) (noting that "[c]ourts must take statutes as they find them"); *but see Univ. of Tex. S.W. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 356 (Tex. 2004) (noting that statutes should not be read to create absurdities).

* * * * *

The court of appeals concluded that there was no evidence that section 74.351(a)'s expert report requirement prevented Stockton from pursuing her claim or that the statute was unconstitutional as applied to her. We agree and affirm the court of appeals' judgment.

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David M. Medina
Justice

Opinion Delivered: February 25, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0465

JAMES LEE SWEED, PETITIONER,

v.

JAY L. NYE ET AL., RESPONDENTS

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

PER CURIAM

Five and a half months after the trial court dismissed his case, James Lee Sweed filed a notice of appeal that did not contain all the information required for a notice of restricted appeal. A month later he amended the notice to include the missing information. The court of appeals dismissed the appeal, holding that Sweed's original, incomplete notice of restricted appeal was insufficient to invoke its jurisdiction, and the amended notice was not timely filed. We conclude that Sweed's original notice of appeal invoked the court of appeals' jurisdiction even though it was incomplete. We reverse the court of appeals' judgment.

Sweed sued Jay L. Nye (a public defender), Jaime Esparza (El Paso District Attorney), the Office of the District Attorney, the State of Texas, and the Texas Attorney General for malicious prosecution and false imprisonment. Eventually the defendants moved to dismiss for want of prosecution. The clerk's office mistakenly sent notice of a status conference and notice of the

hearing on the motion to dismiss to Sweed at the wrong address. Both notices were returned unclaimed. Sweed did not appear at the hearing, and the trial court granted the motion to dismiss. The dismissal order was signed on November 6, 2006.

Sweed filed a notice of appeal on April 24, 2007, five and a half months after the trial court dismissed his claim. *See* TEX. R. APP. P. 26.1(c) (providing that in a restricted appeal, notice must be filed within six months after the judgment or order is signed). The court of appeals sent Sweed a letter stating that his notice of appeal did not contain the required information for a notice of restricted appeal and he needed to amend his notice. *See* TEX. R. APP. P. 25.1(d)(7) (requiring that a notice of appeal in a restricted appeal state that the appellant did not participate in the hearing that resulted in the judgment and the appellant did not timely file a post judgment motion or notice of appeal). Sweed filed an "Amended Notice of Appeal" on May 21, 2007, which was over six months after the trial court dismissed his case. *See* TEX. R. APP. P. 25.1(f) (permitting an amended notice of appeal correcting a defect or omission in a prior notice). The court of appeals held that the notice of restricted appeal was not timely filed and dismissed the case for want of jurisdiction. *See* TEX. R. APP. P. 26.1.

In this Court, Sweed argues that the court of appeals erred by dismissing his appeal because his original notice of appeal, although defective, was sufficient to invoke the court of appeals' jurisdiction. Esparza, the Office of the District Attorney, the State, and the Attorney General (collectively "the State") agree that the court of appeals improperly dismissed Sweed's appeal. Nye, however, maintains that Sweed's original notice of appeal did not invoke the court of appeals' jurisdiction because it did not contain the required information for a notice of restricted appeal and

was outside the thirty-day filing period for a traditional notice of appeal. Nye also argues that Sweed's amended notice of appeal, which included the information required for a notice of restricted appeal, did not invoke the court of appeals' jurisdiction because it was filed outside the six-month time period for a notice of restricted appeal. We disagree with Nye's position.

The court of appeals treated Sweed's notices as two separate notices of appeal: the first as a general notice of appeal and the second as a notice of restricted appeal. But Sweed's Amended Notice of Appeal stated that it was amending his previously filed notice of appeal, cited the rule allowing for amendments, included the restricted-appeal information, and was filed before he filed his brief. It was and should have been considered an amendment to the original notice of appeal.

Rule of Appellate Procedure 25.1 states that "an appeal is perfected when a written notice of appeal is filed with the trial court clerk." TEX. R. APP. P. 25.1(a). The rule contemplates that information might be omitted from a notice of appeal and specifically authorizes a party to file an amendment to "correct[] a defect or omission in an earlier filed notice" before the appellant's brief is filed. TEX. R. APP. P. 25.1(f). And this Court has consistently held that a timely filed document, even if defective, invokes the court of appeals' jurisdiction. *Grand Prairie Indep. Sch. Dist. v. S. Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex. 1991) ("If the appellant timely files a document in a bona fide attempt to invoke the appellate court's jurisdiction, the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument required by law or our Rules to perfect the appeal."); *see Warwick Towers Council of Co-Owners v. Park Warwick, L.P.*, 244 S.W.3d 838, 839 (Tex. 2008); *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994);

Walker v. Blue Water Garden Apartments, 776 S.W.2d 578, 581 (Tex. 1989); *Woods Exploration & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 568, 570 (Tex. 1975).

The original notice of appeal was timely filed insofar as a restricted appeal is concerned. It properly invoked the court of appeals' jurisdiction, was timely amended, and the court of appeals erred by dismissing the appeal.

Although the State now concedes that the court of appeals should not have dismissed Sweed's restricted appeal, it nonetheless argues that Sweed's petition for review should be denied because his underlying case lacks merit.

We do not agree that the merits of Sweed's case are a consideration in determining whether he procedurally invoked the court of appeals' jurisdiction. He is entitled to proper application of the appellate rules regardless of the merits of his underlying case. Furthermore, our decisions construing the appellate rules have not favored disposing of appeals on harmless procedural defects. *Higgins v. Randall County Sheriff's Office*, 257 S.W.3d 684, 688 (Tex. 2008) ("Indigency provisions, like other appellate rules, have long been liberally construed in favor of a right to appeal." (quoting *Jones v. Stayman*, 747 S.W.2d 369, 370 (Tex. 1987))); *see also Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997).

We grant the petition for review. Without hearing oral argument, we reverse the court of appeals' judgment. *See* TEX. R. APP. P. 59.1. We remand to the court of appeals for further proceedings.

OPINION DELIVERED: October 22, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0480

IN THE INTEREST OF C.H.C., A CHILD

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

PER CURIAM

When a pro se party seeks to appeal a trial court's decision and properly files a sufficient and unchallenged affidavit establishing indigency and requesting a free record on appeal, the Texas Rules of Appellate Procedure mandate that the party be provided the record. Because the affidavit in this case was not timely challenged, we reverse the court of appeals' dismissal of this appeal and remand the case to the court of appeals for further proceedings.

Petitioner Christina M. Hawkins and Respondent Kyle Van Corey[1] are the parents of CHC. In 2004, a Dallas County trial court entered an order modifying the parent-child relationship for CHC by recognizing Corey's paternity, appointing Hawkins as Sole Managing Conservator and Corey as

[1] Hawkins was appointed counsel for her Petition through this Court's Pro Bono Pilot Project. After filing a response to Hawkins' Petition for Review, Corey did not file a brief on the merits and informed the Clerk of this Court that he had no intention of further participating in this matter.

Possessory Conservator over CHC, and requiring Corey to pay child support.[2] Thereafter both parties brought contempt and modification actions, each alleging violations of the 2004 order by the other. Among other things, Corey alleged that Hawkins denied him visitation rights with CHC on two separate Thursday afternoons. Hawkins complained that Corey was also not complying with the 2004 order, noting his conviction for interfering with child custody, her $5,000 judgment against him for malicious prosecution, and his alleged arrearage in child support payments. The trial court held a bench trial on the cross-motions, with Corey proceeding first. According to Hawkins, the trial court set a time limit of six hours of evidence, only one and a half hours of which were allotted to Hawkins. After receiving evidence at the hearing, the trial court modified the custody order and held Hawkins in contempt of court for violating the orders for Corey's visitation. On September 23, 2008, the trial court signed a contempt order.[3] The next day Hawkins, through counsel, filed a motion to modify the judgment, arguing among other things that the trial court did not provide sufficient time for her to present proof challenging alleged violations of the visitation order and that the documentary evidence she provided conclusively proved she had not violated the order.

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[2] The record evidence provided by Hawkins is not from the clerk's record below, because Hawkins claims that she cannot afford the $1 per page fee for a certified record. She included an affidavit, attesting that her filings in this Court were copies of the documents she originally filed in the trial court. There is no assertion that the documents are not true and correct, and we consider them for purposes of this appeal.

[3] The order sentenced Hawkins to two concurrent sentences of 90 days in jail, suspended so long as she paid a fine to the county, complied with all court orders, reported monthly to the Domestic Relations office to pay a $25 per month fee, and paid Corey's attorney fees. On December 4, 2008, the trial court suspended Hawkins' commitment to jail and placed her on community supervision for 36 months, provided that Hawkins complied with the other terms of the judgment, including payment of $1500 to Corey's counsel for attorney fees. There is nothing further in the record to indicate whether Hawkins has complied or whether she faces incarceration.

On October 15, 2008, Hawkins filed an affidavit of indigence for appeal. The affidavit alleged that Hawkins was unemployed "due to company layoff"; had no investments, real estate, property or retirement; received $1200 per month in child support; had a small amount of cash on hand, had a total debt of approximately $50,000; and had $3500 in monthly expenses. Hawkins did not attach any documentary evidence to the affidavit. No eligible party filed any contest to the affidavit within ten days. *See* TEX. R. APP. P. 20.1(e) (providing that "[t]he clerk, the court reporter, the court recorder, or any party may challenge an affidavit" of indigence by filing a contest within "10 days after the date when the affidavit was filed . . ."). In November, Hawkins' counsel withdrew. On December 1, 2008, Hawkins filed motions "to Confirm Indigency," and for a court-appointed public defender on appeal, along with a notice of appeal and request for new trial. Even though no party filed a contest to Hawkins' first affidavit, on December 10, the trial court held a hearing on Hawkins' indigence petition. Corey's counsel filed a brief in opposition to Hawkins' indigence petition, served, according to Hawkins, on the morning of the hearing. Two days later, Hawkins filed an expanded, amended affidavit of indigence, including attachments demonstrating that she was receiving governmental assistance. No contest was filed within ten days to the second affidavit. On December 29, 2008, the trial court entered an order denying Hawkins' indigence, confirming the proposed order modifying the parent-child relationship, incorporating the previous contempt order, and denying all other relief.

On January 27, 2009, Hawkins filed a petition for writ of mandamus with the court of appeals, which it reclassified as an accelerated appeal, along with her December 12, 2008 affidavit

of indigence.[4] On February 23, 2009, the court of appeals forwarded Hawkins' motion to proceed without costs back to the trial court providing ten days for any party to contest the claim of indigence, stating that it was "unclear" whether any affidavit of indigence was filed at the trial court.

On March 2, only the district clerk contested the notice, and the trial court held another indigence hearing. At the hearing, the clerk did not submit any evidence, but instead argued that the affidavit did not comply with Texas Rule of Appellate Procedure 20.1. According to the clerk, the affidavit was not specific enough in detailing Hawkins' monthly expenses and because the affidavit's listing of certain medical and child care expenses was undercut by Hawkins' admission that she received Medicaid and that she is CHC's primary caregiver. The clerk also argued a transcript was unnecessary because no substantial question for appellate review was presented. Hawkins challenged the clerk's statements, arguing that she placed sufficient evidence in the record and that the clerk's contest was untimely. The trial court again held that the appeal was frivolous, that Hawkins' affidavit was "insufficient/incomplete," and that Hawkins was not indigent. Hawkins filed objections to the ruling, stating that the clerk did not serve Hawkins, she learned of the hearing "through another party," and the clerk's contest was not timely filed. No action was taken on the objections. The court of appeals then entered an order requiring Hawkins to pay for the record and costs of appeal and, when she was unable, eventually entered judgment dismissing her appeal.

[4] The record does not indicate why the court of appeals classified her petition as an accelerated appeal. There was no objection to this classification, and on July 28, 2009, the court of appeals entered a judgment dismissing Hawkins' appeal. Because the trial court order that Hawkins challenges is a final judgment, we treat Hawkins' petition to this Court as a petition for review.

Before this Court, Hawkins argues that she is entitled to a free record and court-appointed counsel on appeal. Courts should be open to all, including those who cannot afford the costs of admission. *E.g.*, TEX. CONST. art. I, § 13; *Higgins v. Randall Cnty. Sheriff's Office* ("*Higgins II*"), 257 S.W.3d 684, 686 (Tex. 2008) (citations omitted); *Griffin Indus., Inc. v. Thirteenth Court of Appeals*, 934 S.W.2d 349, 353 (Tex. 1996) (citations omitted); *Pinchback v. Hockless*, 164 S.W.2d 19, 19–20 (1942) (citations omitted). Thus, parties who establish their indigency and have a potentially meritorious appeal are entitled to a free record for the appeal and to have their appellate costs waived. "The test for determining indigence is straightforward: 'Does the record as a whole show by a preponderance of the evidence that the applicant would be unable to pay the costs, or a part thereof, or give security therefor, if he really wanted to and made a good-faith effort to do so?'" *Higgins II*, 257 S.W.3d at 686 (quoting *Pinchback*, 164 S.W.2d at 20).

An indigent party seeking to appeal without paying costs must follow the requirements of Texas Rule of Appellate Procedure 20.1 to acquire the record for appeal. The rule requires that the party provide an affidavit of indigence "with or before the notice of appeal" or "with or before the document seeking relief" in mandamus or other proceedings, and enumerates twelve items of financial information that the affidavit must contain. TEX. R. APP. P. 20.1(b), (c)(1), (c)(2).[5]

[5] The twelve requirements are:
(1) the nature and amount of the party's current employment income, government-entitlement income, and other income; (2) the income of the party's spouse and whether that income is available to the party; (3) real and personal property the party owns; (4) cash the party holds and amounts on deposit that the party may withdraw; (5) the party's other assets; (6) the number and relationship to the party of any dependents; (7) the nature and amount of the party's debts; (8) the nature and amount of the party's monthly expenses; (9) the party's ability to obtain a loan for court costs; (10) whether an attorney is providing free legal services to the party without a contingent fee; (11) whether an attorney has agreed to pay or advance court costs; and (12) if applicable, the party's lack of the skill and access to equipment necessary to prepare the appendix, as required by Rule 38.5(d).

However, if the affidavit provides sufficient information to prove by a preponderance of evidence that the party is unable to pay costs on appeal, the affidavit is sufficient, even if information on each of the twelve items is not included. *Higgins II*, 257 S.W.3d at 688–89.

Once an affidavit is filed, "[t]he clerk, the court reporter, the court recorder, or any party may challenge an affidavit" of indigence by filing a contest within "10 days after the date when the affidavit was filed" if the affidavit was filed in the trial court, or as set by the court of appeals if the affidavit is filed there. TEX. R. APP. P. 20.1(e). If a contest is timely filed, then the trial court must provide notice and set a hearing to determine whether the party is indigent. TEX. R. APP. P. 20.1(i). The party filing the affidavit has the burden of proving the affidavit's allegations. TEX. R. APP. P. 20.1(g). However, if no contest to the affidavit is filed, "no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs." TEX. R. APP. P. 20.1(f). If an affidavit is defective in some way, an appellate court may dismiss the appeal for noncompliance only after notice and a period of time for the party to correct the defect. TEX. R. APP. P. 44.3; *Higgins v. Randall Cnty. Sheriff's Office* ("*Higgins I*"), 193 S.W.3d 898, 899–900 (Tex. 2006).

In this case, Hawkins filed her first affidavit on October 15, 2008. The sworn affidavit contained statements that Hawkins was unemployed "due to company layoff"; had no investments, real estate, property or retirement; received $1200 per month in child support; had a small amount of cash on hand, had a total debt of approximately $50,000; and had $3500 in monthly expenses.

TEX. R. APP. P. 20.1(b).

Although Hawkins did not attach any documents to her affidavit and not every factor in Rule 20.1(b) was mentioned, Hawkins swore that she had a negative cash flow, no investments to help pay for the record, no cash on hand, and a dependent to take care of. Taking as true the allegations in the affidavit, which is required under our rules, *see* TEX. R. APP. P. 20.1(f), the preponderance of the evidence from Hawkins' affidavit clearly indicates that she would be unable to afford the costs of appeal.

Even if Hawkins' October 15 affidavit were deemed too conclusory, following the hearing, Hawkins filed an amended affidavit in the trial court. *See Higgins I*, 193 S.W.3d at 899–900 (recognizing that an appeal may not be dismissed for an inadequate affidavit until the party has had an opportunity to correct the defect). The amended affidavit includes all of the information from the first affidavit but provides more information about most entries such as the nature of Hawkins' debt and her child care costs, takes issue with the trial court's findings of fact, and attaches proof that she received Children's Health Insurance Program and Food Stamps benefits from the Texas Health and Human Services Commission. No party challenged the second affidavit within ten days of its filing in the trial court.[6] A contest was finally filed nearly three months later, after the court of appeals remanded the case for a hearing. The affidavit demonstrates that Hawkins was indigent, and when

[6] Hawkins filed both of her affidavits with the clerk of the trial court. She candidly admits that there is no evidence in the record to indicate that the clerk served the affidavit on the court reporter, court recorder, or others who may challenge the affidavit. However, the rule does not require that the indigent party serve the court reporter, or the court recorder, but rather that the trial court "clerk must promptly send a copy of the affidavit to the appropriate court reporter." TEX. R. APP. P. 20.1(d). No party has argued that lack of timely notice precluded them from timely contesting Hawkins' affidavit of indigence.

no contest had been filed, the trial court hearing was not necessary, and it erred in denying Hawkins a free record on appeal.[7]

Hawkins also argues that because the contempt judgment included a suspended sentence of incarceration, she has a right to appointed counsel to challenge that sentence on appeal. The court of appeals did not address this argument, and we remand the case for the court of appeals to consider that argument prior to addressing the merits of the appeal. *See Dealers Elec. Supply Co. v. Scoggins Constr. Co.*, 292 S.W.3d 650, 660 (Tex. 2009); *Little v. Tex. Dep't of Criminal Justice*, 148 S.W.3d 374, 384 (Tex. 2004) (citation omitted) (both remanding cases for the court of appeals to consider remaining issues preserved but previously unaddressed by the court of appeals); TEX. R. APP. P. 53.4.

Because Hawkins established her indigence demonstrating her inability to pay costs on appeal, Hawkins was entitled to proceed with the appeal without costs. The court of appeals erred in dismissing her appeal for Hawkins' failure to pay the docketing fee and provide a record.

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[7] Below, Hawkins argued that her introduction of evidence that she receives public assistance conclusively proves that she is entitled to a free record on appeal, citing Texas Rule of Civil Procedure 145. That rule, relating to costs and fees at the trial court, defines a "party who is unable to afford costs" as "a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs." TEX. R. CIV. P. 145(a). We have in the past noted that the standard to prove indigency on appeal "is met . . . by proof that the appellant depends on public assistance." *Griffin Indus., Inc.*, 934 S.W.2d at 351; *see also id.* at 352–53 (recognizing that once a party has established that she relies on public assistance, "opposing parties bear the burden of introducing some evidence that the witness is not dependent on [public assistance] or that other funds are available" (citations omitted)). However, the plain text of the appellate rule, which requires a separate affidavit of indigence from the affidavit to proceed without payment of costs in the trial court, does not contain the broad definition found in Civil Rule 145. TEX. R. APP. P. 20.1(a)(2); *Higgins II*, 257 S.W.3d at 686 (recognizing that, unlike the federal system, Texas requires a separate indigence proceeding on appeal). We need not determine whether the standard mentioned in *Griffin* and present in Civil Rule 145 also applies to our new Appellate Rule 20.1, as the affidavits submitted by Hawkins clearly show that Hawkins has no money to pay the costs of an appeal, assets from which to procure the funds, or is being represented by counsel who will advance costs.

Likewise, Hawkins argues that, during the second indigency hearing, the clerk failed to rebut the presumption of indigency because the clerk, represented by the district attorney, did not provide any evidence to contradict Hawkins' sworn statements and reliance on public assistance, but provided mere argument about the specificity of the amount of some expenses. Because we hold that the trial court did not need to conduct a hearing in the first instance, we need not address the sufficiency of the district clerk's submissions contesting the affidavit.

Therefore, without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and remand to the court of appeals with instructions to accept Hawkins' appeal without payment of the filing fee, order the preparation of Hawkins' record at no cost, and consider the appeal on its merits.

OPINION DELIVERED: January 28, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0481

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS, PETITIONERS,

v.

TEXAS ENTERTAINMENT ASSOCIATION, INC. AND KARPOD, INC., RESPONDENTS

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

Argued March 25, 2010

JUSTICE HECHT delivered the opinion of the Court.

A Texas statute requires a business that offers live nude entertainment and allows the consumption of alcohol on its premises to remit to the Comptroller a $5 fee for each customer admitted. We are asked to decide whether the statute violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution. We hold it does not. We

reverse the judgment of the court of appeals[1] and remand the case to the trial court for further proceedings.

I

In 2007, the Legislature enacted the Sexually Oriented Business Fee Act.[2] Section 102.052(a) states: "A fee is imposed on a sexually oriented business in an amount equal to $5 for each entry by each customer admitted to the business."[3] A "sexually oriented business" is specially defined as

> a nightclub, bar, restaurant, or similar commercial enterprise that:
>
> (A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and
>
> (B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.[4]

The fee is imposed on the business, not the customer, and the business is given "discretion to determine the manner in which [it] derives the money required to pay the fee".[5] The Comptroller estimates that there are 169 such businesses in Texas. The first $25 million collected is to be

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[1] 287 S.W.3d 852 (Tex. App.–Austin 2009).

[2] TEX. BUS. & COM. CODE §§ 102.051-.056. These provisions were first enacted as sections 47.051-.056, Law of May 25, 2007, 80th Leg., R.S., ch. 1206, § 3, 2007 Tex. Gen. Laws 4082, 4082-4083, but were renumbered in 2009, Law of May 11, 2009, 81st Leg., R.S., ch. 87, § 4.004, 2009 Tex. Gen. Laws 208, 214. We use the current numbering.

[3] TEX. BUS. & COM. CODE § 102.052(a).

[4] *Id.* § 102.051(2). "Nude" is defined as "(A) entirely unclothed; or (B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks." *Id.* § 102.051(1).

[5] *Id.* § 102.052 (a), (c).

credited to the sexual assault program fund,[6] and the balance is to be used to provide health benefits coverage premium payment assistance to low-income persons.[7]

Respondents Karpod, Inc., the operator of a sexually oriented business defined by the Act and the Texas Entertainment Association (TEA), an association representing the interests of such businesses in Texas, sued the Comptroller and the Attorney General (collectively, the Comptroller) for declaratory and injunctive relief, asserting that the fee violates the free-speech guarantee of the First Amendment.[8] After a bench trial, the trial court concluded that:

- "erotic nude/topless dancing is protected expression under the First Amendment";
- the fee "is a content-based tax" on such expression;
- the Comptroller "failed to — and concedes [she] cannot — meet her burden under strict scrutiny to show that the [tax] is necessary to serve a compelling state interest and narrowly tailored for that purpose"; and
- "[e]ven if the [tax] could be considered a content-neutral measure . . . , it fails intermediate scrutiny."

Accordingly, the trial court rendered judgment declaring that the statute violates the First Amendment, permanently enjoining collection of the fee, and awarding respondents attorney fees.

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[6] *Id*. § 102.054.

[7] *Id*. § 102.055(a).

[8] Respondents also asserted that the fee violates three provisions of the Texas Constitution: article I, § 8, guaranteeing free speech; article VII, § 3, relating to occupation taxes; and article VIII, § 2, requiring that taxes be equal and uniform. The trial court did not rule on these claims, and the court of appeals did not address them. 287 S.W.3d 852, 857 n.5, 864 n.12 (Tex. App.–Austin 2009). We express no opinion on these issues.

A divided court of appeals affirmed.[9] The majority concluded that the statutory fee is a "content-based" tax — one directed at constitutionally protected expression in nude dancing — for essentially two reasons. First, whether the fee applies depends on the nature of a business's activities, whether they constitute "live nude entertainment or live nude performances" within the meaning of the statute.[10] Representatives for the Comptroller testified, that to audit a business, they would be required to examine the content of the expression or "essence" of the transaction; for example, they would consider a "wet T-shirt contest"[11] to come within the definition but perhaps not plays or comedy shows.[12] Second, the statute "single[s] out a specific class of First Amendment speakers" who are "conveying a message that the taxing body might consider undesirable".[13] "A selective taxation scheme in which an entity's tax status depends entirely on the content of its speech is 'particularly repugnant to First Amendment principles.'"[14]

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[9] 287 S.W.3d 852 (Tex. App.–Austin 2009).

[10] *Id*. at 858.

[11] The Comptroller had earlier proposed – and later adopted – a rule giving a "wet T-shirt contest" as its only concrete example; see 34 TEX. ADMIN. CODE 3.722 (providing at (c) (3) that: "[a] business that holds occasional events described in subsection(a)(3)of this section, but does not habitually engage in the activity described in subsection (a)(3) of this section is liable for the sexually oriented business fee for those occasional events. For example, a nightclub that hosts a wet t-shirt contest is liable for the fee based upon attendance during the event"), proposed and filed with the Secretary of State in December 2007, and adopted in June 2008. 33 Tex. Reg. 64-66 (January 4, 2008) (proposed); 33 Tex. Reg. 4907-4908 (June 20, 2008) (adopted). The witness who drafted the rule did not explain the rule's omission of any examples of non-taxable events or content.

[12] 287 S.W.3d at 860.

[13] *Id*. at 859.

[14] *Id*. at 860 (quoting *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 229 (1987)).

The majority rejected the Comptroller's argument that because the government can ban public nudity completely, as the United States Supreme Court held in *City of Erie v. Pap's A.M.*,[15] it can impose a lesser restriction — a $5 fee.[16] The important difference between the ban upheld in *Pap's A.M.* and the fee, the majority reasoned, is that the ban applied to all nudity while the fee singles out nude entertainment and performances.[17]

The Comptroller argues that the fee is directed, not at expression in nude dancing, but at the negative secondary effects of nude entertainment, especially in the presence of alcohol — rape, sexual assault, prostitution, disorderly conduct, and a variety of other crimes and social ills — and in this respect is similar to the zoning ordinance the Supreme Court upheld in *City of Los Angeles v. Alameda Books, Inc.*[18] The appeals court majority also rejected this argument, though the members differed in their reasoning. One believed that "a tax on speech is not necessarily content-neutral simply because it is aimed at secondary effects", and that "evidence that the [fee] is aimed at reducing secondary effects of sexually oriented businesses does not preclude the proper application of strict scrutiny".[19] The other argued that the fee might be upheld if there were evidence

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[15] 529 U.S. 277 (2000).

[16] 287 S.W.3d at 861.

[17] *Id*.

[18] 535 U.S. 425 (2002).

[19] 287 S.W.3d at 861(citing *Alameda Books,* 535 U.S. at 449 (Kennedy, J., concurring)).

that the Legislature actually intended to address secondary effects when the statute was enacted, but concluded that no such evidence existed.[20]

Having determined that the fee is "a content-based differential tax burden on protected speech", the majority accepted the Comptroller's concession that the fee could not withstand strict scrutiny[21] — that is, the fee is not "a precisely drawn means of serving a compelling state interest".[22] But they added that "[e]ven if we were to consider the . . . tax to be content-neutral, it would fail constitutional muster under the intermediate-scrutiny standard because it is not narrowly tailored to further a substantial governmental interest."[23] The dissent would have held that the fee met the intermediate scrutiny standard.[24]

We granted the Comptroller's petition for review.[25]

II

Respondents, like the court of appeals, insist that the statutory fee in this case is really a tax. The Comptroller acknowledges that one purpose of the statute is to generate revenue and concedes that her position on respondents' First Amendment challenge does not depend on whether the fee is really a tax or on the Act's dedication of the revenue to specific funds. Accordingly, we assume

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[20] *Id*. at 869-870 (Jones, C.J., concurring).

[21] *Id*. at 864.

[22] *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980).

[23] 287 S.W.3d at 864, n. 12.

[24] *Id*. at 870.

[25] 53 Tex. Sup. Ct. J. 285 (Feb. 12, 2010).

the fee is a tax, although we refer to it as a fee because the statute does, and we do not take into consideration the uses for which the revenue is to be put.

We have been cited to only one case involving a tax directed at adult entertainment. In *Bushco v. Utah State Tax Commission*, the Supreme Court of Utah upheld a ten percent gross receipts tax on "businesses in which individuals perform services while nude or partially nude", including "escort services", against a First Amendment challenge.[26] In so doing, the court relied heavily on the United States Supreme Court's decisions in *Pap's A.M.*[27] and *Alameda Books*.[28] Inasmuch as those cases are the Supreme Court's most recent pronouncements on the validity of restrictions on adult entertainment, we, too, look to them for guidance.

A

Pap's A.M. involved a public indecency ordinance passed by the City of Erie, Pennsylvania, that made it an offense to knowingly or intentionally appear in public in a "state of nudity."[29] To comply with the ordinance, nude erotic dancers were required to "wear, at a minimum, 'pasties' and a 'G-string.'"[30] Pap's A.M., which operated an establishment known as Kandyland that featured nude erotic dancing, challenged the ordinance as a violation of the First Amendment.[31] The Supreme

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[26] 225 P.3d 153, 157-158 (Utah 2009), *cert. denied sub nom. Denali, L.L.C. v. Utah State Tax Comm'n*, 131 S.Ct. 455 (2010).

[27] 529 U.S. 277 (2000).

[28] 535 U.S. 425 (2002).

[29] *Pap's A.M.*, 529 U.S. at 28 (plurality opinion).

[30] *Id*. at 283.

[31] *Id*. at 284.

Court held that the ordinance was not required to pass strict scrutiny and did not violate the First Amendment.[32] Justice O'Connor's plurality opinion announcing the Supreme Court's judgment was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer.[33] Justice Scalia and Justice Thomas agreed that the ordinance did not violate the First Amendment, but because it regulated only conduct, not expression.[34] Justice Souter agreed with the plurality opinion's analytical approach but would have remanded for further evidence regarding the purpose and operation of the ordinance.[35] Justice Stevens, joined by Justice Ginsburg, dissented.[36]

Justice O'Connor's plurality opinion begins by noting that the expressive conduct in nude dancing "falls only within the outer ambit of the First Amendment's protection."[37] The opinion concludes that "the governmental purpose in enacting the [ordinance was] unrelated to the suppression of expression,"[38] and therefore the ordinance "should be evaluated under the framework set forth in [*United States v. O'Brien*[39]] for content-neutral restrictions on symbolic speech."[40] The plurality reached this conclusion for essentially two reasons. First, it noted that the ordinance was

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[32] *Id.* at 295-296, 302.

[33] *Id*. at 282.

[34] *Id*. at 307-310 (Scalia, J., concurring in judgment).

[35] *Id*. at 310-311 (Souter, J., concurring in part and dissenting in part).

[36] *Id*. at 317 (Stevens, J., dissenting).

[37] *Id*. at 289 (plurality opinion) (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991).

[38] *Pap's A.M.*, 529 U.S. at 289 (plurality opinion).

[39] 391 U.S. 367, 377 (1968).

[40] *Pap's A.M.*, 529 U.S. at 289 (plurality opinion).

"on its face a general prohibition on public nudity"[41] that did not "target nudity that contains an erotic message".[42] Second, the plurality explained that the ordinance was

> aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments . . . and not at suppressing the erotic message conveyed by this type of nude dancing. Put another way, the ordinance does not attempt to regulate the primary effects of the expression, *i.e.,* the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are "caused by the presence of even one such" establishment.[43]

The plurality rejected the argument that because a ban on all public nudity bans nude dancing, it necessarily suppresses expression.[44] The plurality looked to the purpose of the ban rather than its effect:

> The State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood.[45]

The plurality also rejected the argument that the city council's real opposition to nude dancing could be shown by statements made by the city attorney.[46] "[T]his Court will not strike down an otherwise constitutional statute," the plurality stated, "on the basis of an alleged illicit motive" on the part of

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[41] *Id*. at 290.

[42] *Id.*

[43] *Id*. at 291 (citing *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47-48, 50(1986)).

[44] *Pap's A.M.*, 529 U.S. at 291-292 (plurality opinion).

[45] *Id*. at 293 (citing *Renton*, 475 U.S. at 50-51).

[46] *Id*. at 292.

the enactors.[47] Finally, the Court observed, even if the public nudity ban had "some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped," nude dancers were still "free to perform wearing pasties and G-strings."[48]

> Any effect on the overall expression is *de minimis.* And as Justice STEVENS eloquently stated for the plurality in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 70 (1976), "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," and "few of us would march our sons and daughters off to war to preserve the citizen's right to see" specified anatomical areas exhibited at [adult entertainment] establishments . . . . If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based.[49]

Having concluded that Erie's ordinance was not directed to suppressing expression, the plurality applied the four-part test set out in *O'Brien*:

> Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[50]

As for the first factor, "Erie's efforts to protect public health and safety [were] clearly within the city's police powers."[51] As for the second, Erie's "asserted interests of regulating conduct through

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[47] *Id*.

[48] *Id.* at 294.

[49] *Id*. (internal citation omitted).

[50] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[51] *Pap's A.M.*, 529 U.S. at 296.

a public nudity ban and of combating the harmful secondary effects associated with nude dancing [were] undeniably important."[52] Erie was not required to

> conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the problem of secondary effects, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in [*Renton v. Playtime Theatres, Inc.,* 475 U.S. (1986)], *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *California v. LaRue,* 409 U.S. 109 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects.[53]

Moreover, the plurality thought it "evident that, since crime and other public health and safety problems are caused by the presence of nude dancing establishments like Kandyland, a ban on such nude dancing would further Erie's interest in preventing such secondary effects."[54] While "requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects,"[55] certainly not as much as "a requirement that the dancers be fully clothed,"[56] the plurality stated that "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"[57] and "must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further the city's interest."[58]

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[52] *Id*.

[53] *Id*. (internal quotation marks and citation omitted).

[54] *Id*. at 300-301.

[55] *Id*. at 301.

[56] *Id*.

[57] *Id*. (internal quotation marks and citation omitted).

[58] *Id*.

In determining whether to apply the *O'Brien* test, the plurality had already determined that Erie's ordinance met the test's third factor — that it be unrelated to the suppression of free expression.[59] And the fourth factor —

> that the restriction is no greater than is essential to the furtherance of the government interest — is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.[60]

Justice Scalia, joined by Justice Thomas, would have upheld the ordinance "because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all."[61] "Moreover," Justice Scalia continued,

> even were I to conclude that the city of Erie had specifically singled out the activity of nude dancing, I still would not find that this regulation violated the First Amendment unless I could be persuaded (as on this record I cannot) that it was the communicative character of nude dancing that prompted the ban. When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only where the government prohibits conduct precisely because of its communicative attributes. Here, even if one hypothesizes that the city's object was to suppress only nude dancing, that would not establish an intent to suppress what (if anything) nude dancing communicates. I do not feel the need, as the Court does, to identify some secondary effects associated with nude dancing that the city could properly seek to eliminate. (I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.) The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that

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[59] *Id*.

[60] *Id*.

[61] *Id*. at 307-308 (Scalia, J., concurring in judgment) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring in judgment)).

> nude public dancing *itself* is immoral, have not been repealed by the First Amendment.[62]

B

In *Alameda Books*, the City of Los Angeles had enacted a zoning ordinance prohibiting more than one adult entertainment business in the same building.[63] The United States Supreme Court reversed summary judgment that held that the ordinance violated the First Amendment.[64] Justice O'Connor announced the Court's judgment in an opinion joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas.[65] Justice Scalia wrote a brief concurring opinion.[66] Justice Kennedy concurred in the judgment.[67] Justice Souter, joined by Justice Stevens and Justice Ginsburg, and in part by Justice Breyer, dissented.[68] The members of the Supreme Court all proceeded from the premise that, as the Court had held in *Renton v. Playtime Theatres, Inc.*, a "time, place, and manner" zoning restriction on an adult business does not violate the First Amendment if it is aimed, not at the content of adult entertainment, but at the secondary effects of such businesses on the surrounding community — that is, if the restriction is "designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods,

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[62] *Id*. at 310 (internal quotation marks and citation omitted).

[63] 535 U.S. 425, 429 (2002) (plurality opinion).

[64] *Id.* at 430.

[65] *Id*. at 428.

[66] *Id*. at 443 (Scalia, J., concurring).

[67] *Id*. at 444 (Kennedy, J., concurring in judgment).

[68] *Id*. at 453 (Souter, J., dissenting).

commercial districts, and the quality of urban life, not to suppress the expression of unpopular views."[69] Such restrictions "are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[70] The disagreement in *Alameda Books* was over whether there was evidence that the ordinance at issue satisfied *Renton*'s requirements.

Justice O'Connor's plurality opinion concluded that a 1977 study conducted by Los Angeles supported its determination, reflected in the ordinance, that diluting the concentration of adult businesses would reduce their negative secondary effects on the community.[71] The adult businesses that challenged the ordinance argued that the study did not show that the ordinance would reduce those secondary effects, and could be read to show that the ordinance might worsen them. The plurality concluded that municipalities were not obliged to justify such ordinances with exacting proof but could "rely upon evidence that is 'reasonably believed to be relevant' to the secondary effects that they seek to address."[72]

Justice Kennedy agreed. "[W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required" to adopt a zoning ordinance like Los Angeles'.[73] "As a general matter," he wrote, "courts should not be in the business

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[69] 475 U.S. 41, 48 (1986) (internal quotation marks and brackets omitted).

[70] *Id*. at 47.

[71] *Alameda Books*, 535 U.S. at 438 (plurality opinion).

[72] *Id.* at 442.

[73] *Id*. at 451 (Kennedy, J., concurring in judgment).

of second-guessing fact-bound empirical assessments of city planners."[74] A city is entitled to rely on its knowledge of the conditions in its community, Justice Kennedy acknowledged, "and if its inferences appear reasonable, we should not say there is no basis for its conclusion."[75] But, he stressed, for an ordinance to avoid strict scrutiny, evidence supporting it was required to show more than that secondary effects would be reduced.

> [T]he necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects. This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. But a content-based tax may not be justified in this manner. It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.[76]

Rather, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact."[77] The study on which Los Angeles relied, Justice Kennedy concluded, provided that basis.

III

Guided by *Pap's A.M.* and *Alameda Books*, we turn to whether the fee in this case is "content-based" — that is, directed to the suppression of expression. The court of appeals concluded that the fee is content-based because it would not be imposed in all incidents of "live nude

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[74] *Id*.

[75] *Id*. at 452.

[76] *Id*. at 450 (internal citations omitted).

[77] *Id*. at 449.

entertainment or live nude performances" — instead, the determination to apply the fee would be made only with reference to the nature of that performance or the business. Justice Kennedy expressly rejected this reasoning in *Alameda Books*. "[T]here is no First Amendment objection", he said, to a measure that

> decrease[s] the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave[s] the quantity and accessibility of the speech substantially undiminished, . . . even if the measure identifies the problem outside by reference to the speech inside — that is, even if the measure is in that sense content based.[78]

The court of appeals also concluded that the fee is content-based because it singles out nude dancing, as opposed to all nudity, and, and so "target[s] a specific class of First Amendment speakers".[79] The court deemed it immaterial that the fee does not apply to nude dancing where alcohol is not consumed, or to other forms of expression involving nudity.[80] We disagree. The fee is not aimed at any expressive content of nude dancing but at the secondary effects of the expression in the presence of alcohol.

The court of appeals dismissed *Pap's A.M.*, because that case involved a total ban on nudity, as unhelpful in analyzing whether the fee in this case is content-based.[81] But the extent of the ban was only one factor in the Supreme Court's analysis. More important, in our analysis of the multiple opinions in that case, was the fact that the ordinance was directed to reducing the negative secondary

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[78] *Id*. at 445.

[79] 287 S.W.3d at 859.

[80] *Id.* at 862-863.

[81] 287 S.W.3d at 858-859, 861.

effects of adult entertainment businesses. Respondents do not deny the existence of such effects, which the Supreme Court has repeatedly recognized, or that they are especially associated with alcohol-consumption. Respondents have not challenged the trial court's finding that the Comptroller "presented persuasive trial evidence supporting a possible link between the business activity subject to the tax and the secondary effects" associated with sexual abuse. Rather, they argue that the fee does nothing to reduce secondary effects. But logic and the evidence indicate that the fee provides some discouragement to combining nude dancing with alcohol consumption.

The court of appeals' apparent belief that any imposition on expression violates the First Amendment is contradicted by the recognition in *Pap's A.M.* that a restriction can be *de minimis*. In that case, the ban could be avoided simply by using pasties and G-strings. We think a $5 fee presents no greater burden on nude dancing. Respondents argue that, because the fee is so small, it is unlikely to have much effect in combating the negative secondary effects that the Comptroller contends it is intended to reduce. But *Pap's A.M.* rejects a similar argument.[82]

The court of appeals and respondents argue that a tax is different from the zoning restriction in *Alameda Books*. They point to Justice Kennedy's statement that a content-based tax may not be justified as suppressing the secondary effects of adult entertainment if it targets expression.[83] That, of course, is true of a zoning restriction as well as a tax. Justice Kennedy reasoned that zoning restrictions are typically less suspect that taxes:

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[82] *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 301 (2000) (rejecting a similar argument because "*O'Brien* requires only that the regulation further the interest in combating" negative secondary effects).

[83] *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring in judgment).

> [Z]oning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional.[84]

But he did not suggest that a fee like the one now before us would never be permissible. The fee is not a tax on unpopular speech but a restriction on combining nude dancing, which unquestionably has secondary effects, with the aggravating influence of alcohol consumption.

Finally, respondents argue that the negative effects from adult entertainment are not secondary effects but primary effects — the response to the erotic content of nude dancing. If that were true, then surely nude dancing could be subject to more direct restrictions, just as shouting "fire" in a crowded theater can be. In any event, the characterization of the societal ills that result from adult entertainment as primary rather than secondary was expressly rejected by Justice O'Connor's plurality opinion in *Pap's A.M.*

The fee in this case is clearly directed, not at expression in nude dancing, but at the secondary effects of nude dancing when alcohol is being consumed. An adult entertainment business can avoid the fee altogether simply by not allowing alcohol to be consumed. For these reasons, we conclude that the fee is not intended to suppress expression in nude dancing.

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[84] *Id.* at 449.

IV

Therefore, the fee need only satisfy the *O'Brien* test. Respondents do not contest that the fee meets the first factor — that the Legislature had the constitutional power to enact it. Nor do they contest, with respect to the second factor, that the State has an important interest in reducing the secondary effects of adult businesses. But they argue that the fee does not further that interest. We think that the fee provides some disincentive to present live nude entertainment where alcohol is consumed, and, consistent with Justice Kennedy's views in *Alameda Books*, the Legislature could reasonably infer that the alternative of non-alcoholic venues was sufficient so as not to work a suppression of expression in nude dancing.

Respondents argue that the lack of discussion about reduction of secondary effects during the legislative process shows that such reduction was not the fee's purpose. But the Supreme Court has rejected the argument that the constitutional validity of a restriction on freedom of speech should turn on the subjective intent of those who enacted it. In *O'Brien*, the Court said:

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.[85]

Regardless of what legislators said or did not say during the fee's enactment, the fee does further the State's interest in reducing secondary effects.

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[85] *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968).

We have already explained at length why we have concluded that the fee meets the third factor of the *O'Brien* test — that the State's interest is unrelated to the suppression of free expression. With respect to the fourth factor — that the restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest — we reiterate two things. The $5 fee is a minimal restriction on the businesses, so small that respondents argue it is ineffective. And the business that seeks to avoid the fee need only offer nude entertainment without allowing alcohol to be consumed.

* * *

Because the fee is content-neutral and satisfies the four-part *O'Brien* test, we conclude that it does not violate the First Amendment. Accordingly, we reverse the judgment of the court of appeals and remand the case to the trial court to consider issues raised by respondents under the Texas Constitution.

Nathan L. Hecht
Justice

Opinion delivered: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0497

TYLER SCORESBY, M.D., PETITIONER,

v.

CATARINO SANTILLAN, INDIVIDUALLY AND AS NEXT FRIEND OF SAMUEL SANTILLAN, A MINOR, RESPONDENT

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

Argued November 9, 2010

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

JUSTICE WILLETT filed a concurring opinion.

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

The Medical Liability Act[1] entitles a defendant to dismissal of a health care liability claim if, within 120 days of the date suit was filed, he is not served with an expert report showing that the claim against him has merit.[2] The trial court's refusal to dismiss is immediately appealable.[3] The

[1] TEX. CIV. PRAC. & REM. CODE §§ 74.001-.507. All references to the Act are to these provisions.

[2] *Id.* § 74.351(b).

[3] *Id.* § 51.014(a)(9); *Badiga v. Lopez*, 274 S.W.3d 681, 685 (Tex. 2009).

Act sets specific requirements for an adequate report[4] and mandates that "an objective good faith effort [be made] to comply" with them,[5] but it also authorizes the trial court to give a plaintiff who meets the 120-day deadline an additional thirty days in which to cure a "deficiency" in the elements of the report.[6] The trial court should err on the side of granting the additional time[7] and must grant it if the deficiencies are curable.[8] The defendant cannot seek review of this ruling[9] or appeal the court's concomitant refusal to dismiss the claim before the thirty-day period has expired.[10]

While the Act thus contemplates that a document can be considered an expert report despite its deficiencies, the Act does not suggest that a document utterly devoid of substantive content will qualify as an expert report. Based on the Act's text and stated purposes, we hold that a document qualifies as an expert report if it contains a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit. An individual's lack of relevant qualifications and an opinion's inadequacies are deficiencies the plaintiff should be given an opportunity to cure if it is possible to do so. This lenient standard avoids the expense and

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[4] TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6).

[5] *Id*. § 74.351(*l*).

[6] *Id*. § 74.351(c).

[7] *Samlowski v. Wooten*, 332 S.W.3d 404, 411 (Tex. 2011) (plurality op. of Medina, J., joined by Jefferson, C.J., and Hecht, J.) ("'[T]rial courts should err on the side of granting claimants' extensions to show the merits of their claims.'" (quoting *id*. at 416 (Guzman, J., joined by Lehrmann, J., concurring in the judgment))).

[8] *Id*. at 411 (plurality op. of Medina, J., joined by Jefferson, C.J., and Hecht, J.); *id*. at 416 (Guzman, J., joined by Lehrmann, J., concurring in the judgment).

[9] TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9) (no interlocutory appeal); *In re Watkins*, 279 S.W.3d 633, 634 (Tex. 2009) (orig. proceeding) (no review by mandamus).

[10] *Ogletree v. Matthews*, 262 S.W.3d 316, 321 (Tex. 2007).

delay of multiple interlocutory appeals and assures a claimant a fair opportunity to demonstrate that his claim is not frivolous. The expert report before us meets this test, and therefore the trial court's order allowing thirty days to cure deficiencies and denying the defendants' motions to dismiss were not appealable. Accordingly, we affirm the court of appeals' judgment dismissing the appeal for want of jurisdiction.[11]

I

On behalf of Samuel Santillan, a minor, Catarino Santillan sued Dr. Tyler Scoresby and Dr. Yadranko Ducic, two otolaryngology (ENT) surgeons (collectively, "the Physicians"), alleging that they negligently performed a medial maxillectomy to remove growths from Samuel's sinus cavity. Santillan asserts that an incision made too far into Samuel's brain lacerated a blood vessel and required surgery to stop the bleeding, resulting in brain damage and partial paralysis.

To satisfy the Act's expert report requirement, Santillan timely served the Physicians with a letter from Dr. Charles D. Marable to Santillan's attorney. The letter did not attach Marable's curriculum vitae or describe his credentials or experience other than to state that he is "a Board-Certified neurologist". From having examined Samuel and reviewed his medical records, Marable explained his condition as follows:

> The patient was initially seen on 8/3/07. He is now a 17-year-old Latin-American male who was taken to John Peter Smith on 1/17/06 for a preoperative diagnosis of maxillary sinus neoplasm under the care of Dr. Yadro Ducic, M.D., an ENT physician, and another surgeon, Dr. Tyler Scorsby [sic], with procedures of left mediomaxillectomy [sic], excision of neoplasm of the maxilla, calvarial bone growth and reconstruction of maxilla and excision of tumor of pterygopalatin [sic] structures. During the procedure, an incision was made in the right parietal region

[11] 287 S.W.3d 319 (Tex. App.–Fort Worth 2009).

in a coronal fashion and carried down the pericranium. As a result of this, there was cortical laceration with active bleeding from several medium size vessels in the area.

According to Dr. Scorsby's [sic] note, the patient awoke in the operating room without complications and was taken to the post anesthesia care unit. However, on awakening he did not have a normal neurologic exam, in fact, had a right-sided hemiparesis, and due to the progression of his neurological deficit, increasing intercerebral hemorrhage was noted by CT scanning.

He was taken back to the operating suite on 1/18/06 by Dr. Gregory Smith, D.O., a neurosurgeon. Dr. Smith's preoperative diagnosis was that of expanding intercerebral hematoma, status post split thickness skull harvesting, with postoperative diagnosis of expanding intercerebral hematoma and intercerebral hematoma skull perforation. Procedure performed was that of a left parietal craniotomy with evacuation of intercerebral hematoma, repair and hemostasis. Dr. Smith's operative report states there was cortical laceration with active bleeding from several medium-sized vessels in the left parietal area, which were then cauterized with bipolar cautery for hemostatis. An underlying intercerebral hematoma was entered and eventually evacuated successfully with suction.

* * *

It appears he was in the hospital until 2/11/06, and at that time was transferred to HealthSouth Rehabilitation Hospital, Cityview, admitted on 2/11/06, date of discharge 2/21/06. He was discharged with the diagnosis of left parietal hemorrhage, maxillary sinus tumor resection, right hemiparesis, persistent pain, apraxia, seizure prophylaxis, peptic ulcer prophylaxis and right hemisensory deficit. During his stay at HealthSouth Hospital he progressed in all areas of mobilization and self-care. He was ambulating greater than 400', but still had significant right upper extremity weakness and spasticity. It was then deemed necessary to transfer him to an outpatient brain injury program and work on his strength, cognition and overall mobilization. . . .

He was seen on 8/3/07. He still has weakness of his right arm and leg. Walking seems to still be a problem. . . . He is still having headaches in the occipital region.

Marable's letter concluded:

As a Board-Certified neurologist, my opinion is that Dr. Ducic violated the standards of care, as well as Dr. Scorsby [sic], and as a result his damages are that of a right-sided hemiparesis with possibility of seizure foci in the future. Although

> he has not had any seizures, he certainly does meet the criteria for a seizure disorder. Had it not been for Dr. Ducic and Dr. Scorsby's [sic] negligent activity in causing cortical laceration of this patient's left parietal lobe, he would not have needed further hospitalization at John Peter Smith or the ICU therapy, or going to HealthSouth Rehab, and is now left with a right hemiparesis at a young age.

The Physicians each timely objected that the letter was inadequate as an expert report, asserting that: (i) a neurologist is not qualified to testify regarding the standard of care for an ENT surgeon in performing the procedures the Physicians performed on Samuel; (ii) Marable's opinions regarding the Physicians' standard of care, breach, and causal relationship to Samuel's injuries were conclusory and directed to Scoresby and Ducic collectively rather than individually; and (iii) Marable's curriculum vitae was not included, as the Act requires.[12] The Physicians argued Marable's letter was so woefully deficient, it did not even qualify as an expert report under the Act to meet the 120-day deadline. They moved the court to dismiss the case with prejudice and award them their reasonable attorney fees and costs.

After the 120-day deadline, Santillan served the Physicians with Marable's curriculum vitae and his amended report, in which he added that "the applicable standard of care would have been to perform the procedure of a calvaria bone transplant without nicking or lacerating the parietal cortex [and] to get the appropriate surgeon, such as a neurosurgeon, instead of an ENT physician to do a calvaria bone grafting procedure", and that "Dr. Ducic and Dr. Scorsby [sic] . . . failed to perform a careful and well-planned surgery, causing a laceration of the cortical hemisphere, causing substantial bleeding". At the hearing on the Physicians' objections and motions, the trial court refused to consider Marable's post-deadline amended report. The Physicians complained that

[12] TEX. CIV. PRAC. & REM. CODE § 74.351(a).

Marable's original letter did not show that he had sufficient qualifications and experience to render an opinion regarding the surgery, and did not define the standard of care, state how it was breached, or explain how a breach resulted in Samuel's injuries. The Physicians acknowledged that Samuel suffered a lacerated artery but argued that such things are inevitable in surgery, no matter how carefully it is performed, and do not necessarily indicate a breach of the standard of care. The trial court denied the motions to dismiss and granted Santillan a thirty-day extension to cure deficiencies in the report.

The Physicians appealed, persisting in their contention that Marable's letter was too inadequate to qualify as an expert report; therefore, Santillan had not met the 120-day deadline; and consequently, the Act did not permit an additional thirty days to cure the deficiencies but instead required that the case be dismissed.[13] The court of appeals construed our analysis in *Ogletree v. Matthews*[14] to mean that deficiencies in a document tendered as an expert report will not preclude it from qualifying as such.[15] The court concluded that an interlocutory appeal in these circumstances was not permitted.[16]

We granted the Physicians' petitions for review.[17]

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[13] 287 S.W.3d at 320.

[14] 262 S.W.3d 316.

[15] 287 S.W.3d at 324.

[16] *Id.* at 325.

[17] 53 Tex. Sup. Ct. J. 1061 (Aug. 27, 2010). We have jurisdiction to determine whether the court of appeals had jurisdiction. *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 343 (Tex. 2004).

While this appeal has been pending, the Physicians have lodged essentially the same objections to Santillan's amended report as they made to the original report. They have also moved again for dismissal, attorney fees, and costs. The trial court has not ruled on those objections and motions.

II

The Legislature enacted the Medical Liability and Insurance Improvement Act ("MLIIA") in 1977[18] in response to "a medical malpractice insurance crisis in the State of Texas" that was having "a material adverse effect on the delivery of medical and health care in Texas, including significant reductions of availability of medical and health care services to the people of Texas and a likelihood of further reductions in the future".[19] The Legislature found that the crisis had been created by an "inordinate[]" increase in the volume and expense of health care liability claims.[20] Concerned that "the direct cost of medical care to the patient and public of Texas ha[d] materially increased",[21] the Legislature's purpose in the MLIIA, expressly stated, was to

> reduce excessive frequency and severity of health care liability claims[,] . . . decrease the cost of those claims[,] . . . do so in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis[, and thereby] . . . make affordable medical and health care more accessible and available to the citizens of Texas . . . .[22]

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[18] Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, formerly TEX. REV. CIV. STAT. ANN. art. 4590i [hereinafter 1977 Act].

[19] 1977 Act, § 1.02(a)(5)-(6).

[20] 1977 Act, § 1.02(a)(1)-(5).

[21] 1977 Act, § 1.02(a)(8).

[22] 1977 Act, § 1.02(b)(1)-(3), (5).

In 2003, the Legislature replaced the MLIIA with the Medical Liability Act, repeating its 1977 findings and statements of purpose.[23]

Fundamentally, the goal of the MLIIA and the Medical Liability Act has been to make health care in Texas more available and less expensive by reducing the cost of health care liability claims. To that end, both statutes have sought to deter frivolous lawsuits by requiring a claimant early in litigation to produce the opinion of a suitable expert that his claim has merit. "[E]liciting an expert's opinions early in the litigation [is] an obvious place to start in attempting to reduce frivolous lawsuits"[24] and thereby reduce the costs of claims.

The Legislature first added an expert report requirement to the MLIIA in 1993, then strengthened it over the next ten years, finally allowing interlocutory appeals to ensure uniform enforcement. We look first at the requirement, then the appeal, and finally at their proper operation together.

A

The 1993 amendment to the MLIIA required a plaintiff, within ninety days of filing suit, either to file an affidavit that he had obtained a suitable expert's opinion that his claim had merit or to post a $2,000 bond or cash deposit.[25] The trial court could extend the deadline for up to ninety

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[23] Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 10.01, 10.09, 10.11, 2003 Tex. Gen. Laws 847, 864-882, 884-885.

[24] *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001).

[25] Act of May 25, 1993, 73rd Leg., R.S., ch. 625, § 3, 1993 Tex. Gen. Laws 2347, 2347, formerly TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(a)-(b) [hereinafter 1993 Act].

days "for good cause shown".[26] A plaintiff who failed to comply risked dismissal without prejudice and liability for costs, again, except for "good cause . . . shown".[27]

In 1995, the Legislature required that the expert report itself be filed and raised the amount of the bond or deposit posted in lieu of a report to $5,000.[28] The amendment retained the ninety-day initial deadline but added that even if a bond or deposit were posted, an expert report and curriculum vitae must be filed within 180 days of initiating suit.[29] The amendment specified the qualifications the expert was required to have[30] and defined the report as one "provid[ing] a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed."[31] The failure to make "a good faith effort" to comply[32] could result in dismissal with prejudice and liability for attorney fees as well as costs.[33] But if the failure — even missing the deadline completely[34] — was "not intentional or the

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[26] 1993 Act, former art. 4590i, § 13.01(d).

[27] 1993 Act, former art. 4590i, § 13.01(c).

[28] Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, 986, formerly TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(a) [hereinafter 1995 Act].

[29] 1995 Act, former art. 4590i, § 13.01(d).

[30] 1995 Act, former art. 4590i, §§ 13.01(r)(5) & 14.01.

[31] 1995 Act, former art. 4590i, § 13.01(r)(6).

[32] 1995 Act, former art. 4590i, § 13.01(*l*).

[33] 1995 Act, former art. 4590i, § 13.01(e).

[34] *Stockton v. Offenbach*, 336 S.W.3d 610, 616 (Tex. 2011) ("Under article 4590i, a plaintiff could obtain an extension, even when no report was provided by the deadline, if the plaintiff could show an 'accident or mistake' in failing to furnish a timely report.").

result of conscious indifference but was the result of an accident or mistake," the trial court was required to grant "a grace period of 30 days to permit the claimant to comply".[35]

The Medical Liability Act, adopted in 2003 and now in effect, eliminates the bond/deposit alternative, shortens the deadline for the expert report and curriculum vitae to 120 days (unless extended by agreement), and requires service rather than filing.[36] The Act retains the definition of an expert report[37] but is more specific about an expert's qualifications.[38]

The Act now distinguishes between missing a deadline altogether and serving an inadequate report. Section 74.351(b) provides that

> [i]f, as to a defendant . . . , an expert report has not been served [by the deadline], the court, on the motion of the [defendant], shall, subject to Subsection (c), enter an order that:
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> (1) awards [the defendant] reasonable attorney's fees and costs of court . . . ; and
>
> (2) dismisses the claim with respect to the [defendant] with prejudice to the refiling of the claim.[39]

Under section 74.351(*l*), the same consequences attend serving an inadequate report that "does not represent an objective good faith effort" to comply with the Act's requirements.[40] But before those

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[35] 1995 Act, former art. 4590i, § 13.01(g).

[36] TEX. CIV. PRAC. & REM. CODE § 74.351(a).

[37] *Id.* § 74.351(r)(6).

[38] *Id.* §§ 74.351(r)(5), 74.401-.403.

[39] *Id.* § 74.351(b).

[40] *Id.* § 74.351(*l*).

consequences are imposed, the Act provides an opportunity for deficiencies to be cured. Section 74.351(a) requires that any objection to the sufficiency of a report be lodged within twenty-one days of service,[41] and section 74.351(c) provides:

> If an expert report has not been served [by the deadline] because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency."[42]

The Act's thirty-day extension to cure deficiencies replaces the 1995 law's thirty-day "grace period" for "accident or mistake", shifting the focus from the claimant's conduct to the report's contents. But the importance of an appropriate delay in finally dismissing a claim for want of an adequate report is undiminished. The purpose of the expert report requirement is to deter frivolous claims,[43] not to dispose of claims regardless of their merits. "The Legislature has determined that failing to timely file an expert report, or filing a report that does not evidence a good-faith effort to comply with the definition of an expert report, means that the claim is either frivolous, or at best has been brought prematurely."[44] But the Legislature has likewise recognized that when an expert report can be cured in thirty days, the claim is not frivolous. It must be remembered that "'[t]here are constitutional limitations upon the power of courts . . . to dismiss an action without affording a party

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[41] *Id.* § 74.351(a).

[42] TEX. CIV. PRAC. & REM. CODE § 74.351(c).

[43] *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001) ("And one purpose of the expert-report requirement is to deter frivolous claims.").

[44] *Id.*

the opportunity for a hearing on the merits of his cause'",[45] and those limitations constrain the Legislature no less in requiring dismissal.

For these reasons, we have held that trial courts should be lenient in granting thirty-day extensions and must do so if deficiencies in an expert report can be cured within the thirty-day period. This "minimal delay before a report's sufficiency may again be challenged and the case dismissed, if warranted"[46] does not impair the purpose of the Act.

B

Under the MLIIA, there was no interlocutory appeal from the denial of a motion to dismiss a health care liability claim for failure to comply with the expert report requirement, and we did not make clear until 2008 that review by mandamus was available.[47] In adopting the Medical Liability Act in 2003, the Legislature permitted an interlocutory appeal from an order denying "all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351".[48] In a series of cases, we have explained the limits of this review mechanism.

If an expert report is timely served, even without a curriculum vitae, we held in *Ogletree v. Matthews* that the trial court's denial of a motion to dismiss, asserting the report's inadequacy,

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[45] *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991) (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209-210 (1958), citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-351 (1909), and *Hovey v. Elliott*, 167 U.S. 409 (1897); *accord Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-706 (1982)); *see also Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003).

[46] *Ogletree v. Matthews*, 262 S.W.3d 316, 321 (Tex. 2007).

[47] *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 461-462 (Tex. 2008).

[48] TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9); Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.03, 2003 Tex. Gen. Laws 847, 849.

cannot be appealed if the court also grants a thirty-day extension to cure deficiencies.[49] "This prohibition," we said, "is both logical and practical."[50] Otherwise,

> the court of appeals would address the report's sufficiency while its deficiencies were presumably being cured at the trial court level, an illogical and wasteful result. Moreover, because the Legislature authorized a single, thirty day extension for deficient reports, health care providers face only a minimal delay before a report's sufficiency may again be challenged and the case dismissed, if warranted.[51]

If after an extension has been granted, the defendant again moves to dismiss, we held in *Lewis v. Funderburk* that a denial of the motion is appealable.[52]

If no expert report is timely served, we held in *Badiga v. Lopez* that the denial of a motion to dismiss is appealable, even if the court grants an extension.[53] The Medical Liability Act, unlike the MLIIA, does not authorize an extension if no report is timely served. Granting an extension not authorized by section 74.351 does not preclude appeal. But because an appeal is available, we held in *In re Watkins* that review by mandamus is not available.[54]

The present case requires us to determine whether a document served on a defendant can be so lacking in substance that it does not qualify as an expert report, and therefore an immediate appeal from the denial of a motion to dismiss is available under *Badiga*.

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[49] 262 S.W.3d at 321.

[50] *Id.*

[51] *Id.*

[52] 253 S.W.3d 204, 207-208 (Tex. 2008).

[53] 274 S.W.3d 681, 685 (Tex. 2009).

[54] 279 S.W.3d 633, 634 (Tex. 2009).

C

The Act defines an expert report to be

> a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.[55]

The qualifications and experience necessary for an expert are prescribed in great detail.[56] The adequacy of a report is determined by whether it "represent[s] an objective good faith effort to comply" with the statutory definition.[57] As we have explained:

> In setting out the expert's opinions on each of those elements, the report must provide enough information to fulfill two purposes if it is to constitute a good-faith effort. First, the report must inform the defendant of the specific conduct the plaintiff has called into question. Second, and equally important, the report must provide a basis for the trial court to conclude that the claims have merit.[58]

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[55] TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6).

[56] *Id.* §§ 74.351(r)(5), 74.401-.403.

[57] *Id.* § 74.351(*l*).

[58] *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001).

No particular words[59] or formality[60] are required, but bare conclusions will not suffice.[61] The report must address all the elements,[62] and omissions may not be supplied by inference.[63]

But as we have seen, the Act allows a claimant a thirty-day period to cure deficiencies before the trial court finally determines that the report is inadequate and the claim must be dismissed. In *Ogletree*, we rejected the argument that a deficient report is no report.[64] There, the claimant provided the opinion of a radiologist, without a curriculum vitae, on a urologist's standard of care.[65] Dr. Ogletree argued that the report was really no report at all, but we held that despite its shortcomings, it "implicated Dr. Ogletree's conduct", so that the trial court was authorized to grant a thirty-day extension, and an appeal was prohibited.[66]

Ogletree's holding, though sound, can be extended only so far. To stretch the meaning of deficient to include a sheet of paper with the two words, "expert report", written on it would mock the Act's requirements. The expert report in *Lewis* was substantively no more than that — one

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[59] *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002) (per curiam) ("[A] report's adequacy does not depend on whether the expert uses any particular 'magical words.'").

[60] *Palacios*, 46 S.W.3d at 879 ("The report can be informal in that the information in the report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial.").

[61] *Id.* ("A report that merely states the expert's conclusions about the standard of care, breach, and causation does not fulfill these two purposes.").

[62] *Id.* ("Nor can a report meet these purposes and thus constitute a good-faith effort if it omits any of the statutory requirements.").

[63] *See Bowie Mem'l Hosp.*, 79 S.W.3d at 53 ("[T]he report must include the required information within its four corners.").

[64] *Ogletree v. Matthews*, 262 S.W.3d 316, 320-321 (Tex. 2007).

[65] *Id.* at 318.

[66] *Id.* at 321.

physician's thank-you letter to another for referring the patient.[67] In determining where to draw the line, we are guided by two considerations. One is that the Act's principal purpose is to reduce the expense of health care liability claims. The Legislature could reasonably have determined that that purpose is served by an interlocutory appeal from the denial of a motion to dismiss for want of an adequate expert report, but as we observed in *Ogletree*, permitting two such appeals — one before the thirty-day cure period and one after — is simply wasteful. The other consideration is the goal of the Act's expert report requirement: to deter frivolous claims. An inadequate expert report does not indicate a frivolous claim if the report's deficiencies are readily curable.

We conclude that a thirty-day extension to cure deficiencies in an expert report may be granted if the report is served by the statutory deadline, if it contains the opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated. We recognize that this is a minimal standard, but we think it is necessary if multiple interlocutory appeals are to be avoided, and appropriate to give a claimant the opportunity provided by the Act's thirty-day extension to show that a claim has merit. All deficiencies, whether in the expert's opinions or qualifications, are subject to being cured before an appeal may be taken from the trial court's refusal to dismiss the case.

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[67] *Lewis v. Funderburk*, 191 S.W.3d 756, 762-763 (Tex. App.–Waco 2006) (Gray, C.J., dissenting), *rev'd*, 253 S.W.3d 204 (Tex. 2008).

III

Dr. Marable's letter in this case easily meets this standard. Claiming expertise as a neurologist, he described the injury to Samuel's brain, ascribed it to the Physicians' breach of the standards of care, and stated that their breach caused Samuel's partial paralysis and other lingering debilities. As an expert report, Dr. Marable's letter was deficient. For example, it did not state the standard of care but only implied that it was inconsistent with the Physicians' conduct. But there is no question that in his opinion, Santillan's claim against the Physicians has merit.

The dissent argues that Dr. Marable was not qualified to give an opinion about the Physicians' conduct because he is only a neurologist, not a surgeon, and therefore his letter is so deficient it does not qualify as an expert report. The Act requires that Dr. Marable's knowledge, training or experience, and practice be "relevant" to Santillan's claim.[68] We express no view on the adequacy of Dr. Marable's qualifications; the trial court did not specifically address the matter, and it is premature for us to consider it. But the dissent's arguments, we believe, show the wisdom of our approach in determining what qualifies as an expert report.

The dissent acknowledges that, as in *Ogletree*, a radiologist is qualified to opine on "whether the urologist should have involved radiology-related devices and techniques (the specialty in which the expert was qualified) in treating the patient and whether the failure to do so resulted in injury."[69] In that instance, the dissent contends, there is an "apparent closely-related connection" between

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[68] *See* TEX. CIV. PRAC. & REM. CODE §§ 74.351(r)(5), 74.401(a), (c).

[69] *Post* at ___.

radiology and neurology.[70] The dissent sees no such connection between neurology and ENT surgery that damages the brain.[71] But surely a neurologist's expertise is relevant in explaining the connection between the Physicians' injury to blood vessels during surgery and the hemiparesis and weakness Simon suffered. What further relevance that expertise has to Santillan's claim should first be addressed by the trial court. In no event, however, do we think a claimant's opportunity to cure and a defendant's immediate right to appeal should turn on such fine distinctions, either in an expert's qualifications or in his opinions.

This case also demonstrates the difficulty with any more stringent standard. The trial court denied the Physicians' motions to dismiss and ordered that Santillan have a thirty-day extension to cure deficiencies in Dr. Marable's report nearly three years ago. Santillan had already served an amended report, in response to which the Physicians had filed renewed objections and again moved to dismiss the case. Now that we have dismissed this appeal for want of jurisdiction, the trial court will rule on the objections to the amended report and the motions to dismiss. Whatever the ruling, another appeal will undoubtedly follow. Our holding today will all but eliminate the first, wasteful appeal. Just as importantly, it will help assure that a claimant, after being apprised of a defendant's objections to an expert report, and having had an opportunity to discuss those objections at a hearing before the trial court, will have a fair opportunity to cure any deficiencies and demonstrate that his claim is not frivolous and should be determined on the merits.

* * *

[70] *Id.*

[71] *Id.*

Accordingly, the judgment of the court of appeals dismissing this appeal for want of jurisdiction is

Affirmed.

Nathan L. Hecht
Justice

Opinion Delivered: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0497

TYLER SCORESBY, M.D., PETITIONER,

v.

CATARINO SANTILLAN, INDIVIDUALLY AND AS NEXT FRIEND OF SAMUEL SANTILLAN, A MINOR, RESPONDENT

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

Argued November 9, 2010

JUSTICE JOHNSON, joined by JUSTICE WAINWRIGHT, dissenting.

The Court says that a plaintiff who timely files a defective expert report is eligible for an extension of time to cure the report if

> [the report] contains a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit. An individual's lack of relevant qualifications and an opinion's inadequacies are deficiencies the plaintiff should be given an opportunity to cure if it is possible to do so.

___ S.W.3d ___, ___. In my view the Court's standard does not conform to requirements the Legislature imposed in authorizing an extension to cure a deficient report. I respectfully dissent.

A trial court is statutorily authorized to grant an extension to cure elements of an expert report that are found deficient, not to cure a report that substantively is not a report, nor to cure a report from which elements are absent as opposed to deficient:

> (b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), 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.
>
> (c) If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency.

TEX. CIV. PRAC. & REM. CODE § 74.351(b), (c);[1] *see In re Watkins*, 279 S.W.3d 633, 634-35 (Tex. 2009) (Johnson, J., concurring) ("The definition [of expert report] requires that for a document to qualify as a statutory expert report, it must demonstrate three things: (1) someone with relevant expertise ('"[e]xpert report" means a written report by an expert'), (2) has an opinion ('that provides a fair summary of the *expert's opinions*'), and (3) that the defendant was at fault for failing to meet applicable standards of care and thereby harmed the plaintiff . . . ."). Absent an expert with relevant expertise, I do not see how there can be an expert report under the statute, because the foundation of an expert report is the requirement that the report be by a qualified expert. "Expert" for purposes of a report means:

[1] Further references to the Civil Practice and Remedies Code will be by referring to section numbers unless otherwise indicated.

> [W]ith respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 74.401 . . . .

TEX. CIV. PRAC. & REM. CODE § 74.351(r)(5)(A). Section 74.401 provides specific requirements for an expert to be qualified to provide the section 74.351 report:

> (a) In a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if the person is a physician who:
>
> (1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;
>
> (2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and
>
> (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.

Id. § 74.401(a). The Court has said that "[a] report by an unqualified expert will sometimes (though not always) reflect a good-faith effort sufficient to justify a 30-day extension." *In re Buster*, 275 S.W.3d 475, 477 (Tex. 2008) (per curiam) (citing *Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008)). The Court has recognized that not every doctor is qualified to render an opinion about every aspect of medicine or medical science. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 463 (Tex. 2008); *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996) ("[G]iven the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question.").

The Court's new test apparently allows a report to qualify as a deficient report even if the report demonstrates none of the three requirements of section 74.401(a). The test requires only that

the person rendering the opinion have some type of undefined level of expertise. It abandons the requirements that the report show the expert (1) has knowledge of accepted standards of care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and (2) qualifies on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care. *See* TEX. CIV. PRAC. & REM. CODE §74.401(a)(2), (3). Nor does the test require a showing that the expert is practicing medicine or was doing so when the claim arose. *See id.* § 74.401(a)(1).

Dr. Marable's report says nothing about his surgical qualifications. The report does not give any facts or information which would qualify him to opine on the standards of care for the type of surgery performed in this case, and he did not attach a CV to the report.[2] The report was written on a letterhead showing that he maintains board certification in neurology and psychiatry. In his report he makes it clear that he is basing his opinion on his expertise in neurology, not surgery: "As a board certified neurologist, my opinion is that Dr. Ducic violated the standards of care, as well as Dr. Scoresby, and as a result [Santillan's] damages are that of a right-sided hemiparesis with possibility of seizure foci in the future." The neurological expertise on which Dr. Marable relies does not involve surgery. *See* WILSON STEGEMAN, MEDICAL TERMS SIMPLIFIED 106 (1976) (noting that neurologists do not perform surgery); American Academy of Neurology, *Working with Your Doctor*, https://patients.aan.com/go/workingwithyourdoctor (last visited Apr. 18, 2011) ("Neurologists do not perform surgery."). Dr. Marable's report does not claim that he now performs or has in the past

[2] An amended report by Dr. Marable with a CV attached was filed on the day the defendants' motions to dismiss were heard. The CV was not considered by the trial court, but it did not show that Dr. Marable had any training or expertise in the type of surgery involved here.

performed surgery, much less this particular type of surgery. The report neither claims that he has knowledge of the standard of care for performing the surgery nor that he is qualified on the basis of training or experience to offer an expert opinion on those standards of care. *See* TEX. CIV. PRAC. & REM. CODE 74.401(a)(2), (3). The report does not say that he has participated in, observed, or even read about how to do "procedures of left mediomaxillectomy, excision of neoplasm of the maxilla, calvarial bone growth and reconstruction of maxilla and excision of tumor of pterygopalatin structures," which were the surgical procedures performed by Drs. Scoresby and Ducic.[3] In short, nothing in Dr. Marable's report raises an inference that he is a qualified expert as to this type of surgery, as prescribed by statute, and the report is all that was before the trial court in regard to his qualifications.

In *Ogletree v. Matthews*, we considered a defendant's contention that no statutory expert report had been filed because the report was by a radiologist who was not qualified to express an opinion on the standard of care for a urologist. 262 S.W.3d 316, 319 (Tex. 2007). The urologist defendant had performed a urethral catheterization during which the patient suffered bruising and bladder perforation. *Id.* at 317. We held that the radiologist's report was deficient, not absent. *Id.* at 320. But in *Ogletree* the radiologist was opining about whether the urologist should have performed the catheterization under flouroscopic guidance in order to avoid or more timely diagnose the perforation. *Id.* at 318. In that instance, the radiologist was opining about whether the urologist should have involved radiology-related devices and techniques (the specialty in which the expert

[3] Santillan's attorney represented during oral argument that he believed Dr. Marable's amended report contained statements by Dr. Marable that he had seen surgery of this type because he had treated patients after they had the surgery.

was qualified) in treating the patient and whether the failure to do so resulted in injury. The matter before us is different from *Ogletree* because there is no apparent closely related connection between the expertise involved in the specialty of neurology and the expertise involved in knowing how to perform, and performing, the surgery performed by Drs. Scoresby and Ducic.

In *McAllen Medical Center*, 275 S.W.3d 458, we considered the validity of a doctor's expert reports in negligent credentialing suits against the medical center. McAllen challenged the adequacy of the reports on the basis that the doctor was not qualified to express opinions as to the credentialing process. *Id.* at 462. We agreed with McAllen and held that the reports were inadequate:

> On this record, the plaintiffs have not established Dr. Brown's qualifications. "The standard of care for a hospital is what an ordinarily prudent hospital would do under the same or similar circumstances." Nothing in the record here shows how Dr. Brown is qualified to address this standard. Nor can we infer that she may have some knowledge or expertise that is not included in the record.
>
> Moreover, "a negligent credentialing claim involves a specialized standard of care" and "the health care industry has developed various guidelines to govern a hospital's credentialing process." Dr. Brown's reports contain no reference to any of those guidelines, or any indication that she has special knowledge, training, or experience regarding this process. Nor was Dr. Brown qualified merely because she is a physician; "given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question."

Id. at 463 (citations omitted).

The substance of the issue before us is similar to the issue we decided in *McAllen Medical Center*. Dr. Marable's report indicates that the defendants violated standards of care for the surgery and their negligent activity caused damages to Santillan. But Dr. Marable's report does not show

he was qualified under the statute to give such an expert opinion, nor did his opinion about the surgeons' decisions and actions during surgery involve his specialty except to the extent a physician with his specialty would have been involved in post-surgical care and possibly a decision to re-operate.

If Dr. Marable's report had in some manner demonstrated that he was qualified to render an opinion about the standard of care for the surgery involved, then I might agree that his conclusory statements about the defendants having negligently violated applicable standards of care and those negligent activities having caused damages were sufficient to support an extension of time. But the report sets out his opinion as a neurologist, not a physician with surgical expertise. The Legislature did not intend that an expert report could be by a doctor with no demonstrated or inferable experience and training in a practice area who reads medical records and writes a report containing the simplistic indictments in the report here: the defendants negligently lacerated the brain and further surgery was required. *See* TEX. CIV. PRAC. & REM. CODE § 74.401(a).

The Court says that "'there are constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'" ___ S.W.3d at ___ (quoting *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991)). I agree. But the statement does not fit here. First of all, the constitutionality of the statute is not challenged. Second, even if it were, the statutory requirement of a timely report by a qualified expert did not spring upon Santillan without warning. The requirement was in place before the surgery took place in January 2006, while suit was not filed against the defendant doctors and

Tarrant County Hospital until January 2008. Santillan had time to find a qualified expert to provide the report required to show his claim had merit, if he could find such an expert.

I would hold that failure to timely serve a report by an expert qualified under the statute is not merely a deficiency in an element of the report, it is a deficiency going to the question of whether the report is competent and is entitled to be given any weight. And I would hold that it is not an expert report and the filing of such a report supports inferences that a proper report by a qualified expert was not available, the claim lacks merit, and the claim should be dismissed.

I would reverse the judgment of the court of appeals and dismiss the case. *See Badiga v. Lopez*, 274 S.W.3d 681, 684-85 (Tex. 2009).

_____

Phil Johnson
Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0497

TYLER SCORESBY, M.D., PETITIONER,

v.

CATARINO SANTILLAN, INDIVIDUALLY AND AS NEXT FRIEND OF SAMUEL SANTILLAN, A MINOR, RESPONDENT

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

Argued November 9, 2010

JUSTICE WILLETT, concurring.

Since 2006 we have circled an issue both recurring and elusive: whether any document, even one that never accuses anyone of committing malpractice, suffices to warrant an unreviewable thirty-day extension under Section 74.351(c).[1] Until today, the issue was procedurally (and frustratingly) unreachable and thus unresolvable. Finally it is squarely presented, and I am confident today's decision will brighten the line between deficient-report cases (where an extension is discretionary) and no-report cases (where dismissal is mandatory).

* * *

[1] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c).

In a trio of concurrences in 2007,[2] 2008,[3] and 2009,[4] I focused on this nagging question: Is there a legal difference between filing nothing and filing something that amounts to nothing? That is, can a filing be so utterly lacking in the required statutory elements as to be no report at all, thus requiring dismissal? I join today's decision, which I read to confirm my consistently stated view: If a document bears zero resemblance to what the statute envisions—more to the point, *if it never asserts that anyone did anything wrong*—it cannot receive an extension.

In *Ogletree v. Matthews*, I described what I naively hoped would be "a rare bird in Texas legal practice"[5]—a plaintiff passing off as a bona fide report a document so facially absurd that, "no matter how charitably viewed, it simply cannot be deemed an 'expert report' at all, even a deficient one."[6] The deficient-or-no-report issue was not present in *Ogletree*, but I noticed it in another then-pending case, *Lewis v. Funderburk*, filed one week before *Ogletree*.[7]

In *Funderburk*, the Court confronted "an actual sighting of this rare bird, a species that in my view merits extinction, not conservation."[8] The "report" in *Funderburk* was a thank-you letter from one doctor to another—a letter that never once in any manner, way, shape, or form accused

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[2] *Ogletree v. Matthews*, 262 S.W.3d 316, 323 (Tex. 2007) (Willett, J., concurring).

[3] *Lewis v. Funderburk*, 253 S.W.3d 204, 210 (Tex. 2008) (Willett, J., concurring).

[4] *In re Watkins*, 279 S.W.3d 633, 636 (Tex. 2009) (Willett, J., concurring).

[5] 262 S.W.3d at 324 (Willett, J., concurring).

[6] *Id.* at 323.

[7] *Funderburk*, 253 S.W.3d at 209 (Willett, J., concurring).

[8] *Id.*

anyone of malpractice.[9] This thanks-for-your-referral letter was no more a medical-expert report "than a doctor-signed prescription or Christmas card would be," I wrote, adding, "If a report is missed, not just amiss, courts are remiss if they do not dismiss."[10] Alas, the defendant did not raise the "no report" issue, thus foreclosing a merits-based challenge.[11]

Finally came *In re Watkins*, where a plaintiff merely filed a narrative of treatment, something that omitted every statutorily required element and had no apparent relationship to a medical-malpractice case.[12] Like *Funderburk*, this case also had a procedural wrinkle that kept the marquee "no report" vs. "deficient report" issue out of reach.[13] But the rare-bird sightings, I noticed, were becoming more commonplace. And they would proliferate on our docket, I predicted, absent appellate enforcement of the statute's mandatory-dismissal provision[14]—or alternatively, this

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[9] The letter is reproduced in its entirety in Chief Justice Gray's dissent in the court of appeals. *See Lewis v. Funderburk*, 191 S.W.3d 756, 762–63 (Tex. App.—Waco 2006) (Gray, C.J., dissenting), *rev'd*, 253 S.W.3d 204 (Tex. 2008).

[10] *Funderburk*, 253 S.W.3d at 210–11 (Willett, J., concurring).

[11] *Id.* at 208 (majority opinion) ("We do not reach the question addressed in the concurring opinions here because it is not raised. As stated in his reply brief, '[Dr.] Lewis has made it abundantly clear that he is not appealing the trial court's [initial] order (no matter how vehemently he disagrees with it),' but instead is only appealing the order denying his second motion to dismiss.").

[12] 279 S.W.3d at 637 (Willett, J., concurring).

[13] *Id.* at 634 (majority opinion) ("The separate writings join issue again today on the question whether the item served was a deficient report or no report at all. But here it does not matter. If no report was served, interlocutory appeal was available, so mandamus is unnecessary. If the report was merely deficient, then an interlocutory appeal was prohibited, and granting mandamus to review it would subvert the Legislature's limit on such review.") (citations omitted).

[14] My sense is that such sightings have indeed grown more prevalent, making Chapter 74 defendants perhaps "identify with the seaside residents of Bodega Bay, besieged by avian attacks," *In re Watkins*, 279 S.W.3d at 637 n.13 (Willett, J., concurring) (citing THE BIRDS (Universal Pictures 1963)), or else those Arkansans who witnessed the so-called Aflockalypse last New Year's Eve, when thousands of blackbirds and starlings fell mysteriously from the skies.

Court's express adoption of a grace-period test that is indeed gracious, allowing extensions for most everything.

Under the Court's admittedly "lenient standard,"[15] the document must merely "[contain] a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit."[16] The line is forgiving but bright: The "report" must actually allege someone committed malpractice. The genesis of this elemental requirement is found in *Ogletree*, where the Court first indicated that the purported report must implicate a provider's conduct.[17] It merits emphasis, however, that today's standard, benevolent as it is, is not satisfied by any medical-related piece of paper; the bar is low but not subterranean. For example, the "report" in *Funderburk* would surely fail even today's lax test. The thank-you letter in that case never mentioned malpractice by anyone, even in the most implicit or glancing manner. Again, it is not merely that the letter omitted every required statutory element. Rather, it never even hinted at having any relationship to a malpractice case at all—no mention of a claim or a defendant, much less a claim that "an individual with expertise" indicates "has merit."[18]

* * *

[15] __ S.W.3d __, __.

[16] *Id.* at __.

[17] 262 S.W.3d at 321 ("Because *a report that implicated Dr. Ogletree's conduct* was served and the trial court granted an extension, the court of appeals could not reach the merits of the motion to dismiss.") (emphasis added).

[18] __ S.W.3d at __. The narrative in *In re Watkins* might also fail today's test, as it lacked every required statutory element, though unlike the referral letter in *Funderburk*, it at least mentions (twice) the defendant physician's name.

Based on my understanding of the Court's "minimal standard"[19]—requiring that someone with expertise express an opinion that the plaintiff has a meritorious malpractice claim against the defendant—I join the Court's decision.

Don R. Willett
Justice

OPINION DELIVERED: July 1, 2011

[19] *Id.* at __.

IN THE SUPREME COURT OF TEXAS

444444444444
NO. 09-0520
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IN RE COY REECE, RELATOR

444444444444444444444444444444444444444444444444444444
ON PETITION FOR WRIT OF MANDAMUS
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Argued October 12, 2010

JUSTICE GUZMAN delivered the opinion of the Court, joined by CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE LEHRMANN.

JUSTICE JOHNSON filed a dissenting opinion.

JUSTICE WILLETT filed a dissenting opinion, in which JUSTICE JOHNSON joined as to Part IV.

It is well-rooted in our jurisprudence that contempt is a broad and inherent power of a court. But, we have also recognized that despite the breadth and necessity of that power, it is a power that must be exercised with caution. Today, we decide as a matter of first impression whether a trial court may hold a litigant in contempt for perjury committed during a deposition. We are further presented with a question arising from the bifurcated nature of the Texas judiciary and our limited habeas jurisdiction: whether we should exercise our mandamus jurisdiction to provide a forum for a civil litigant who is deprived of liberty pursuant to a court's contempt order, and the Court of Criminal Appeals has declined to exercise its habeas jurisdiction.

In the underlying civil case, the relator was held in contempt and confined for perjuring himself during a deposition. The relator challenged his confinement by seeking a writ of habeas corpus in the Court of Criminal Appeals, but that court declined to exercise its jurisdiction citing, among other things, the civil nature of the case. The Court of Criminal Appeals directed the relator to pursue his remedies in this Court. Because we lack habeas jurisdiction in this case, the relator pursued relief by filing the instant petition for writ of mandamus to challenge his confinement.

We conclude the trial court abused its discretion by holding the relator in contempt for perjury occurring during a deposition, because such perjury did not obstruct the operation of the court. Further, because the underlying suit is civil in nature, and the Court of Criminal Appeals declined to grant the relator leave to file a habeas petition in that court, we hold the relator has no adequate remedy by appeal and therefore mandamus is the appropriate remedy to correct the trial court's abuse of discretion. We conditionally grant relief.

I. Background

The trial court found relator Coy Reece in contempt for perjuring himself during a 2008 deposition in the underlying civil suit brought by real party in interest SB International, Inc. (SB). Specifically, during the deposition, Reece denied knowledge of a codefendant's transactions in violation of a contract with SB,[1] but later admitted to deliberately making misstatements in the deposition.

[1] In the underlying suit, SB accuses Reece and codefendants of diverting business from SB by secretly convincing SB's customers to place orders directly with SB's suppliers, enabling Reece and his codefendants to keep all profits rather than sharing the profits with SB as required by their contracts.

After Reece's admission, SB filed a motion for sanctions, requesting costs and fees incurred in connection with its efforts to obtain Reece's compliance with discovery obligations, totaling $58,331.17.[2] SB secured a hearing on the motion for sanctions, but the trial court suspended the hearing and issued a show cause order to determine if Reece had committed criminal contempt. At the contempt hearing, Reece testified he had lied under oath during the deposition. On May 29, 2009, the court found beyond a reasonable doubt that Reece was guilty of "repeatedly, deliberately, and intentionally [lying] under oath" and that his lying under oath "was reasonably calculated to impede, embarrass, and/or obstruct the court in the discharge of its duties." The trial court found Reece in contempt and sentenced him to sixty-days confinement, with all but two weeks of the sentence suspended.

Reece filed a petition for writ of habeas corpus with the court of appeals, which granted his request for emergency relief, but that court later dismissed the habeas petition for want of jurisdiction.[3] Reece then sought habeas relief from the Court of Criminal Appeals, which denied his initial petition because he was not in custody. On June 24, 2009, after the trial court entered a revised commitment order and Reece was taken back into custody, Reece filed another habeas petition with the Court of Criminal Appeals. The Court of Criminal Appeals issued an order denying leave to file the habeas petition without prejudice, explaining that (1) the underlying case is civil in

[2] The motion for sanctions was a renewed motion. SB had previously moved for sanctions based on what it suspected was the defendants' lack of credibility, but it did not have proof of any of the defendants' misrepresentations or misstatements until Reece's admission. The trial court twice carried this motion.

[3] Texas courts of appeals only have habeas jurisdiction in situations where a relator's restraint of liberty arises from a violation of an order, judgment, or decree previously made by a court or judge in a civil case. TEX. GOV'T CODE § 22.221(d).

nature, (2) the Texas Supreme Court thus has jurisdiction to entertain Reece's petition, and (3) although the Court of Criminal Appeals possesses jurisdiction to act on Reece's petition, it declines to do so in order for Reece to pursue his remedies in the Texas Supreme Court. *In re Reece*, No. WR-72,199-02, slip op. at 2 (Tex. Crim. App. June 24, 2009) (per curiam) (not designated for publication) (order denying leave to file for habeas relief).

Reece filed a motion for reconsideration in the Court of Criminal Appeals, explaining that this Court lacks habeas jurisdiction because the contempt order does not emanate from a violation of an order, judgment, or decree. *See* TEX. GOV'T CODE § 22.002(e). Reece also filed the instant mandamus petition with this Court.[4] In his mandamus petition, Reece argues that (1) the show cause order is deficient and does not afford him due process, (2) even if the show cause order is not deficient, perjury committed during a deposition is not punishable by contempt, and (3) this Court possesses mandamus jurisdiction to review a contempt judgment involving confinement in a civil case when the Court of Criminal Appeals refuses to exercise its habeas jurisdiction. We granted Reece's motion for temporary relief and ordered him released on bond; he has served four days of his fourteen-day sentence.

To be entitled to mandamus relief, a relator must demonstrate (1) the trial court clearly abused its discretion, and (2) the relator has no adequate remedy by appeal. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 462 (Tex. 2008) (orig. proceeding). We begin by considering the first prong

[4] The motion for reconsideration is still pending at the Court of Criminal Appeals, presumably because that court is awaiting this Court's ruling on Reece's mandamus petition.

in our mandamus inquiry: whether the trial court clearly abused its discretion by holding Reece in contempt.

II. Clear Abuse of Discretion

The crux of Reece's arguments rests on his assertion that perjury committed during a deposition is not punishable by contempt, and therefore the trial court clearly abused its discretion by holding him in contempt for this conduct. In evaluating the merits of this assertion, we first examine the general contours of a court's contempt power in Texas and then decide whether the specific misconduct at issue in this case is punishable by contempt.

A. Contempt of Court in Texas

We have broadly defined contempt as "disobedience to or disrespect of a court by acting in opposition to its authority," *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding), and observed that contempt is a broad and inherent power of a court, *see Ex parte Browne*, 543 S.W.2d 82, 86 (Tex. 1976) (orig. proceeding). But, despite the breadth of a court's contempt power, we have warned it is a tool that should be exercised with caution. *Herring v. Houston Nat'l Exch. Bank*, 255 S.W. 1097, 1104 (Tex. 1923) (orig. proceeding); *accord Ex parte Taylor*, 807 S.W.2d 746, 748 (Tex. Crim. App. 1991). As the Court of Criminal Appeals has explained, "[c]ontempt is strong medicine"—the alleged contemnor's very liberty is often at stake—and so it should be used "only as a last resort." *Ex parte Pink*, 746 S.W.2d 758, 762 (Tex. Crim. App. 1988) (citing *Willson v. Johnston*, 404 S.W.2d 870, 873 (Tex. Civ. App.—Amarillo 1966, orig. proceeding)).

Contempt may occur in the presence of a court (direct contempt), or outside the court's presence (constructive contempt). *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979) (orig. proceeding). In direct contempt cases, the court must have direct knowledge of the behavior constituting contempt, *In re Bell*, 894 S.W.2d 119, 127 (Tex. Spec. Ct. Rev. 1995), while the converse is true in a case of constructive contempt. As a result of this distinction, the trial court in a direct contempt proceeding is entitled, in some instances, to conduct a summary proceeding in which the alleged contemnor is not entitled to notice and a hearing, *id.*,[5] while a constructive contemnor is always entitled to notice and a hearing in order to defend or explain the charges, *see Ex parte Gordon*, 584 S.W.2d at 688; *Ex parte Werblud*, 536 S.W.2d 542, 546 (Tex. 1976) (orig. proceeding) (observing that constructive contempt entitles the contemnor to more procedural safeguards than those afforded to direct contemnors); *see also Ex parte Krupps*, 712 S.W.2d 144, 147 (Tex. Crim. App. 1986) (explaining that constructive contempt adjudications satisfy due process if the contemnor is given notice, a hearing, and the opportunity to obtain an attorney).

Contempt is further classified into either civil or criminal contempt. In determining whether contempt is civil or criminal, it is necessary to examine the purpose behind the contempt order: civil contempt is "remedial and coercive in nature"—the contemnor carries the keys to the jail cell in his or her pocket since the confinement is conditioned on obedience with the court's order, *Ex parte*

[5] There are limits, however, to a trial court's ability to summarily hold someone in direct contempt. *See Ex parte Knable*, 818 S.W.2d 811, 813 (Tex. Crim. App. 1991) (observing that summary punishment for direct contempt flows from both the court's observation of the conduct and the exigency of the situation); *In re Bell*, 894 S.W.2d at 129 (same).

Werblud, 536 S.W.2d at 545,[6] while criminal contempt is punitive in nature—"the contemnor is being punished for some completed act which affronted the dignity and authority of the court," *id*. Thus, the distinction between criminal and civil contempt does not turn on whether the underlying litigation is civil or criminal, but rather on the nature of the court's punishment. *Ex parte Chambers*, 898 S.W.2d at 266 (Gonzalez, J., dissenting); *see generally Ex parte Werblud*, 536 S.W.2d at 545–46.

Here, Reece has admitted to lying outside the trial court's presence during a deposition, and the purpose of the contempt judgment was to punish him for this misdeed rather than to coerce him into complying with an order. The trial court therefore held Reece in constructive criminal contempt.

Reece first asserts that a court's constructive contempt power is limited to situations in which a person violates a court's order, and thus Reece cannot be held in contempt here because he did not violate any order. We disagree with this overly narrow definition. While our case law suggests constructive contempt generally arises from the violation of a court order,[7] there are situations where a party or attorney to a suit could engage in behavior that may warrant a judgment of constructive

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[6] *See also In re Coppock*, 277 S.W.3d 417, 419 (Tex. 2009) (orig. proceeding) (noting that civil contempt is the process by which a court can exert its authority to compel obedience with one of its orders).

[7] *See, e.g.*, *Ex parte Gonzalez*, 238 S.W. 635, 636 (Tex. 1922) (orig. proceeding) (the purpose of contempt is to either "compel due decorum and respect in its presence" (i.e., direct contempt) or compel "due obedience to its judgments, orders, and process" (i.e., constructive contempt)); *see also In re Bell*, 894 S.W.2d at 132 (Jones, J., concurring) (noting that while direct contempt rests on a direct affront to the authority or dignity of a court, regardless of the existence of an order or decree of that court, in constructive contempt, "'*but for* the order or decree violated, the allegedly contemptuous conduct would not constitute contempt'") (quoting Wendell A. Odom & Lang A. Baker, *Direct and Constructive Contempt, An Attempt to Clarify the Confused History of a Confused Distinction in the Jurisprudence of Texas*, 26 BAYLOR L. REV. 147, 150 (1974)).

contempt. For example, in *Ex parte Privitt*, a criminal defendant was found in contempt for attempting to bribe prospective jurors. 77 S.W.2d 663, 664 (Tex. Crim. App. 1934); *see also Ex parte Gordon*, 584 S.W.2d at 688 ("Constructive contempt . . . is contemptuous conduct outside the presence of the court, *such as* the failure or refusal to comply with a valid court order.") (emphasis added); *Ex parte Murphy*, 669 S.W.2d 320, 321 (Tex. Crim. App. 1983) (affirming judgment holding attorney in constructive contempt for failing to attend hearing and trial).[8] We decline Reece's invitation to limit the boundaries of a court's constructive contempt power in the manner he proposes.

Reece next argues that, even if constructive contempt is not limited to violations of court orders, it is at least confined to acts that obstruct, impede, or embarrass the court in the discharge of its duties. SB responds that although obstruction is a necessary element of contempt under federal law, it is not under Texas law.

At the outset, we acknowledge that federal statutory contempt standards are more stringent than Texas statutory standards. Under federal law, a court has discretion to punish for contempt only to the extent that a contemnor (1) engages in misbehavior in or near the court's presence so as to obstruct the administration of justice, (2) in the case of a court officer, engages in misbehavior during official transactions, or (3) disobeys or resists a court order. 18 U.S.C. § 401. In Texas, however, the statutory guidance is more sparse. Section 21.002 of the Government Code sets forth the only

[8] *But see Ex parte Arnold*, 503 S.W.2d 529, 533–34 (Tex. Crim. App. 1974) (suggesting constructive contempt is limited to violations of orders, but going on to state that constructive contempt would be available in a situation where a defamatory publication is calculated to interfere with the administration of justice).

statutory framework for contempt, broadly providing that a "court may punish for contempt." TEX. GOV'T CODE § 21.002(a).[9] Any restrictions on this authority are found in the common law.

Contrary to SB's assertion, however, it is firmly established in our common law that a court's ability to punish for contempt is not unfettered. Rather, an act must impede, embarrass, or obstruct the court in the discharge of its duties in order to constitute constructive contempt.[10] *See Ex parte Norton*, 191 S.W.2d 713, 714 (Tex. 1946) (orig. proceeding); *Ex parte Krupps*, 712 S.W.2d at 149; *In re Bell*, 894 S.W.2d at 127. "The essence of contempt is the contemn[o]r's conduct obstructs or tends to obstruct the proper administration of justice." *Lee v. State*, 799 S.W.2d 750, 752 (Tex. Crim. App. 1990); *see Ex parte Gibson*, 811 S.W.2d 594, 596 (Tex. Crim. App. 1991) (per curiam) (setting aside a judgment for contempt arising from an attorney sending an angry letter to the court of appeals because this act did not disrupt the court in the performance of its duties).[11] Because conduct must additionally obstruct the court in the performance of its duties to constitute

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[9] The statute also provides that punishment for criminal contempt may not exceed $500 or confinement for more than six months in jail, *see* TEX. GOV'T CODE § 21.002(b), but provides no similar limits for civil contempt, *see id.* § 21.002(e). The Federal Rules of Criminal Procedure provide more detailed instructions for the procedures a court must utilize in holding a person in criminal contempt. FED. R. CRIM. P. 42.

[10] Though not at issue in this case, obstruction includes the flagrant disregard of a court order. *See Ex parte Taylor*, 807 S.W.2d at 750. We have also previously observed that intentional disrespect is a proper alternative ground for contempt, *Ex parte Norton*, 191 S.W.2d at 714, though this ground is invariably limited to situations of direct contempt, such as when an attorney deliberately insults a judge during open proceedings.

[11] Though an unpublished opinion, it is helpful to compare *Ex parte Gibson* to the factual scenario of *In re Wightman*. No. 05-98-01697-CV, 1998 WL 877494, at *1 (Tex. App.—Dallas Dec. 17, 1998, orig. proceeding) (not designated for publication). In *In re Wightman*, a plaintiff's attorney was held in contempt for mailing a judge a letter not only questioning the judge's competence and corruptibility, but also threatening suit against the judge if he did not rule as the attorney wished. In *In re Wightman*, unlike *Ex parte Gibson*, the attorney's conduct obstructed court operations by attempting to coerce the judge to rule as he wished.

constructive contempt, we turn to whether a litigant's misstatements during a deposition amount to such an obstruction.

B. Perjury as Grounds for Contempt

This Court has not had occasion to determine whether perjury in a deposition obstructs a court's performance and thus constitutes contempt. Federal law includes obstruction as an element of contempt and is therefore instructive in our analysis.

It is axiomatic under federal law that perjury alone is not a ground for contempt unless the conduct also obstructs the court in the performance of its duties. *See In re Michael*, 326 U.S. 224, 228 (1945) (concluding that perjury alone does not constitute an obstruction justifying the exertion of a court's contempt power); *Ex parte Hudgings*, 249 U.S. 378, 383 (1919) (same); *Matusow v. United States*, 229 F.2d 335, 341 (5th Cir. 1956) ("It is well settled that proof of perjury alone will not sustain a conviction for contempt, but misbehavior constituting obstruction of the court must also be established."). Because a person's conduct must obstruct a court in the performance of its duties to constitute constructive contempt, we hold that perjury committed during a deposition does not alone constitute constructive contempt. To constitute constructive contempt, such perjury must actually obstruct a court in the performance of its duties.

SB argues that even if obstruction is a necessary element in a constructive contempt case, Reece's perjury met this element because it interfered with and prejudiced SB during the underlying litigation. While we agree that Reece's perjury undoubtedly may have caused SB difficulty in the discovery process, we cannot say, on this record, that it obstructed the court in the performance of its duties. Reece's behavior was reprehensible: he admitted to making intentional misstatements

during his deposition concerning core issues in the underlying litigation, behavior which inevitably caused his opponent delays and additional costs. *See Soliz v. State*, 97 S.W.3d 137, 142 (Tex. Crim. App. 2003) (observing that perjury, including in a deposition, has the effect of hindering the accurate resolution of legal proceedings). But we fail to see how Reece's misstatements during his deposition rose to the level of actually obstructing the court in the performance of its duties. Neither the contempt orders, nor the record, demonstrate this additional element of obstruction.

During discovery it is inevitable that inconsistencies will arise, but the function of our legal system is to ascertain the truth from within these inconsistencies. *See In re Michael*, 326 U.S. at 227–28. As the Supreme Court reminds us:

> All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses.

Id. We are loath to contemplate a system where litigants and their attorneys scour transcripts, searching for any misstatement for the sole purpose of accusing the opponent of contempt and ultimately securing the opponent's confinement. Authorizing contempt in a situation such as the instant one also begs several questions. Is any misstatement during a deposition punishable by contempt, no matter how immaterial? Or, as the Supreme Court has noted, could a court, in believing a witness testified falsely, punish the person for contempt with the purpose of compelling the person to testify in a manner the court considers truthful? *See Ex parte Hudgings*, 249 U.S. at 384. The Supreme Court has warned of "a potentiality of oppression and wrong" that could result

from authorizing a court to exercise its contempt power in a situation of stand-alone perjury. *See id.* If a court may hold a litigant in contempt for making misstatements during a deposition, the risk for the "oppression and wrong" the Supreme Court contemplated becomes too great. *See id.*

A trial court has other weapons in its arsenal to discourage perjury during a deposition without resorting to restraining a person's liberty in a contempt proceeding. First, a deposition is a discovery tool. As such, our rules make available the possibility of a range of sanctions for discovery abuse. *See* TEX. R. CIV. P. 215; *Bodnow Corp. v. City of Hondo*, 721 S.W.2d 839, 840 (Tex. 1986) (per curiam). Here, SB moved for sanctions in response to Reece's admission that he lied during the deposition; the trial court issued a show cause order concerning contempt on its own initiative. The trial court could have found that Reece abused the discovery process and imposed sanctions ranging from payment of SB's expenses caused by the failure, including attorney's fees, to rendering a default judgment. *See* TEX. R. CIV. P. 215.3, 215.2(b)(1)–(5), (8).

Second, a trial court has the option of referring a perjury allegation to the district attorney for criminal prosecution. *See Soliz*, 97 S.W.3d at 146 (noting the power of courts to prosecute perjury within the parties' depositions). As applicable to this case, a person commits the offense of perjury if, with intent to deceive, the person makes a false statement under oath; such an offense is punishable as a Class A misdemeanor. TEX. PENAL CODE § 37.02. The greater offense of aggravated perjury is available if the perjury is made in connection with an official proceeding and is material, punishable as a third degree felony. *Id.* § 37.03.[12]

[12] We also note that while confinement is a possibility in a criminal prosecution for perjury just as it is in a contempt proceeding, the procedural distinctions between the two are important: although a court is required to employ various procedural safeguards similar to those found in a criminal prosecution in a constructive criminal contempt case,

"Courts 'must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.'" *Ex parte Gibson*, 811 S.W.2d at 596 (quoting *Brown v. United States*, 356 U.S. 148, 153 (1958)). Because we hold that perjury committed during a deposition is only punishable by contempt if the act additionally obstructs the court in the performance of its duties, and that no such obstruction occurred here, the trial court's contempt orders against Reece are void.[13] Accordingly, we conclude the trial court abused its discretion by holding Reece in contempt.[14]

III. No Adequate Remedy by Appeal

We now turn to whether Reece has met the second element required for the exercise of our mandamus jurisdiction: the lack of an adequate remedy by appeal. The parties agree this Court lacks jurisdiction to grant habeas relief in this matter; we may only exercise our habeas jurisdiction when the contemnor's confinement is on account of a violation of an order, judgment, or decree previously made in a civil case. *See* TEX. GOV'T CODE § 22.002(e); TEX. CONST. art. V, § 3. The Court of

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these procedures do not duplicate a criminal trial. Namely, a person charged with criminal contempt is not entitled to a trial by jury. *See* TEX. GOV'T CODE § 21.002(b); *Ex parte Werblud*, 536 S.W.2d at 547 (observing that the Texas contempt statute authorizes punishment for not more than six months, falling within the definition of "petty" contempt that is exempted from the requirements of a jury trial); *see also Muniz v. Hoffman*, 422 U.S. 454, 475–76 (1975). On the other hand, under the criminal procedures of this state, a person charged with a crime is entitled to have the person's case tried by a jury. TEX. CODE CRIM. PROC. arts. 1.05, 1.12. When a trial court possesses the ability to hold a person in contempt and confine him for perjury, the alleged perjurer lacks any possibility of having his case tried before a jury, as would be his right in a criminal prosecution. *See Matusow*, 229 F.2d at 343 (observing that allowing contempt for perjury "permit[s] too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury").

[13] Of course, under our rules, a person may be held in contempt for failure to appear, to be sworn, or to answer questions during a deposition after being directed to do so by the trial court. TEX. R. CIV. P. 215.2. The federal rules contain a similar provision. *See* FED. R. CIV. P. 37(b)(1).

[14] Reece also argues the contempt judgments are void because the show cause order did not afford him due process. Because we hold the contempt judgments are void on other grounds, we need not reach this issue.

Criminal Appeals—and not this Court—is the state's appellate court afforded general original habeas jurisdiction.[15] *See* TEX. CONST. art. V, § 5; *Ex parte Thompson*, 273 S.W.3d 177, 181 (Tex. Crim. App. 2008). Reece contends that because the Court of Criminal Appeals refuses to exercise its habeas jurisdiction, he is left with no avenue to challenge his confinement. Under these circumstances, Reece argues this Court should exercise its mandamus jurisdiction and release him from confinement. SB counters that this Court lacks jurisdiction over Reece's mandamus petition because it is inherently a habeas petition styled as a mandamus petition: SB contends habeas is the only vehicle for challenging a person's confinement in a contempt case, and a party may not relabel a petition as one of mandamus to evade this requirement.

As stated above, the Texas Constitution grants this Court limited jurisdiction to review lower court decisions through the writ of habeas corpus. TEX. CONST. art. V, § 3(a) ("The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law . . . ."). Section 22.002(e) of the Government Code prescribes the reach of this Court's habeas jurisdiction:

> The supreme court or a justice of the supreme court, either in termtime or vacation, may issue a writ of habeas corpus when a person is restrained in his liberty *by virtue of an order, process, or commitment issued by a court or judge on account of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case*.

TEX. GOV'T CODE § 22.002(e) (emphasis added). Thus, if the basis of contempt is not a previous violation of a court order, this Court lacks jurisdiction to review a sentence of confinement by way

[15] As mentioned previously, the courts of appeals possess the same habeas jurisdiction as this Court. *See* TEX. GOV'T CODE § 22.221(d).

of writ of habeas corpus, even in a civil case. *Ex parte Morris*, 349 S.W.2d 99, 100 (Tex. 1961) (orig. proceeding).

We have previously indicated that a petition for writ of habeas corpus is generally the only method for attacking an order of contempt. *See Deramus v. Thornton*, 333 S.W.2d 824, 827 (Tex. 1960) (orig. proceeding) ("We have uniformly held in this State . . . that the validity of a contempt judgment can be attacked only collaterally and that by way of habeas corpus."). However, we also left open the possibility of circumstances "where the writ of habeas corpus would not be adequate and where mandamus would be the proper remedy." *Id.*; *see also Dunn v. Street*, 938 S.W.2d 33, 35 (Tex. 1997) (orig. proceeding) (per curiam) (citing *Deramus* and observing same).

On this basis, we have held mandamus is available to challenge an order of contempt not involving confinement given the unavailability of the Court's statutory habeas corpus jurisdiction in that circumstance. *See In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding) (per curiam) ("Contempt orders that do not involve confinement cannot be reviewed by writ of habeas corpus, and the only possible relief is a writ of mandamus."); *Rosser v. Squier*, 902 S.W.2d 962, 962 (Tex. 1995) (orig. proceeding) (per curiam) (entertaining the exercise of mandamus jurisdiction to determine whether fine-only contempt order was void, given the unavailability of the Court's habeas jurisdiction). But, today, we examine whether section 22.002 permits this Court to exercise its mandamus jurisdiction when the contemnor *is* confined.

Like SB, several courts of appeals have presumed mandamus is limited to the review of fine-only contempt orders, but not orders that result in confinement.[16] In determining whether this maxim is correct, we first consider the contours of both our own and the Court of Criminal Appeals' habeas jurisdiction, and then address our mandamus jurisdiction.

A. Habeas Corpus Jurisdiction

Before determining whether mandamus relief is available here, we note, and the parties do not dispute, that Reece may not pursue relief through the writ of habeas corpus in this Court. By virtue of the particularities of this state's bifurcated judicial system and the problems arising from the division of habeas corpus jurisdiction between the Court of Criminal Appeals and this Court, we lack habeas jurisdiction over this case. The Court of Criminal Appeals is the court of last resort for criminal matters, TEX. CONST. art. V, § 5, while this Court is the court of final review for civil matters, *id.* art. V, § 3. This framework, while at times imperfect, has been in place since 1876, and is the cornerstone of the bifurcated system of appeals in this state. *See State ex. rel. McNamara, Co. v. Clark*, 187 S.W. 760, 762 (Tex. Crim. App. 1915) ("Whether wisely or unwisely, the people of this state in framing their Constitution divided the jurisdiction of the civil and criminal courts of final

[16] *See In re M.J.*, 227 S.W.3d 786, 793 (Tex. App.—Dallas 2006, pet. denied [mand. denied]) (denying mandamus petition since contempt order involved confinement and observing that contempt order involving confinement must be challenged by writ of habeas corpus, while contempt orders not involving confinement are only reviewable through mandamus); *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 671 (Tex. App.—Fort Worth 2001, pet. denied) (en banc) ("A contempt judgment is reviewable only via a petition for writ of habeas corpus (if the contemnor is confined) or a petition for writ of mandamus (if no confinement is involved)."); *In re Zenergy, Inc.*, 968 S.W.2d 1, 11–12 (Tex. App.—Corpus Christi 1997, orig. proceeding) (concluding habeas—and not mandamus—is the proper vehicle for challenging contempt order assessing both fine and confinement).

resort, conferring on the Supreme Court final jurisdiction in all civil matters, and upon [the Court of Criminal Appeals] final jurisdiction in all criminal matters.").

The history of the two high courts' respective habeas jurisdictions is less than clear. Until 1876, this Court possessed the general power to issue writs of habeas corpus, as well as appellate jurisdiction over criminal law matters. TEX. CONST. of 1869, art. V, § 3; TEX. CONST. of 1866, art. IV, § 3; TEX. CONST. of 1861, art. IV, § 3; TEX. CONST. of 1845, art. IV, § 3; *see also Ex parte Jackson*, 252 S.W. 149, 150 (Tex. 1923) (orig. proceeding). But in 1876, the newly adopted Texas Constitution removed jurisdiction over criminal cases from this Court and conferred such jurisdiction to the newly created Court of Appeals, which was granted not only jurisdiction over criminal appeals and certain low-dollar civil appeals, but also general authority to issue writs of habeas corpus. TEX. CONST. art. V, § 3 (amended 1891 and 1980); *id.* § 6 (amended 1891); *see Ex parte Jackson*, 252 S.W. at 150.[17] At the same time, the Constitution revoked this Court's habeas corpus jurisdiction. TEX. CONST. art. V, § 3 (amended 1891 and 1980). In 1891, the Texas Constitution was amended to abolish the Court of Appeals and create the Court of Criminal Appeals, limiting the Court of Criminal Appeals' appellate jurisdiction to criminal law matters, and granting this Court habeas corpus jurisdiction once more, but only as "may be prescribed by law." Tex. S.J. Res. 16, 22nd Leg., R.S., 1891 Tex. Gen. Laws 199, 199–200 (amending TEX. CONST. art. V, §§ 3, 5). This constitutional provision has remained unchanged for over 100 years.

[17] For a general review of the history of original jurisdiction in our state's high courts, *see* George E. Dix, *Appellate Review by Mandamus and Prohibition in Texas Criminal Litigation*, 17 TEX. TECH L. REV. 75, 80–89 (1986).

Though the Texas Constitution granted this Court habeas jurisdiction as "may be prescribed by law," we lacked any actual statutory authority to grant writs of habeas corpus until 1905, when the Legislature enacted Senate Bill 36. This bill authorized us to exercise habeas jurisdiction, but only in situations where a contemnor's confinement is by virtue of a violation of an order in a civil case. Act of February 24, 1905, 29th Leg., R.S., ch. 17, § 1, 1905 Tex. Gen. Laws 20, 20 (current version at TEX. GOV'T CODE § 22.002(e)). This statute has remained substantively the same since its enactment and continues in effect today.

As a matter of historical context, the Legislature apparently enacted Senate Bill 36 to ensure the Court of Criminal Appeals determines criminal matters and this Court civil matters in habeas proceedings, in line with the bifurcated system contemplated in our Constitution. As the full report from the House Judiciary Committee states:

> Under the present status of the law all writs of habeas corpus sued out by a person who has been fined or imprisoned for a violation of any order, judgment or decree entered in a civil case, go upon appeal to the Court of Criminal Appeals instead of the Supreme Court. This often results in confusion and conflicts of decision authority. The object of the bill is to harmonize our judicial decisions and jurisdiction so that *all civil matters shall be determined by the Supreme Court and all criminal matters by the Court of Criminal Appeals.*

House Judiciary Comm., Full Report, Tex. S.B. 36, 29th Leg., R.S. (1905) (emphasis added). Over the past 100 years, contempt orders arising from civil cases concern a contemnor's violation of a court order the vast majority of the time. *See* James L. Branton, Note, Ex parte Morris, *349 S.W.2d 99 (Tex. 1961)*, 40 TEX. L. REV. 413, 416 (1962) (noting the rarity of contempt judgments arising from civil cases that do not involve violations of a prior court order and recommending a legislative amendment to grant this Court jurisdiction over all contempt matters arising from civil cases). The

Legislature, perhaps, simply did not envision contempt in civil cases extending beyond this limited scope, and so crafted this Court's habeas jurisdiction accordingly. Similarly, the Court of Criminal Appeals has suggested the same purpose behind Senate Bill 36: to confer original habeas corpus jurisdiction to this Court in all civil cases in order to better maintain the bifurcated court system contemplated in the Texas Constitution. *See Ex parte Wolf*, 34 S.W.2d 277, 278 (Tex. Crim. App. 1930) (noting that the Court of Criminal Appeals should avoid exercising habeas jurisdiction in civil cases due to the possibility of "find[ing] ourselves in conflict with the civil courts, and thus interfer[ing] with [the civil courts'] proper functioning and the administration of justice"); *Ex parte Zuccaro*, 162 S.W. 844, 845 (Tex. Crim. App. 1913) (observing that the Court of Criminal Appeals has jurisdiction in criminal cases and has no jurisdiction in "civil cases of any character").

Nonetheless, this Court has generally properly declined to exercise habeas jurisdiction in contempt cases arising from civil suits where a violation of a court order is not the grounds for contempt, as required by the plain language of section 22.002(e) and its predecessors.[18] But the

[18] For example, in a case somewhat similar to this one, this Court dismissed a contemnor's habeas petition for want of jurisdiction where the contemnor was found to have given false testimony during court proceedings. *Ex parte Morris*, 349 S.W.2d at 100–01. In doing so, we stated that the habeas statute limited the Court's habeas power to restraints brought about by an order or process of a court issued because of a violation of an order, judgment, or decree in a civil case. *Id.* We concluded that "[t]o say that [the habeas statute] empowers us to act whenever the restraint grows out of proceedings in a civil case, it would be necessary to disregard the [other language in the statute]." *Id. See also, e.g.*, *Ex parte Hofmayer*, 420 S.W.2d 137, 138 (Tex. 1967) (orig. proceeding) (declining to exercise habeas jurisdiction over juvenile's challenge of his confinement in boys' school and noting that the habeas statute did not allow us to do so even though the juvenile's case was civil); *Ex parte Jackson*, 252 S.W. at 149 (observing that the habeas statute "limits our power in the language just stated; that is, we may inquire only into the restraint brought about by an order or process of the court issued because of the violation of some order, judgment, or decree in a civil case"). *But see Ex parte Fisher*, 206 S.W.2d 1000, 1005 (Tex. 1947) (orig. proceeding) (upholding a contempt judgment arising from an attorney arguing with a judge in open court without discussion of the statutory limits on this Court's habeas jurisdiction); *Ex parte Calhoun*, 91 S.W.2d 1047, 1048–49 (Tex. 1936) (orig. proceeding) (dismissing habeas jurisdiction because of contemnor's lack of restraint, but finding Court possessed jurisdiction to consider petition in civil contempt case without discussion of whether the contemnor's acts—described by the trial court as "contemptible"—involved the violation of a court order).

result of this Court's limited habeas jurisdiction in civil cases has led to an occasional inefficient back-and-forth between the Court of Criminal Appeals and this Court on the issue of jurisdiction, as well as some difficulties when the underlying case is civil in nature, but falls inside the statutory loophole created by the particular division of habeas jurisdiction between the Court of Criminal Appeals and this Court.

Despite its general original habeas jurisdiction, the Court of Criminal Appeals has deferred to this Court in cases where the two courts clearly have concurrent habeas jurisdiction over civil matters.[19] And, as in the instant case, the Court of Criminal Appeals has preferred to defer to this Court in contempt proceedings arising from civil cases before exercising its habeas jurisdiction, even when it is less evident this Court possesses jurisdiction over the matter.[20] The issue we must resolve

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[19] *See, e.g.*, *Ex parte Jones*, 294 S.W.2d 111, 112 (Tex. Crim. App. 1956) (dismissing habeas petition arising from contempt proceeding due to contemnor's violation of a court order because "[t]he many questions raised appear to be civil in nature" and "this Court will exercise its jurisdiction only upon a showing that the civil courts have declined to pass upon the legality of the confinement of relators under the contempt decree"); *Ex parte Wolf*, 34 S.W.2d at 277–78 (declining to reinstate habeas petition since the contempt proceeding arose from the alleged contemnor's failure to observe an order in a civil case and directing the contemnor to this Court); *Ex parte Alderete*, 203 S.W. 763, 764 (Tex. Crim. App. 1918) ("[I]n a contempt proceeding where it appears that it grows out of an alleged failure to observe an order in a civil cause this court will refuse to grant the writ relegating the party to his remedy in the Supreme Court."); *Ex parte Zuccaro*, 162 S.W. at 845–46 (dismissing habeas petition without prejudice where relator was confined for violation of an injunction in a civil case because "it was intended that the Supreme Court should first be given an opportunity to take jurisdiction in such matters as are provided for by [the statute granting this Court habeas corpus jurisdiction]").

[20] For example, in *Ex parte Duncan*, the contemnor was held in contempt due to certain statements made in a brief in a civil case. 182 S.W. 313, 313 (Tex. Crim. App. 1916). Apparently the contemnor first filed a habeas petition with the Court of Criminal Appeals, which declined to exercise its jurisdiction until it was first presented to this Court as the Court of Criminal Appeals believed this Court had jurisdiction given the underlying case's civil nature. *Id.* One of the justices of this Court apparently endorsed on the contemnor's habeas petition that we lacked jurisdiction, but that the Court of Criminal Appeals did possess jurisdiction under the Constitution to issue the writ. *Id.* Only then did the Court of Criminal Appeals exercise its habeas jurisdiction and release the contemnor from confinement. *Id.* at 314. *See also Ex parte Cvengros*, 384 S.W.2d 881, 882 (Tex. Crim. App. 1964) (observing that "[a]s a general practice, where there is reason to believe that the application falls within the area of concurrent jurisdiction, the Court of Criminal

is whether mandamus is an appropriate remedy in a situation where we lack habeas jurisdiction to review a contempt order involving confinement arising from a civil case, but the Court of Criminal Appeals declines to exercise its general habeas jurisdiction.

B. Mandamus Jurisdiction

Unlike our habeas jurisdiction, our constitutional and statutory grant of mandamus jurisdiction is broad; this Court possesses general original jurisdiction to issue writs of mandamus. *See* TEX. CONST. art. V, § 3(a) (granting the Court power to issue writs of mandamus as specified by the Legislature); TEX. GOV'T CODE § 22.002(a) (permitting the Court to issue writs of mandamus "agreeable to the principles of law regulating those writs"). Because we ascertain nothing in the statutory grant of our mandamus jurisdiction precluding us from granting relief here, and further determine the circumstances of this case warrant the exercise of our mandamus jurisdiction, we conclude mandamus is an appropriate remedy for Reece's unlawful confinement.

First, the limit SB proposes on our mandamus jurisdiction is unwarranted as a matter of statutory construction. While a person *must* be confined for us to exercise our habeas jurisdiction, this is so only because the habeas statute specifically states that a person must be "restrained in his liberty" for that remedy to be available. *See* TEX. GOV'T CODE § 22.002(e). But the converse is not true: our statutory grant of habeas jurisdiction does not prohibit us from exercising mandamus jurisdiction when a person *is* confined. *See id.* Nor does the statute prescribing our mandamus jurisdiction state that mandamus relief is unavailable when a person is confined—instead, as noted

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Appeals will decline to act until the Supreme Court has decided whether the case comes within its restricted habeas corpus jurisdiction").

above, our statutory grant of mandamus jurisdiction is broad. *Id.* § 22.002(a). The Legislature could have included language designating habeas corpus as the exclusive remedy for unlawful confinement, but declined to do so. *Cf. MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 504 (Tex. 2010) (declining to limit a statutory designation as exclusive since the terms of the statute did not include such a limitation). We will not read such a limitation into the statutory scheme governing our mandamus jurisdiction.

Further, mandamus is an "extraordinary remedy, not issued as a matter of right, but at the discretion of the court." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding). "Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss . . . ." *Id.* at 136. Mandamus is a remedy not restricted by "rigid rules" that are "necessarily inconsistent with the flexibility that is the remedy's principle virtue." *Id.*; *see also In re McAllen*, 275 S.W.3d at 464 (noting that whether a clear abuse of discretion can be remedied on appeal "depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories"). And mandamus is a proper vehicle for this Court to correct blatant injustice that otherwise would elude review by the appellate courts. *See In re Prudential*, 148 S.W.3d at 138.

It is difficult to imagine a circumstance more compelling for the exercise of our mandamus jurisdiction than a situation where the relator's liberty interests are threatened without a remaining procedural safeguard for challenging his confinement. Certainly, a result of our inaction is a potential waste of judicial and litigant resources as the case travels between this Court and the Court of Criminal Appeals, with neither court exercising jurisdiction to consider the merits of Reece's

petition. But the further consequence of Reece's lack of an adequate appellate remedy in this matter is his unlawful confinement: the relator's very liberty interests are at stake with no other procedure to challenge his confinement in our state courts.

Finally, because mandamus is expressly reserved for situations where a relator lacks an adequate remedy by appeal, we have employed it in other situations where, as here, a statutory gap prevents the relator from obtaining adequate appellate relief. For example, before the Legislature enacted section 51.016 of the Civil Practice and Remedies Code, a party improperly denied the benefit of arbitration under the Federal Arbitration Act had no right to interlocutory appeal in state courts. *See Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding). The Court therefore held mandamus was the appropriate remedy in wrongful denials of motions to compel arbitration under the FAA since otherwise the very subject of the appeal—the right to arbitrate, as contracted for by the parties—would be rendered illusory. *Id.* Eventually, of course, the Legislature closed this gap by enacting a law authorizing interlocutory appeals under the FAA in Texas courts. *See* TEX. CIV. PRAC. & REM. CODE § 51.016.[21]

More relevant to the instant dispute, until 1978, the Court of Criminal Appeals lacked jurisdiction to grant writs of mandamus except as necessary to protect its own judgments. *See* TEX. CONST. art. V, § 5 (amended 1977 and 1980); *Thomas v. Stevenson*, 561 S.W.2d 845, 847 (Tex.

[21] Similarly, we have exercised our mandamus jurisdiction in situations where a trial court improperly denies a motion to dismiss premised on an inadequate expert report under former article 4590i. *See* TEX. REV. CIV. STAT. art. 4590i (repealed 2003). Article 4590i did not provide for interlocutory appeal of such a denial, but in *In re McAllen* we held mandamus was available to contest an improper denial of a challenge to an inadequate expert report to fill this statutory gap. *In re McAllen*, 275 S.W.3d at 461–62. The Legislature, in enacting Texas Civil Practice and Remedies Code section 74.351, subsequently allowed for interlocutory appeal in such a situation. *See* TEX. CIV. PRAC. & REM. CODE § 74.351; *see also id.* § 51.014.

Crim. App. 1978). To fill this jurisdictional gap, this Court occasionally entertained mandamus petitions filed by criminal defendants, primarily involving requests to compel courts to begin trial in accordance with the defendant's right to a speedy trial. *See, e.g.*, *Fariss v. Tipps*, 463 S.W.2d 176, 180–81 (Tex. 1971) (orig. proceeding) (observing that this Court has mandamus jurisdiction in civil and criminal cases and defendant seeking speedy trial has no adequate remedy by appeal); *Lawrence v. State*, 412 S.W.2d 40, 40 (Tex. 1967) (orig. proceeding) (per curiam); *Cooper v. State*, 400 S.W.2d 890, 890–92 (Tex. 1966) (orig. proceeding); *Wilson v. Bowman*, 381 S.W.2d 320, 321 (Tex. 1964) (orig. proceeding). In 1978, the people amended the Texas Constitution, granting the Court of Criminal Appeals mandamus jurisdiction over all criminal law matters. *See* Tex. S.J. Res. 18, 65th Leg., R.S., 1977 Tex. Gen. Laws 3359, 3359–60; *Stevenson*, 561 S.W.2d at 846–47.[22] This Court has since limited its exercise of mandamus review to civil matters. *See Stevenson*, 561 S.W.2d at 847.[23]

Our Constitution grants the Court of Criminal Appeals jurisdiction over criminal matters and this Court jurisdiction over civil cases. TEX. CONST. art. V, §§ 3, 5. As it has done historically, the Court of Criminal Appeals prudently deferred to this Court because the underlying case is civil in nature. But, by virtue of a statutory limitation, we lack jurisdiction to issue a writ of habeas corpus

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[22] *See generally* 6 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, MCDONALD & CARLSON TEXAS CIVIL PRACTICE § 35:2 (2d ed. 2010).

[23] Indeed, in *Stevenson*, the petitioner initially filed his mandamus petition with this Court, but we transferred the case to the Court of Criminal Appeals so that they could determine if they had jurisdiction to issue writs of mandamus to compel speedy trials concurrently with this Court. *Stevenson*, 561 S.W.2d at 846. Once the Court of Criminal Appeals determined it had concurrent jurisdiction to issue writs of mandamus in these cases, this Court discontinued its practice of hearing these sorts of petitions. *See* Dix, *supra* note 17, at 87–88.

to discharge the relator from unlawful confinement in this civil case. The constitutional and statutory contours of our mandamus jurisdiction, however, are not so limited. Because the Court of Criminal Appeals declines to exercise jurisdiction over this civil case, Reece is left without a procedure for challenging his confinement in our state appellate courts. Accordingly, we hold Reece has no adequate remedy by appeal. We note that our holding is limited to situations where the underlying dispute is civil in nature, and the Court of Criminal Appeals declines to exercise its habeas jurisdiction. A relator does not lack an adequate remedy by appeal when the Court of Criminal Appeals entertains the merits of a habeas petition but dismisses with prejudice or denies relief. In other words, a relator is not entitled to a "second bite at the apple" by virtue of our holding.

C. Response to Dissent

In his dissent, Justice Willett argues that an "express statutory prohibition" precludes our exercise of mandamus jurisdiction here. Justice Willett points to the unavailability of our habeas jurisdiction in this matter as a "sign" that we are not meant to hear appeals of any sort—including by way of mandamus—arising from contempt orders not involving a violation of a previous court order. As such, Justice Willett reads the statute permitting us to issue writs of mandamus "agreeable to the principles of law regulating those writs," TEX. GOV'T CODE § 22.002(a), as circumscribed by the limitations in our habeas statute. Yet, the plain text of the statute governing our original proceeding jurisdiction does not comport with Justice Willett's interpretation. As discussed above, neither our statutory grant of habeas or mandamus jurisdiction prohibits us from exercising mandamus jurisdiction when a person is confined, and we decline to read such a limitation into the language of the statute.

Despite his statements to the contrary, the rule Justice Willett's dissent attempts to establish is that express legislative permission is required for us to exercise our mandamus jurisdiction. Under his reasoning, if a statute grants jurisdiction in only a limited circumstance, it must follow that we are forbidden from exercising our mandamus jurisdiction in a situation falling outside the parameters of that limitation. The weakness inherent in this argument is obvious in the context of arbitration. We could have interpreted the Legislature's specific allowance for interlocutory appeal under the Texas Arbitration Act in the absence of a law allowing for the same under the Federal Arbitration Act as a "sign" that the Legislature did not intend for any appeal, including by mandamus, under the FAA. But we wisely declined to limit our mandamus jurisdiction so narrowly.

Further, a review of our precedent reveals its support for our—and not Justice Willett's—interpretation of our mandamus jurisdiction. We decline to overrule *Deramus* because the general proposition in *Deramus* is still valid. In *Deramus*, we stated that a petition for writ of habeas corpus was the only manner for challenging a contempt judgment, but left open the possibility of the availability of mandamus in a situation where habeas would prove inadequate. *See Deramus*, 333 S.W.2d at 827. Seizing on that exception, we have exercised our mandamus jurisdiction in situations of fine-only contempt where, under the constraints of the habeas statute, we lacked habeas jurisdiction. *See Rosser*, 902 S.W.2d at 962; *In re Long*, 984 S.W.2d at 625; TEX. GOV'T CODE § 22.002(e) (authorizing this Court to issue a writ of habeas corpus "when a person is *restrained in his liberty*" by virtue of violating a previous order) (emphasis added). Here, as in *Rosser* and *In re Long*, the habeas statute does not permit our exercise of habeas jurisdiction, but it does not follow that we may not exercise our broader mandamus jurisdiction. In *Rosser* and *In re*

Long, we declined to read the limitations in our habeas statute as a legislative prohibition against our exercise of mandamus jurisdiction. We decline to do so here as well.

We finally observe that whatever one's view of our bifurcated judicial system, it is the system established by the people of this state. The bifurcated system, pursuant to our Constitution, establishes this Court as the court of final resort for civil matters, *see* TEX. CONST. art. V, § 3, and the Court of Criminal Appeals as the court of final resort for criminal matters, *see id.* art. V, § 5. The instant case—a business dispute in which a party to the case was held in contempt for lying during a deposition—is unquestionably civil, and not criminal, in nature. A case of criminal contempt does not depend on whether the underlying case is civil or criminal, *see generally Ex parte Werblud*, 536 S.W.2d at 545–46, nor require the same procedural safeguards as those required in a criminal case, *see id.* at 547 (noting that contempt statute is exempted from requirements of a jury trial). Under our bifurcated system, it is legal, as well as logical, for this Court to exercise its mandamus jurisdiction in a civil case where the Court of Criminal Appeals has refused to exercise its jurisdiction and has deferred to this Court. While a man's very liberty is at stake, Justice Willett focuses on policy issues concerning our bifurcated judicial system that are beyond the purview of the case before us today and are best left to the people of Texas and their elected legislative officials. The people have entrusted this Court with expertise over civil matters and our sister court with the same over criminal matters. We honor this decision in exercising our jurisdiction over this civil case today.

IV. Conclusion

Because the trial court abused its discretion in confining Reece for criminal contempt for acts of perjury occurring during a deposition and Reece has no adequate remedy by appeal, we

conditionally grant the writ of mandamus and order the trial court to vacate the May 29, 2009, and June 24, 2009, contempt judgments against Reece. We are confident the trial court will comply, and our writ will issue only if it does not.

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Eva M. Guzman
Justice

OPINION DELIVERED: May 27, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0520

IN RE COY REECE, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE JOHNSON, dissenting.

The Court of Criminal Appeals has general original habeas jurisdiction, TEX. CONST. art. V, § 5; *Ex parte Thompson*, 273 S.W.3d 177, 181 (Tex. Crim. App. 2008), while this Court's habeas jurisdiction is limited. Our habeas jurisdiction exists in matters where a contemnor is confined because he or she violated "an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case." TEX. GOV'T CODE § 22.002(e).

Although our habeas jurisdiction is limited, our mandamus jurisdiction is broad. *See* TEX. CONST. art. V, § 3(a); TEX. GOV'T CODE § 22.002(a). And for the reasons the Court sets out, I agree that our broad mandamus jurisdiction encompasses the matters set out in Reece's petition. Nevertheless, and as SB International, Inc. argues, Reece substantively petitions this Court for habeas relief. Under the circumstances I would refrain from granting mandamus relief for the reasons Justice Willett sets out in part IV of his dissent, which I join.

Because I disagree that we should grant mandamus relief, I respectfully dissent.

Phil Johnson
Justice

OPINION DELIVERED: May 27, 2011

IN THE SUPREME COURT OF TEXAS

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NO. 09-0520
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IN RE COY REECE, RELATOR

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ON PETITION FOR WRIT OF MANDAMUS
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JUSTICE WILLETT, joined by JUSTICE JOHNSON as to Part IV, dissenting.

Intrepidity at the Alamo; entering the United States as the Republic of Texas; fifty-eight Texas-born recipients of the Medal of Honor; Bob Wills and George Strait; Nolan Ryan and Babe Didrikson Zaharias; five Super Bowl titles (sadly none this millennium); Dr Pepper and the "little creamery" in Brenham; deep-fried anything at the State Fair; a spirit of daring and rugged independence—the sources of Lone Star pride are innumerable.

Unfortunately, the juris-imprudent design of the Texas judiciary does not make the list. Today's case is a byproduct of that recondite web, sparking a game of jurisdictional hot potato between us and our constitutional twin, the Court of Criminal Appeals. Truth be told—and this particular truth has been told repeatedly—the State's entire Rube Goldberg-designed judicial "system" is beyond piecemeal repair; it should be scrapped and rebuilt top-to-bottom. That said, and however labyrinthine the jurisdictional maze often is, the answer in today's case seems straightforward: This dispute belongs with our sister court. It arrived on our doorstep because of a simple yet pivotal misunderstanding: the Court of Criminal Appeals' mistaken belief that we have

unfettered habeas jurisdiction and are thus equally able to grant habeas relief.[1] We do not,[2] and the Court today is unified 9-0 on that point (though the Court does not explicitly mention our sister court's misinterpretation). We part ways 7-2 on whether we should make lemons out of jurisdictional lemonade by wiring around our habeas limitation and relabeling the relief sought "mandamus."

The mandamus remedy turns on two findings: legality and practicality.[3] On both scores, I would return this case to the court that conceded two years ago that it "does have the authority to act in this case."[4] Statute and precedent strongly suggest we *cannot* hear this case, but even if we *can*, practical considerations advise we *should not*. Neither refusing nor resisting, the Court today yanks tighter a Gordian knot that should be cut clean through. I respectfully dissent, and, for good measure, exhort the Legislature to propose a judiciary worthy of Texas.

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[1] *See In re Reece*, No. WR-72,199-02, slip op. at 2 (Tex. Crim. App. June 29, 2009) (per curiam) (not designated for publication) ("Although this Court does have the authority to act in this case pursuant to Article 5, § 5, of the Texas Constitution, we decline to do so. Effective 1981, Article 5, § 3(a) of the Texas Constitution was amended to give the Texas Supreme Court and the Justices thereof the authority to issue writs of habeas corpus."). The Court of Criminal Appeals also offers the civil/criminal distinction as a basis for deference, *id.*, an issue I address below. *See infra* IV.D. Even so, it is difficult to imagine our sister court lateraling to us had it realized we lack habeas jurisdiction to hear in this case.

[2] *See* TEX. CONST. art. V, § 3(a) (limiting the habeas jurisdiction of the Texas Supreme Court).

[3] Though it is discussed explicitly throughout this opinion, the legality prong has often been implicit: As a general rule, the Legislature determines our jurisdiction. *See* TEX. GOV'T CODE § 22.001(a). This principle applies no less strongly to the issuance of mandamus. The practicality prong—namely, that the requesting party must show it has "no adequate remedy by appeal"—has received more judicial attention. *See, e.g.*, *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding) ("The operative word, 'adequate', has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts.").

[4] *In re Reece*, No. WR-72,199-02, at 2 ("Although this Court does have the authority to act in this case pursuant to Article 5, § 5, of the Texas Constitution, we decline to do so.").

I. This Case Illustrates (Again) Our Abstruse Judicial "System."

"An artificial and arbitrary system, as age creeps on, gets hardened arteries."[5]

The history of Texas courts is indeed a sclerotic one. But all's well that ends well, and even a helter-skelter judicial structure might be worth the strife if it still managed, despite itself, to produce efficiency. Ours hasn't.

A. We Have Arrived Here Through Historical Happenstance.

Like many things of Texas lore, the story of our court system begins with its size. During the colonization of Texas, judicial power was vested in the "municipal alcalde, an elected official who held executive, legislative and judicial duties,"[6] and Stephen F. Austin was himself the court of last resort.[7] After winning our independence, "Texas began with a unified judiciary system,"[8] and both the Republic of Texas and the early State had a single high court with both civil and criminal

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[5] Rhodes S. Baker, *The Bar Association's Legislative Program—Judicial Control of Procedure*, 2 TEX. L. REV. 422, 429–30 (1924).

[6] Adrienne Sonder, Tarlton Law Library, Jamail Center for Legal Research, *Timeline of the Texas Supreme Court and Court of Criminal Appeals* (Nov. 2006), http://tarlton.law.utexas.edu/justices/timeline.html [hereinafter "Sonder, *Timeline*"].

[7] TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT ONE, THE TEXAS JUDICIARY: A STRUCTURAL-FUNCTIONAL OVERVIEW, at xiii and 2 (1990) (citation omitted) [hereinafter "TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT I"].

[8] Joe R. Greenhill, *The Constitutional Amendment Giving Criminal Jurisdiction to the Texas Courts of Civil Appeals and Recognizing the Inherent Power of the Texas Supreme Court*, 33 TEX. TECH L. REV. 377, 378 (2002) (citation omitted) [hereinafter "Greenhill, *The Constitutional Amendment*"].

jurisdiction.[9] From statehood through Reconstruction, every appeal from a trial court went directly to the state's Supreme Court, which at varying times had three or five members.[10]

"Forty years and five constitutions later,"[11] and responding to this Court's congested docket, the Constitution of 1876 created a three-judge court of appeals for criminal matters and limited this Court's jurisdiction to civil matters.[12] The court of appeals, which despite its name was not an intermediate court, had final say in criminal appeals, and could also hear civil matters involving less than $1,000.[13] The flow of cases continued unabated, however, and in 1879, the Legislature fashioned another judicial Band-Aid with the creation of a Commission of Appeals.[14] But even doubling the number of commissioners provided scant docket relief, and in 1891 (just fifteen years after the Constitution was adopted), the citizens of Texas tried another approach, a massive overhaul that scrapped the entire Judiciary Article of the Constitution.[15] This kitchen-sink reform abolished the court of appeals and Commission of Appeals, gave criminal jurisdiction to a new Court of

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[9] *Id*.

[10] James T. Worthen, *The Organizational & Structural Development of Intermediate Appellate Courts in Texas, 1892–2003*, 46 S. TEX. L. REV. 33, 34 (2004) (citation omitted) [hereinafter "Worthen, *The Organizational & Structural Development*"]; Leila Clark Wynn, *A History of Civil Courts in Texas*, 60 SW. HIST. Q. 1, 4–5 (1956).

[11] TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT I, at xiii.

[12] *Id.* This was itself "the sixth judicial structure implemented in Texas within 40 years." H. COMM. ON THE JUDICIARY, A PROPOSAL FOR THE COMPREHENSIVE REVISION OF ARTICLE V, 63rd Leg., R.S., at 3 (1974) [hereinafter "H. COMM. ON THE JUDICIARY, A PROPOSAL"].

[13] Worthen, *The Organizational & Structural Development*, at 34 (citation omitted).

[14] *Id.* (citation omitted).

[15] *Id.* at 34–35 (citation omitted).

Criminal Appeals, and created three new intermediate courts of civil appeals[16] (in Galveston, Forth Worth, and Austin).[17] Our Court would maintain its civil-only docket and focus chiefly on resolving conflicts in the courts of appeals.[18]

The Legislature was also charged with the task of dividing the state into judicial districts, each with its own court of civil appeals.[19] In 1913, this Court's jurisdiction grew to include all cases from the courts of civil appeals,[20] and in 1980, a constitutional amendment bestowed criminal jurisdiction on the renamed courts of appeal.[21] Efforts to create a separate body of criminal-only intermediate courts were defeated.[22] So while the two highest courts in the state maintain specialized dockets, the feeder courts beneath them do not.

Generally speaking, under our bifurcated structure, litigants file civil matters in the Supreme Court and criminal matters in the Court of Criminal Appeals. People frequently get misdirected, though—lawyers included—and the courts' front offices regularly redirect lost litigants to the

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[16] TEX. CONST. art. V, § 4–5 (amended 1891).

[17] Second Court of Appeals, *History and Jurisdiction*, TEXAS COURTS ONLINE, http://www.2ndcoa.courts.state.tx.us/court/history.asp (last updated Sept. 2, 2008).

[18] TEX. CONST. art. V § 3 (amended 1891).

[19] *Id.* § 6.

[20] Act of March 26, 1913, 33rd Leg., R.S., ch. 55, § 1, 1913 Tex. Gen. Laws 107. Incidentally, the Commission of Appeals, created in 1879 and eliminated in 1891, was reestablished in 1918 to ease this Court's still-crowded docket, and in 1925, the Legislature created a two-person Commission of Appeals to help the Court of Criminal Appeals. These two commissioners were folded into the formal Court of Criminal Appeals when its membership grew from three to five in 1966. But just three years later, in 1969, the Commission was reestablished to help the Court of Criminal Appeals meet its workload. *See* Sonder, *Timeline*.

[21] *See* Worthen, *The Organizational & Structural Development*, at 39–40 (citations omitted).

[22] *See id.* at 40–41 (citations omitted).

"other" high court. In fact, this Court's clerk's office has a stock letter it sends—every single day—to lost litigants, steering them to our sister court and noting that the Supreme Court "does not have jurisdiction over criminal cases" and "does not review the decisions of the Court of Criminal Appeals."[23]

Our dual high courts are largely meant to be co-equals—constitutional twins. This is anomalous among court systems, even in the only other two-court state, Oklahoma. Like Texas, Oklahoma has a Supreme Court that hears civil appeals and a Court of Criminal Appeals that hears criminal appeals.[24] But there are two key differences. First, the Oklahoma Court of Criminal Appeals is "subject to the power of the Legislature to change or abolish."[25] Second, the Oklahoma Supreme Court is truly supreme; if there is a jurisdictional clash, the Supreme Court "shall determine which court has jurisdiction and such determination shall be final."[26] In other words, there are two states in the nation with two courts of last resort. But only one state—the Lone Star State—has a non-supreme Supreme Court.[27]

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[23] Letter from Blake A. Hawthorne, Clerk of the Supreme Court of Texas (May 9, 2011) (citing TEX. GOV'T CODE §§ 22.001–.002) (on file in the clerk's office of the Supreme Court of Texas).

[24] The Supreme Court of the State of Oklahoma, *Bringing a case before the Appellate Courts*, http://www.oscn.net./oscn/schome/appelcase.htm (last visited Mar. 28, 2011). There are 52 state courts of last resort (50 state courts, the criminal courts in Texas and Oklahoma), plus the District of Columbia Court of Appeals). National Center for State Courts, *Many states outpace U.S. Supreme Court on gender diversity* (Apr. 21, 2010), http://www.ncsc.org/newsroom/backgrounder/2010/gender-diversity.aspx.

[25] OKLA. CONST. art. VII, § 1.

[26] *Id.* § 4.

[27] Nearly one hundred years ago, the Alabama Supreme Court explained why this might be a bad idea:

> There must be in every state a court capable of exercising ultimate judicial power. In this state that is the Supreme Court. If it were otherwise, there would be no organ of government capable of

B. Our Fragmented Structure is Much Maligned, and Deservedly So.

The convoluted make-up of the Texas judiciary—"one of the most complex in the United States, if not the world"[28]—does not lack for critics, from the litigants who endure it, the lawyers who navigate it, and the judges who lead it. In 1991, this Court's appointed Citizens' Commission on the Texas Judicial System reached a stark but unsurprising conclusion: "Texas has no uniform judicial framework to guarantee the just, prompt and efficient disposition of a litigant's complaint. . . . With the passage of time, the organization of the courts has become more, not less cumbersome."[29] That critique mirrors one that same year from the Texas Research League ("TRL"), which former Chief Justice Phillips had asked to scrutinize our judicial structure and suggest concrete improvements. The system's mind-numbing complexity led TRL to lament in May 1991 that the Texas judiciary was in "disarray" and "ill-equipped to meet the needs of the 21st century," adding, "Texas does not have a court system in the real sense of the word."[30] Indeed, "assigning the

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> authoritatively settling judicial questions; and there must be such an organ there can be no doubt, for the judicial department is an independent one, and the element of sovereignty delegated to that department must, as in the case of the executive and legislative, reside, in its last and highest form, in one tribunal, one officer, or body of officers.

Williams v. Louisville & Nashville R.R., 58 So. 315, 316 (Ala. 1912).

[28] GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 367 (1977).

[29] CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, REPORT AND RECOMMENDATIONS: INTO THE TWENTY-FIRST CENTURY 3 (1993) [hereinafter CITIZENS' COMMISSION, REPORT AND RECOMMENDATIONS].

[30] TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT TWO, THE TEXAS JUDICIARY: A PROPOSAL FOR STRUCTURAL-FUNCTIONAL REFORM, at iii, xi (1991) (emphasis omitted) [hereinafter "TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT II"].

appellation 'system' to our state courts might require a long stretch of the imagination."[31] Nothing has improved, and interestingly, the most strenuous critics, it seems, are those who know the system best: the judges.

First, trial courts. "Texas has some 3,241 trial courts within its 268,580 square miles."[32] The complexity at the lower-court level is dizzying, as the attached chart (meant to simplify things) illustrates.[33] In his 2007 State of the Judiciary address, CHIEF JUSTICE JEFFERSON urged the Legislature to modernize our patchwork trial-court system, calling on lawmakers to start "examining whether Texans are best served by the current (and often redundant) complex system of county courts at law, district courts and statutory probate courts, or whether streamlining some of these courts may create a simpler system."[34] Three members of this Court recently branded our jurisdictional mishmash "unimaginably abstruse," a tangle that has "gone from elaborate to Byzantine."[35] A former member of this Court politely called our system "the opposite of a

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[31] TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT I, at 5.

[32] *In re United Servs. Auto Ass'n*, 307 S.W.3d 299, 302 (Tex. 2010) (citations omitted).

[33] Texas Courts Online, *Court Structure of Texas* (Mar. 1, 2001), http://www.courts.state.tx.us/.

[34] Wallace B. Jefferson, The State of the Judiciary in Texas: Presented to the 80th Legislature by Chief Justice Wallace B. Jefferson (Feb. 20, 2007), *in* 70 TEX. B.J. 314, 316 (2007) [hereinafter "Jefferson, The State of the Judiciary"].

[35] *Sultan v. Mathew*, 178 S.W.3d 747, 753 (Tex. 2005) (Hecht, J., dissenting) (describing the jurisdictional system in a case regarding jurisdiction over claims originally filed in small claims court).

coordinated judiciary."[36] One former state appellate judge bemoaned our "maze of jurisdiction and procedure" that "[o]nly a puzzle-maker could appreciate."[37]

In 1993, the Court-appointed Citizens' Commission on the Texas Judicial System commented that "[n]o one person understands or can hope to understand all the nuances and intricacies of Texas' thousands of trial courts."[38] Yet another report bemoaned that "current judicial districts are so fundamentally unfair and so irrationally configured as to shock the conscience of all Texans who familiarize themselves with the present system."[39] This long-derided irrationality persists.

As one might imagine, our bizarre structure has generated some fanciful factoids—practical problems and offbeat jurisdictional oddities that clog the everyday inner workings of our judiciary. Consider:

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[36] Thomas M. Reavley, *Court Improvement: The Texas Scene*, 4 TEX. TECH L. REV. 269, 270 (1973) (citations omitted).

[37] Ed Kinkeade, *Appellate Juvenile Justice in Texas: It's a Crime! Or Should Be*, 51 BAYLOR L. REV. 17, 59 (1999) (explaining the jurisdictional overlap between Texas's two courts of last resort as it applies to questions of juvenile appeals).

[38] CITIZENS' COMMISSION, REPORT AND RECOMMENDATIONS 17.

[39] H. COMM. ON THE JUDICIARY, TO THE SPEAKER AND MEMBERS OF THE TEXAS HOUSE OF REPRESENTATIVES, 72ND LEGISLATURE, 71st Leg., R.S., at 8 (1990).

- Texas has at least nine different types of trial courts, "although that number does not even hint at the complexities of the constitutional provisions and statutes that delineate jurisdiction of those courts."[40] Whether a given trial court has jurisdiction is a five-step inquiry.[41]

- As CHIEF JUSTICE JEFFERSON has pointed out: "Some counties share a multi-county district court, while others have multiple districts within the county. And some counties are part of more than one district, creating a shifting target for litigants who may not know which court's rules prevail. Overlapping geographical jurisdiction creates confusion for litigants and increases the risk of conflicting rulings in a single area."[42]

- At least one county court has no civil jurisdiction whatsoever.[43]

- Only eight percent of Texas's justices of the peace are lawyers, even though they can hear cases involving multimillion-dollar claims.[44]

- A civil suit that would be tried before a twelve-person jury in district court would be tried before a six-person jury if filed in a county court.[45]

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[40] *In re United Servs.*, 307 S.W.3d at 303 (citations omitted).

[41] *Id.* at 303–04 ("[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)." (citation omitted)).

[42] Jefferson, The State of the Judiciary, at 316.

[43] *See, e.g.*, TEX. GOV'T CODE § 26.321 ("The County Court of Taylor County has the general jurisdiction of a probate court and juvenile jurisdiction as provided by Section 26.042(b) but has no other criminal or civil jurisdiction.").

[44] OFFICE OF COURT ADMINISTRATION, 2010 ANNUAL REPORT FOR THE TEXAS JUDICIARY 13 (2010).

[45] Jose A. Berlanga and Diana P. Larson, *Six is Not Enough: Why Six Person Juries in Concurrent Jurisdiction Cases in County Courts are Not Constitutional*, 51 S. TEX. L. REV. 1, 1 (2009).

- District court vacancies are filled by appointment by the Governor[46] but statutory county court vacancies are filled by appointment by the county commissioners, even though those courts frequently have jurisdiction over the same matters.[47]

- Whether there is a minimum monetary limit on the State's district court jurisdiction actually remains an open question.[48] While the Constitution has been amended to eliminate a monetary minimum, there is some argument that it is still implied.[49]

- Generally, jurisdictional limits on statutory county courts range widely by county—from $500 to $100,000[50]—and some such courts have no monetary limits at all.[51]

- "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 courtroom presides over two distinct courts."[52]

Second, intermediate appellate courts. Texas is the only state in the nation in which trial judges answer to more than one intermediate appellate court;[53] that is, no other state has overlapping

[46] TEX. CONST. art. V, § 28.

[47] TEX. GOV'T CODE § 25.0009(a).

[48] *See Sultan*, 178 S.W.3d at 756 (Hecht, J., dissenting).

[49] *See id.* at 756 n.24.

[50] TEX. GOV'T CODE § 25.0003(c)(1); *see also In re United Servs.*, 307 S.W.3d at 303 ("Statutory county courts (of which county courts at law are one type) usually have jurisdictional limits of $100,000, unless, of course, they do not.") (citations omitted).

[51] *Sultan*, 178 S.W.3d at 756 (Hecht, J., dissenting).

[52] *In re United Servs.*, 307 S.W.3d at 303 (citations omitted).

[53] *See* Worthen, *The Organizational & Structural Development*, at 63–64 ("Texas has the only intermediate appellate system in the nation with overlapping geographical appellate districts.") (citation omitted).

appellate jurisdictions.[54] Fifteen counties are in overlapping districts.[55] This Court has lamented the "manifest" problems inherent in overlapping districts: "uncertainty from conflicting legal authority," "the potential for unfair forum shopping," and "jurisdictional conflicts."[56] In fact, the two Houston-based courts of appeals have even reached polar-opposite outcomes *on the same facts*[57]—allowing three passengers in a car accident to sue but not the fourth.[58] The following year, in 2002, we exhorted the Legislature that "[n]o county should be in more than one appellate district."[59] I suspect we will do so again next year when we issue our required plan to the Legislature on whether any appellate courts should be added, eliminated, consolidated, or reallocated.[60]

The Attorney General's current chief legal counsel recently bemoaned problems inherent in our overlapping intermediate-court structure: "Much of the problem—and most of the opportunity

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[54] *See* Scott Brister, *Is It Time to Reform Our Courts of Appeals?*, 40 HOUS. LAW. 22, 25 (Mar.–Apr. 2003) (citations omitted) [hereinafter "Brister, *Is It Time to Reform?*"].

[55] Andrew T. Solomon, *A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis*, 37 ST. MARY'S L. J. 417, 451–52 (2006) (citations omitted). In five of these counties, the appellant may choose to file an appeal in either intermediate court. *Id.* at 451, 453. In the ten Houston-area counties, the intermediate court is randomly assigned. *See id.* at 451; TEX. GOV'T CODE § 22.202(h).

[56] *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 139–40 (Tex. 1995).

[57] *See Montes v. City of Houston*, 66 S.W.3d 267, 267–68 (Tex. 2001) (Hecht, J., concurring).

[58] *Compare Reyes v. City of Houston*, 4 S.W.3d 459, 462 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) *with Montes v. City of Houston*, 2000 WL 1228618, at *4 n. 3 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

[59] Tex. Sup. Ct., *Recommendations for Reallocation of Courts of Appeals*, Misc. Docket No. 02-9232 (Dec. 17, 2002).

[60] *See* TEX. GOV'T CODE § 74.022.

for reform—lies in the antiquated structure of the lower courts";[61] likewise, our appellate courts "are struggling to overcome a structure ill-suited to modern caseloads."[62] Created to ease high-court docket congestion, our "heavily fractured intermediate court structure," if anything, has created a system "more primed for generating conflicts" than any other state in the nation.[63]

Third, courts of last resort. Coy Reece's case is but one more cautionary Texas tale. As it illustrates, our dichotomized system invites inter-court confusion, and as Texas history shows, inter-court clashes. The Citizens' Commission report from 1993 noted that conflicts between the dual courts have arisen over the conclusivity of the courts of appeals' factual determinations, the constitutionality of the "Pool Hall Law," and whether journals of the House and Senate can be used to contradict an enrolled bill.[64]

In fact, members of the two courts have themselves sometimes highlighted the friction that occasionally befalls a bifurcated system. A Court of Criminal Appeals judge once lamented the split-system's tendency to shuffle parties needlessly about as he sent an "appellant on his way to begin yet another search for the proper forum."[65] In another case, three members stated that they were "concerned that this State's bifurcated judicial process could sometimes generate conflicting

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[61] David J. Schenck, *Are We Finally Ready to Reshape Texas Appellate Courts for the 21st Century?*, 41 TEX. TECH L. REV. 221, 223 (2009).

[62] *Id*. at 222.

[63] *Id*. at 225–26.

[64] CITIZENS' COMMISSION, REPORT AND RECOMMENDATIONS 11–12.

[65] *Bretz v. State*, 508 S.W.2d 97, 98 (Tex. Crim. App. 1974) (Roberts, J., concurring).

decisions at the highest level on identical questions of law . . . . If there is a problem, it lies with the lines dividing the constitutional jurisdiction of this Court and the Texas Supreme Court."[66] The Texas system's decentralized nature has been blamed for a "lack of coordination"[67] that is apparent here. Even the Office of the Attorney General—"the law firm of Texas" itself—is not wholly immune from the jurisdictional confusion. In 1992, the Attorney General's Office took the rare step of appealing a lower-court ruling striking down the State's anti-sodomy law to *both* courts because, as the lead attorney explained, "We want to make sure we're not locked out of an appeal. It was either file with both or roll the dice."[68] The Court of Criminal Appeals declined jurisdiction,[69] and this Court eventually ruled that it too had no jurisdiction.[70] The (non)decision was roundly criticized. One might wonder, as did an editorial board, "What's the point of having not one, but two final state appellate courts if neither of them has the authority to rule on the constitutionality of a Texas criminal statute?"[71] Lawyers ought not be forced to litigate "on a guess and a gamble."[72]

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[66] *State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 418–419 (Tex. Crim. App. 1994) (Meyers, J., dissenting).

[67] Keith Carter, *The Texas Court of Criminal Appeals*, 11 TEX. L. REV. 455, 470 (1933) ("This lack of coordination extends throughout the courts. To the writer it seems clear that the existence of two independent 'supreme courts' can not be justified on either theoretical or practical grounds.").

[68] Janet Elliott, *State Appeals Twice in Sodomy Case, But Neither High Court May Want 'Hot Potato'*, TEX. LAWYER, May 18, 1992, at 1.

[69] *State v. Morales*, 869 S.W.2d 941, 948 n.16 (Tex. 1994).

[70] *Id.* at 947.

[71] Editorial, *Texas' Top Courts Dodge Decision*, SAN ANTONIO EXPRESS-NEWS, Jan. 15, 1994, at 40.

[72] *See* Brister, *Is It Time to Reform?*, at 26. Former Governor Bill Clements, who helped Chief Justice Greenhill promote giving criminal jurisdiction to the courts of appeals, once speculated that a majority of Texans "have no idea that we have a parallel system of courts, and the Supreme Court is, in fact, not supreme . . . . We can have a better court system, if we start right at the top and combine these two courts into one court." *See* G. Robert Hillman, *Clements Wants*

Up north in Oklahoma, that Supreme Court could decide this jurisdictional quandary swiftly. Not so here, though one court-reform study, mindful of the potential for jurisdictional confusion, proposed a Sooner-like solution whereby "the supreme court should determine which court has jurisdiction, and those determinations should be final."[73]

C. A Century of Pleas for Structural Reform Have Failed.

The urgency of sweeping judicial reorganization was "a perennial theme"[74] throughout the twentieth century. Earnest reformers like Roscoe Pound[75] and blue-ribbon studies galore urged a sweeping restructuring of our hodgepodge judiciary. Throughout the 1900s, "in virtually every decade of [the] century,"[76] there were regular calls in the Legislature, the academy, and the profession for structural reforms at every level, including high-court merger.[77] There have been

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One Texas Supreme Court, DALLAS MORNING NEWS, Mar. 18, 1987, at 1A.

[73] TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT II, at 25.

[74] Clarence A. Guittard, *Court Reform, Texas Style*, 21 SW. L. J. 451, 451 (1967) [hereinafter "Guittard, *Court Reform*"].

[75] Dr. Roscoe Pound, *Address Before the Thirty-Seventh Annual Proceedings of the Texas Bar Association*, 37 TEX. BAR ASS'N 205–16 (1918) (J.A. Lord, rep.) [hereinafter "Lord, TEX. BAR. ASS'N"].

[76] TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT I, at xvii.

[77] The Texas Bar Association saw an urgent need for judicial reorganization and responded by recommending an ambitious Article V overhaul. *See* Lord, TEX. BAR. ASS'N 69. Over the years, numerous distinguished lawyers and jurists pushed continually for system-wide reforms. *See* Guittard, *Court Reform*, at 453 (citing several calls for reform). In 1933, the Texas Civil Judicial Council, a longtime proponent of broadbased judicial reform, advocated a single, nine-member Supreme Court to handle both civil and criminal matters. TEXAS JUDICIAL COUNCIL 1929–1997, at 63 (Aug. 31, 1997), *reprinted from* TEXAS JUDICIAL COUNCIL 50TH ANNUAL REPORT 60, 63 (1978). In 1941, then-Chief Justice Alexander exhorted the Council that "[w]e need a reorganization of our judicial system," prompting the Council to propose a wholesale revision of Article V, which later died in a House subcommittee. Guittard, *Court Reform*, at 453–54 (citation omitted). In 1943, then-Dean of the University of Texas Law School, Charles McCormick, echoed the call for reform, including a single high court. Charles T. McCormick, *Modernizing the Texas Judicial System*, 21 TEX. L. REV. 673, 695 (1943). A decade later, in the early 1950s, State Bar President Cecil Burney led another ill-fated effort to

periodic small-bore reforms, yet even those piecemeal tweaks were "inexorably tedious and protracted";[78] ad hoc is the rule—evolutionary rather than revolutionary.

The 1970s were particularly reform-minded. The Judicial Section of the State Bar of Texas pushed for substantial changes to our judicial structure during the 1971 legislative session.[79] That same year, the Legislature proposed a constitutional amendment, eventually adopted by voters in 1972, directing the Legislature to form a Constitutional Revision Commission to "study the need for constitutional change" and then convene in 1974 as a constitutional convention.[80] Also that same year, in October 1971, then-Chief Justice Calvert formed the Chief Justice's Task Force for Court Improvement to rewrite Article V, the Judiciary Article of the Texas Constitution. In September 1972 the Task Force proposed, among other things, simplifying the trial-court maze, investing the courts of civil appeals with criminal jurisdiction (which happily happened in 1980), reforming judicial selection, and merging our twin high courts.[81] The Calvert Task Force coincided with a

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rewrite Article V, including judicial selection and high-court consolidation, proposals favored by a first referendum of state bar members but rejected by a second referendum. Guittard, *Court Reform*, at 454. In 1964, a conference sponsored by the state bar and the Joint Committee for the Effective Administration of Justice, derided our "unorganized and fragmented courts," calling it "archaic" and calling for "a single and unified court system." *Lawyers, Laymen Urge Modernization of Texas' Antiquated Judicial System*, 27 TEX. B.J. 299, 305 (1964).

[78] TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT I, at 66.

[79] *See* Tex. H.B. Nos. 1372–1376, 62nd Leg., R.S. (1971); Tex. H.R.J. Res. Nos. 77–80, 62nd Leg., R.S. (1971).

[80] Tex. H.R.J. Res. 61, 62nd Leg., R.S., 1971 Tex. Gen. Laws 4140.

[81] TASK FORCE FOR COURT IMPROVEMENT, PROPOSED JUDICIARY ARTICLE OF THE TEXAS CONSTITUTION (1972) [hereinafter "TASK FORCE: PROPOSED JUDICIARY ARTICLE"]. *See also* Greenhill, *The Constitutional Amendment*, at 379–80 (citations omitted).

court-reorganization report by the House Judiciary Committee, which in 1972 called for extensive changes in the judicial branch.[82]

In early 1973, the thirty-seven members of the Texas Constitutional Revision Commission began nine months of study and public hearings, culminating in a proposed new state constitution.[83] (The Revision Commission was chaired by then-*former* Chief Justice Calvert, who had left the Court the previous October, one month after his Task Force unveiled its proposed Judiciary Article). Essentially, the Calvert-led Revision Commission adopted the recommendations of the Calvert-led Task Force.[84] Notably, though, the Revision Commission, unlike the Task Force, wrestled with modernizing the *entire* Texas Constitution, not just Article V. And the document it presented to the Legislature in November 1973 was the first comprehensive effort to draft a new constitution for Texas since the Constitutional Convention of 1875.[85]

The following January, the Legislature convened unicamerally in the House chamber as the Constitutional Convention of 1974. Like the Revision Commission, the Constitutional Convention favored a wholesale overhaul of the entire Constitution, and many of the proposed reforms,

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[82] H. COMM. ON THE JUDICIARY, STREAMLINING THE TEXAS JUDICIARY: CONTINUITY WITH CHANGE, 62nd Leg., R.S. (1972). This report prompted consideration in the 63rd Legislature, Regular Session of 1973 of Tex. H.B. Nos. 725, 1401–07, and 1600; Tex. H.R. Res. Nos. 48 and 96; and Tex. H.R. Con. Res. 129. *See* H. COMM. ON THE JUDICIARY, A PROPOSAL, at 3 n.5.

[83] Greenhill, *The Constitutional Amendment*, at 383 (citation omitted). Chief Justice Calvert had also once served as Speaker of the Texas House of Representatives.

[84] *Compare* THE TEXAS CONSTITUTIONAL REVISION COMMISSION: A NEW CONSTITUTION FOR TEXAS 109–22, *with* TASK FORCE: PROPOSED JUDICIARY ARTICLE 1–5.

[85] Texas State Historical Association, *Constitutional Convention of 1974*, HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/mjc07 (last visited May 25, 2011).

especially a right-to-work provision, provoked raucous debate.[86] The Convention dissolved seven months later, falling three votes shy of submitting a new constitution to Texas voters.[87] That October, the House Judiciary Committee submitted a report calling on the Legislature to submit to voters the revision of Article V that the 1974 Constitutional Convention considered.[88]

The Legislature reconvened in January 1975, and this time, acting as a regular legislature and not as a constitutional convention, it approved what became a package of eight separate amendments, including a new Article V, which resurrected the recommendations for a combined high court, courts of appeals with both civil and criminal jurisdiction, and substantial trial-court unification.[89] For the first time in a century, Texans had an opportunity to consider a revised constitution. It was not to be. As in the Constitutional Convention the previous year, fierce opposition arose over various non-judiciary proposals (like annual legislative sessions, a right-to-work provision, and taxation and education reforms) and each and every proposed revision was defeated, including the modernized Article V (which received more votes than any other amendment).[90]

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[86] *Id*.

[87] *Id*.

[88] *See generally* H. COMM. ON THE JUDICIARY, A PROPOSAL.

[89] Greenhill, *The Constitutional Amendment*, at 384 (citations omitted).

[90] *Id.* at 384–85.

A 1976 interim study of the House Judiciary Committee submitted fifteen piecemeal recommendations,[91] six of which the Legislature enacted (like the creation of the Office of Court Administration).[92] In 1979, then-Chief Justice Greenhill championed in his State of the Judiciary address the rifle-shot reform of giving criminal jurisdiction to the courts of civil appeals,[93] and voters agreed in 1980.[94]

The call for broader reforms persisted throughout the 1990s—from TRL,[95] to the Comptroller,[96] to the Court-appointed Citizens' Commission.[97] In May 1991, TRL urged a totally new Judicial Article, saying our courts are so "fragmented" that "[t]he Texas court system really is not a system at all."[98] In 1991, we directed an eighty-four-member Citizens' Commission on the Texas Judicial System to "study and recommend any necessary or desirable improvements in the courts of Texas."[99] Given our constitutional responsibility "for the efficient administration of the

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[91] H. COMM. ON THE JUDICIARY, THE TEXAS COURT SYSTEM: MANPOWER, RESOURCES, AND MANAGEMENT, 65th Leg., R.S., at 2–5 (1976).

[92] CITIZENS' COMMISSION, REPORT AND RECOMMENDATIONS 4 n.9.

[93] Joe R. Greenhill, State of the Judiciary: Address By the Texas Supreme Court Chief Justice to the 66th Texas Legislature (Jan. 31, 1979), *in* 42 TEX. B.J. 379, 380 (1979).

[94] Greenhill, *The Constitutional Amendment*, at 396.

[95] TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT I, at xvii.

[96] CITIZENS' COMMISSION, REPORT AND RECOMMENDATIONS 3 n.4.

[97] *Id.* at 9–12.

[98] TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT II, at 1. TRL's earlier report in 1990 reached a similar conclusion: "Because the courts are so decentralized and because individually they are quite independent, it is difficult to call the Texas judiciary a system." TEXAS RESEARCH LEAGUE, TEXAS COURTS: REPORT I, at xvii.

[99] CITIZENS' COMMISSION, REPORT AND RECOMMENDATIONS 47.

judicial branch,"[100] the Court invited common-sense reforms, predominantly those related to the "jurisdiction and title of the trial and appellate courts of Texas."[101] Believing "a sound organizational and administrative structure is essential to a well-regarded judiciary," the Commission proposed a system that simplified general-jurisdiction trial courts and unified our dual high courts, though the new Supreme Court would have "two divisions, civil and criminal, each with seven justices."[102]

In the 1990s, the Citizens' Commission proposals did draw support as part of broader efforts to streamline our ungainly constitution down to something approaching comprehensibility.[103] No such luck; the efforts sputtered. Our unwieldy constitution lives, including our crazy-quilt court system, a top-to-bottom mess. The push for modernization has continued apace in the 2000s. Many observers, including members of this Court,[104] have continued pushing for lower-court simplification, and other voices urge high-court merger as part of a broader restructuring.[105]

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[100] TEX. CONST. art. V, § 31.

[101] CITIZENS' COMMISSION, REPORT AND RECOMMENDATIONS 5.

[102] *Id*. at 1. This two-courts-in-one proposal resembles one first proposed by Charles De Morse, a delegate at the Texas Constitutional Convention of 1875. DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 384–85 (Seth Shepard McKay ed., 1930).

[103] Editorial, *Texas Constitution: State should overhaul this outmoded relic*, DALLAS MORNING NEWS, Nov. 12, 1995, at 2J.

[104] *See Sultan*, 178 S.W.3d at 753 (Hecht, J., dissenting); Jefferson, The State of the Judiciary, at 316.

[105] Editorial, *Improve Texas justice by combining courts*, AUSTIN AMERICAN-STATESMAN, Feb. 18, 2003, at A10.

Against this bizarre background I turn to Reece's petition for writ of habeas corpus. It determines the procedural posture that so interestingly animates this case, and channels the kinds of cases this Court can and cannot hear. The issue of jurisdiction—deciding to decide—may sound like a meta-interest floating in the jurisprudential ether, but its importance as a threshold issue cannot be overstated. The matter of to whom the courts are open—and for which claims—colors our bifurcated high-court system, and ultimately disposes of this case. Sections II and III discuss, respectively, the statutory and precedential evidence that suggests we are not permitted by law to hear this case. Section IV explains that even if we do maintain jurisdiction, it would be unwise to exercise it. The former is a matter of a legal directive, the latter a matter of judicial discretion, but both yield the same conclusion: There is no compelling case to hear this case.

II. The Clear Statutory Prohibition that Prevents this Court from Hearing this Case as a Habeas Petition Suggests it Cannot be Cleverly Restyled as Mandamus.

There is no argument that this Court is statutorily hamstrung when it comes to habeas jurisdiction. The Texas Constitution gives us the "power to issue writs of habeas corpus, as may be prescribed by law."[106] That law is Section 22.002(e) of the Government Code, which limits such jurisdiction to times "when a person is restrained in his liberty by virtue of an order, process, or commitment issued by a court or judge on account of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case."[107] Despite the jurisdictional thicket that has sprouted kudzu-like around us, the path out is rather linear.

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[106] TEX. CONST. art. V, § 3(a).

[107] TEX. GOV'T CODE § 22.002(e).

A. There is No Debate that Habeas May Not Issue Here.

As applies here, this Court has the authority to issue a habeas writ only if Reece both seeks release from custody and appeals from an order of contempt based on a violation of an order, judgment, or decree "previously made" by the court or judge in a civil case.[108] Otherwise, we have no statutory authority to act: If the basis for contempt is *not* the violation of a previously issued order, we do *not* have jurisdiction to review a sentence of confinement via habeas corpus.[109] While Reece does seek release from custody, there is no argument—either by the Court,[110] the trial court

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[108] *See Ex parte Morris*, 349 S.W.2d 99, 101 (Tex. 1961) (orig. proceeding) ("[T]he statute limits our power in the language just stated, and we may inquire only into restraint brought about by an order or process of the court issued because of the violation of some order, judgment or decree in a civil case.") (citation omitted); *see also Ex parte Jackson*, 252 S.W. 149, 149–50 (Tex. 1923) (orig. proceeding) ("It is apparent that Judge Duncan [in his role as an attorney in another case] was held in contempt by the trial court, not for violating any order made by the court in a civil case, but because of certain language used in a brief filed in the case. From this statement it appears that, although the alleged contempt arose out of a civil case, yet, since it did not arise by reason of a violation of the court's order, the Supreme Court declined to take jurisdiction. The Court of Criminal Appeals, as shown by the report of the case, did take jurisdiction, and discharged the relator."). *Ex parte Jackson* was decided under a precursor to Section 22.002(e)—article 1529—which limited habeas jurisdiction to times when "any person is restrained in his liberty by virtue of any order, process or commitment, issued by any court or judge, on account of the violation of any order, judgment or decree theretofore made, rendered or entered by such court or judge in any civil cause." 252 S.W. at 149. *Ex parte Morris* was decided under article 1737, a precursor to Section 22.002(e) with the same wording as article 1529. 349 S.W.2d at 100; Act of Oct. 7, 1895, 24th Leg., R.S., ch. 53, § 1, 1895 Tex. Gen. Laws 79 (amended 1905, 1909, 1927, 1933, 1941, 1943, 1963, 1981, 1983), *repealed by* Act of June 12, 1985, 69th Leg., R.S., ch. 480, § 26(1), 1985 Tex. Gen. Laws 1720, 2050.

[109] *See Ex parte Morris*, 349 S.W.2d at 101.

[110] The Court cites to a case in which this Court, without discussing the statutory limits of our habeas jurisdiction, upheld a contempt judgment against an attorney. __ S.W.3d __, __ (Tex. 2011); (citing *Ex parte Fisher*, 206 S.W.2d 1000 (Tex. 1947) (per curiam) (orig. proceeding)). It also cites to a case in which this Court found it possessed jurisdiction without discussing whether the contemnor's acts involved the violation of a court order. __ S.W.3d at __ (citing *Ex parte Calhoun*, 91 S.W.2d 1047, 1048–49 (Tex. 1936) (orig. proceeding)). But *Ex parte Fisher* did note that "[i]n a habeas corpus proceeding of this character this court has only limited powers." 206 S.W.2d at 1003. And the Court in *Ex parte Calhoun* did not need to address whether a violation of a court order was involved since—as the Court notes—it did not find that there was restraint. 91 S.W.2d at 1048.

below, or the very parties before us—that the contempt order here was based on such a violation. Therefore, this Court lacks power to issue habeas relief.

To say this is a rule grounded in statute and in precedent would be an understatement. This Court has been in the business of reviewing habeas petitions based on statutory language similar to Section 22.002(e) for more than 100 years.[111] We have denied jurisdiction over habeas petitions not arising from the violation of a previously made order for just as long.[112] The Court of Criminal Appeals was, respectfully, incorrect when it stated that "[e]ffective 1981, Article 5, § 3(a) of the Texas Constitution was amended to give the Texas Supreme Court and the Justices thereof the authority to issue writs of habeas corpus."[113] The amendments of 1980 (effective 1981) did no such thing. Instead, they rewrote the first paragraph of the section, but *retained* the language that "[t]he Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, *as may be prescribed by law . . . .*"[114] And here, law prescribes that habeas may not issue in this case.

B. There Should Be No Debate that Relabeling the Remedy "Mandamus" Cannot Circumvent this Rule.

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[111] *See, e.g.*, *Ex parte Allison*, 90 S.W. 870, 872 (Tex. 1906) (denying a habeas writ resulting from contempt for violation of an injunction); *Ex parte Gonzalez*, 238 S.W. 635, 636 (Tex. 1922) (orig. proceeding) (granting habeas relief where contempt judgment was void because trial court lacked jurisdiction to find contemnor in contempt).

[112] *See, e.g.*, *Ex parte Reid*, 89 S.W. 956, 956 (Tex. 1905) (explaining the Supreme Court had no jurisdiction over a habeas petition where "[the] only contention is that the imprisonment is illegal"); *Ex parte Jackson*, 252 S.W. at 149 ("[W]e may inquire only into the restraint brought about by an order or process of the court issued because of the violation of some order, judgment, or decree in a civil case.").

[113] *In re Reece*, No. WR-72,199-02, at 2.

[114] *See* Tex. S.J. Res. 36, 66th Leg., R.S., 1979 Tex. Gen. Laws 3223. The 1980 amendments were adopted at the Nov. 4, 1980 election, and became effective Sept. 1, 1981. *See* TEX. CONST. art. V, § 3.

The strength of this rule should be heeded as a sign—both from the Texas Legislature and our many decisions construing its enactments—that we are not meant to hear appeals from contempt cases where the basis for contempt is not the violation of a previously issued order, and therefore, we are not meant to ad-lib the means to arrive at the same forbidden end. It is undisputed that we cannot hear this case as a habeas petition. Why, then, should we be permitted to hear it under another name?

This statutory prohibition—the only legislatively mandated anchor in a sea of confused and overlapping jurisdiction—should and does provide a comprehensive sense of this case. By issuing mandamus when we are clearly not permitted to issue habeas, we do a disservice to the framework differentiating the two, as well as to the jurisdictional structure which (for better or worse) we are charged with upholding.

The Court contends "our constitutional and statutory grant of mandamus jurisdiction is broad," and not limited in the way I suggest here, explaining that "this Court possesses general original jurisdiction to issue writs of mandamus."[115] But the Court is forced to qualify that proposition by citing to the Texas Constitution: "*See* TEX. CONST. art. V, § 3(a) (granting the Court power to issue writs of mandamus *as specified by the Legislature*)."[116] The exception nullifies the rule. Our mandamus jurisdiction is undoubtedly circumscribed by law. Where the Legislature has

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[115] __ S.W.3d at __.

[116] __ S.W.3d at __ (emphasis added). The Court subsequently cites to TEX. GOV'T CODE § 22.002(a) (permitting the Court to issue writs of mandamus "agreeable to the principles of law regulating those writs"). This Court should not issue mandamus where, as here, it is *dis*agreeable to principles of law—those clearly stated in our statutory prohibition against hearing this case styled as habeas.

spoken clearly and removed the kind of case now before us from our jurisdiction, it is disingenuous to circumvent the rule by renaming the remedy.

III. Precedent Further Indicates this Court Cannot Issue Mandamus.

The statutory prohibition against habeas is but one reason to dismiss the case. There are others grounded in our mandamus (rather than habeas) jurisprudence. We have at least suggested—if not stated plainly—that the habeas prohibition precludes our ability to hear a case like this, explaining that "[o]ur original habeas corpus jurisdiction is limited thereby to cases in which a person has been confined for violating an order, judgment or decree in a civil cause, *and we are without power to inquire into the legality of restraint imposed for some other reason.*"[117]

A. Our *Deramus* Decision Demonstrates—Rather Than Disproves—that Habeas is Inappropriate Here.

Both Reece and the Court[118] rely heavily upon one sentence in *Deramus v. Thornton*, in which we preserved the possibility that there might be contempt-related situations where mandamus, not habeas, would be the proper remedy: "We are not to be understood as saying, however, that there may not arise conditions involved in contempt matters where the writ of habeas corpus would not be adequate and where mandamus would be the proper remedy."[119] The cautious words of wise

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[117] *Ex parte Morris*, 349 S.W.2d at 101 (emphasis added).

[118] *See* __ S.W.3d at __ ("[W]e have also left open the possibility of circumstances 'where the writ of habeas corpus would not be adequate and where mandamus would be the proper remedy.'") (quoting *Deramus v. Thornton*, 333 S.W.2d 824, 827 (Tex. 1960) (orig. proceeding)).

[119] *Deramus*, 333 S.W.2d at 827.

jurists intent on protecting a hypothetical situation, however, should not be read to apply to and permit any series of facts that follow.

Deramus was held in contempt for violating an injunction. He sought a writ of mandamus ordering his trial judge to vacate the contempt judgment and dismiss the contempt proceedings. There, as here, we noted that the usual avenue for such a situation was habeas, explaining: "Had the District Judge not suspended the judgment of contempt the normal course would have followed, and the remedy adopted by the relator could necessarily have been an application for a writ of habeas corpus."[120] Contrary to Reece's urgings, in *Deramus* we noted that mandamus was *not* proper, buttressed in large part by the reasoning that "[w]e have uniformly held in this State . . . that the validity of a contempt judgment can be attacked only collaterally and that by way of habeas corpus."[121] Even when we noted that this question was arguably a matter of policy—a view that seems to pervade the Court's looser approach to the issue—we still remained "reluctant to depart from a judicial path so well landmarked, especially so since the claimed inadequacy of habeas corpus . . . [was] one common to all cases where escape is sought from the penalties of a contempt judgment."[122] We went on to explain that "[t]his in itself, we think, is sufficient justification for our

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[120] *Id.*

[121] The opinion then goes on to note several then-recent decisions to that effect. *Id.* (citing *Tims v. Tims*, 204 S.W.2d 995 (Tex. Civ. App.—Amarillo 1947, writ ref'd); *Wanger v. Warnasch*, 295 S.W.2d 890 (Tex. 1956); *Ex parte Arapis*, 306 S.W.2d 884 (Tex. 1957)).

[122] *Deramus*, 333 S.W.2d at 827.

refusal of this application. To do otherwise would completely change the procedure long followed in this State and allow in every case an attack on the order of contempt by way of mandamus."[123]

Reece has not violated a previously issued order, meaning this Court may not issue habeas. If the Court in *Deramus* found that habeas—not mandamus—was appropriate where contempt was the result of the violation of a previously made order, then the Court should find here that neither habeas—nor mandamus—is proper where there is no such violation. The dissent in *Deramus* acknowledged that habeas was the usual remedy in cases where a relator seeks a release from confinement, but maintained the view that the import of the cases suggested a different principle: "[W]here a judge, as in the instant case, has determined to commit and fine a relator on a void contempt judgment, this court has the power to issue writs of mandamus and prohibition to prevent the enforcement of a void act."[124] It is unclear why the Court has essentially taken up the *Deramus* dissent without explicitly overruling *Deramus*.

In sum, what was true in *Deramus* remains true today: Granting mandamus "would completely change the procedure long followed in this State and allow in every case an attack on the order of contempt by way of mandamus."[125] *Deramus* imagined scenarios in which the inadequacy of habeas would render mandamus the proper route. But *Deramus* itself demonstrates that this is not such a scenario.

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[123] *Id.*

[124] *Id.* at 830 (Smith, J., dissenting) (citations omitted) (emphasis omitted).

[125] *Deramus*, 333 S.W.2d at 827.

B. *In re Long* Indicates Mandamus Specifically May Not Issue Here, Where Contempt Sanctions Involve Confinement.

In re Long[126] reinforces this conclusion. There we held mandamus would be proper in the review of contempt sanctions not involving confinement.[127] But because Reece challenges a criminal contempt action involving confinement, not based upon a previously issued order, *In re Long* is not directly controlling. Therefore, Reece fits into neither category. The Court's assertion that because we have "declined to read the limitations in our habeas statute as a legislative prohibition against our exercise of mandamus jurisdiction" in fine-only cases, we can rightly "decline to do so here as well"[128] is a non sequitur. Reece was confined, so cases about non-confined persons cannot support the leap made by the Court today. There is simply no precedent establishing that mandamus is the appropriate remedy in this case.

In fact, quite the opposite is true. It can be inferred from *In re Long* that contempt sanctions that *do* involve confinement may *not* be reviewed through mandamus—otherwise, the distinction that case makes would be meaningless. We have applied this kind of logic to the habeas cases discussed earlier, in which we reasoned from the statute *permitting* issuance of the habeas writ where there *is* a violation of a previous court order that we were *prohibited* from issuing the writ where there was *no* such order. It makes sense to do the same here. Under a simple corollary of the *In re*

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[126] 984 S.W.2d 623 (Tex. 1999) (per curiam) (orig. proceeding).

[127] *See In re Long*, 984 S.W.2d at 625 ("Contempt orders that do not involve confinement cannot be reviewed by writ of habeas corpus, and the only possible relief is a writ of mandamus.") (citing *Rosser v. Squier*, 902 S.W.2d 962, 962 (Tex. 1995) (per curiam) (orig. proceeding)).

[128] __ S.W.3d at __.

Long rule, we are prohibited from issuing mandamus because Reece was subject to contempt sanctions that involved confinement. Even foregoing this inference as the Court would, however, it is clear that mandamus has never been permitted where there was no violation of an order and confinement was involved.

C. The Court Misconstrues the Mandamus Remedy.

The Court's defense of its decision is based largely on four contentions: (1) mandamus is generally flexible; (2) no law announces that habeas is the exclusive remedy; (3) mandamus has often been used to "gap-fill" where there is no remedy; and (4) our sister court tends to defer to us on matters such as these. The first two stem from a more general view about the mandamus and habeas remedies, respectively. The second two are rooted in case law. I address each in turn.

First, it is true, as the Court points out, that mandamus is available to review rulings in "exceptional cases," and that "rigid rules . . . are necessarily inconsistent with the flexibility that is the remedy's principal virtue."[129] But we have regularly deferred to the Legislature's determinations of when mandamus is appropriate.[130] And the remedy has been largely used in obviously civil cases with no criminal element, and generally has not been used to trump other, independent limitations

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[129] __ S.W.3d at __ (quoting *In re Prudential*, 148 S.W.3d at 136) (quotation marks omitted).

[130] *See, e.g.*, *In re Watkins*, 279 S.W.3d 633, 634 (Tex. 2009) (Noting as dispositive whether "granting mandamus to review . . . would subvert the Legislature's limit on such review."); *Teat v. McGaughey*, 22 S.W. 302, 303 (Tex. 1893) ("The bill of right secures the right of trial by jury, and, while the people doubtless could amend the constitution so as to modify or limit the right, we do not think any modification was intended by the provision in the late amendments which authorized the legislature to confer jurisdiction upon this court to issue the writ of mandamus in certain specified cases.").

that work to bar the mandamus remedy.[131] This case is distinguishable on both counts: It presents an underlying civil case with a criminal penalty and is independently limited by precedent that confines the mandamus remedy when it comes to criminal contempt.

Consider, as an illustration, *Betts v. Johnson*.[132] There, the Court determined that an independent statutory limitation prevented it from issuing mandamus, and consequently overruled a motion to file a mandamus petition.[133] The statutory limitation was an article that permitted the Court to issue mandamus against an "officer of the state government."[134] But since the writ applied for was against a *board* of officers, not against an *officer*, the Court reasoned that it could not issue mandamus.[135] The text of the statute prevented it from doing so. As recently as 2001, some justices of this Court refused mandamus on the same logic—not as a matter of practicality, but instead as a matter of legality.[136]

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[131] *See, e.g., In re AIU Ins. Co.*, 148 S.W.3d 109, 110 (Tex. 2004) (granting mandamus in the arbitration context); *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (per curiam) (granting mandamus in the discovery context); *In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005) (per curiam) (granting mandamus in the legislative-continuance context).

[132] 73 S.W. 4 (1903).

[133] *Id.* at 5.

[134] Act of Apr. 13, 1892, 22nd Leg., C.S., ch. 14, § 1, art. 1012, 1892 Tex. Gen. Laws 19, 21, *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, § 1, 1939 Tex. Gen. Laws 201.

[135] *Betts*, 73 S.W. at 5 ("But the writ applied for in this case is against a board of officers, and not against an officer. It seems that, if it had been the purpose to empower this court to issue the writ as well against a board of officers as against a single officer, the language would have been, 'any officer or board of officers of the state government.'").

[136] *See In re TXU Elec. Co.*, 67 S.W.3d 130, 136 (Tex. 2001) (per curiam) (Baker, J., concurring) ("Because I believe this Court does not have jurisdiction to mandamus a state board or commission, I can only concur in the Court's judgment that TXU is not entitled to mandamus relief.").

Similarly, we have determined mandamus may not issue to controvert a prior injunction[137] or to compel an officer to act outside the bounds of the law.[138] In both instances, the existence of law that would conflict with the mandamus remedy functions as an independent limitation upon it. We have also found ourselves powerless to issue mandamus where a collection of statutes suggested we lacked jurisdiction to hear the case in the first place.[139] While this is, to be sure, different from a prohibition specifically against mandamus, it still reinforces the general rule that independent statutory limitations channel the mandamus power.

Second, it is also true that no statutory or constitutional provision states that habeas is the only vehicle in this circumstance, and this Court has previously granted mandamus relief in quasi-criminal cases. The first point is a cat's game, in which neither side wins: While there may not be a provision *limiting* the possibilities in this case to habeas, there is certainly not one explicitly *permitting* mandamus. To the contrary, *In re Long* at least suggests that mandamus is inappropriate where confinement is involved.[140] This and the fact that there is a statutory provision in Section 22.002(e) specifically limiting this Court's habeas jurisdiction to certain instances—none

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[137] "The rule is, of course, an elementary one that mandamus will not lie to an inferior court where proceedings therein have been enjoined." *Sterling v. Ferguson*, 53 S.W.2d 753, 757 (Tex. 1932) (quotation marks and citations omitted); 2 THOMAS CARL SPELLING, EXTRAORDINARY RELIEF § 1402, at 1159 (1893) ("It is a familiar principle that mandamus does not lie to compel a party to violate an injunction; and the principle is as applicable where the writ is sought in a superior court as in other cases.").

[138] "[M]andamus cannot issue to compel a public officer to do an act which is not clearly prescribed by law." *Horton v. Pace*, 9 Tex. 81, 84 (Tex. 1852) (citations omitted) (emphasis omitted).

[139] *See Kidder v. Hall*, 251 S.W. 497, 498 (Tex. 1923) (citing to various statutes and concluding that mandamus could not issue in part because "[f]rom a consideration of all the articles named," jurisdiction fell within the district court, and therefore this Court had no jurisdiction).

[140] *See* 984 S.W.2d at 625.

of which are presented here—are at least two thumbs on the scale for the view that this Court lacks jurisdiction in this instance. As to the second point, having granted mandamus relief in other quasi-criminal cases does not make it appropriate here. Neither party seems to be able to point to a case where this Court granted mandamus on facts such as these, and in the teeth of an independent statute and precedent circumscribing our ability to do so.

Third, according to the Court, many cases support the view that mandamus is a statutory "gap-filler" that may issue here. But in *none* of these cases did an independent statutory prohibition suggest that mandamus was inappropriate as it does here. Instead, we simply fashioned a remedy because there was a lack of available alternatives. In other words, we are not claiming that *express statutory permission* is required to issue mandamus; we are simply asking that the Court refrain from issuing mandamus where there seems to be an *express statutory prohibition* against doing so.

Contrary to the Court's understanding of my position, I do not believe that "if a statute grants jurisdiction in only a limited circumstance, it must follow that we are forbidden from exercising our mandamus jurisdiction in a situation falling outside the parameters of that limitation."[141] We have certainly gap-filled properly in the past. This case is distinguishable because there is no gap (the Court of Criminal Appeals can still act, as Reece's motion for rehearing remains pending there) and because there is statutory evidence not only that our jurisdiction is limited, but also that our jurisdiction is explicitly prohibited in this context.

[141] __ S.W.3d at __.

"Gap-filling" is just that—a decision to act when there is no other avenue open to the parties. Today the Court does something more akin to "needle-threading" than "gap-filling." It attempts to gap-fill where there is not clearly a gap—where there is, instead, a law.

For this reason, the Court's citations to various arbitration cases are off-point. In *Jack B. Anglin Co. v. Tipps*,[142] the Court determined that mandamus was appropriate to review a trial court's denial of a motion to compel arbitration under the Federal Arbitration Act ("FAA").[143] But because of an independent statutory limitation—Texas procedural rules—those claiming a right to arbitration under the Texas Arbitration Act ("TAA") and alternatively the FAA were required to file both an interlocutory appeal under the TAA and a writ of mandamus under the FAA.[144] Was this dual requirement a model of efficiency? Clearly not. But the Court recognized then—as it should realize now—that the form of the remedy was circumscribed by legislative mandate.[145] We reaffirmed that principle in the next case, too.[146]

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[142] 842 S.W.2d 266 (Tex. 1992) (orig. proceeding).

[143] *Id.* at 273.

[144] *Id.* at 272.

[145] *Id.* ("Although we can conceive of no benefit from such an unnecessarily expensive and cumbersome rule, we may not enlarge appellate jurisdiction absent legislative mandate.").

[146] *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 n.4 (Tex. 2006) ("While we continue to see no benefit in requiring parties to pursue parallel proceedings that are 'unnecessarily expensive and cumbersome,' we remain mindful that 'we may not enlarge appellate jurisdiction absent legislative mandate.'") (quoting *Jack B. Anglin Co.*, 842 S.W.2d at 272).

We gap-filled because without the mandamus remedy the essence of the appeal would vanish, and the arbitration-seeker would be left without the very thing for which he contracted ex ante.[147] But we did not ignore law suggesting or stating we could not do so. Here, there *is* a wealth of law tending to show the mandamus remedy is not permitted. There is not a gaping hole that suggests oversight, but a narrow cranny that suggests deliberation. In other words, despite the Court's argument, a "specific allowance for interlocutory appeal under the TAA in the absence of a law allowing for the same under the FAA"[148] is not the same as the presence of an independent statute explicitly suggesting *interlocutory appeal is not allowed* under the FAA. I doubt we would have permitted mandamus if there had been such a limitation.

This Court has similarly stepped in[149] where the Court of Criminal Appeals could not issue mandamus except as necessary to protect its own judgments.[150] This line of cases only reinforces my own view. We have granted mandamus where the Court of Criminal Appeals was constitutionally prohibited from doing so. We should not short-circuit the Court of Criminal Appeals from issuing habeas where we are statutorily prohibited from doing so.

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[147] *Jack B. Anglin Co.*, 842 S.W.2d at 272.

[148] __S.W.3d at __.

[149] *See, e.g.*, *Fariss v. Tipps*, 463 S.W.2d 176, 180 (Tex. 1971) (orig. proceeding); *Lawrence v. State*, 412 S.W.2d 40, 40 (Tex. 1967) (per curiam) (orig. proceeding); *Wilson v. Bowman*, 381 S.W.2d 320, 321 (Tex. 1964) (orig. proceeding); *Cooper v. State*, 400 S.W.2d 890, 890–92 (Tex. 1966) (orig. proceeding). While it is true, as the Court points out, that the Court "occasionally entertained" these petitions, __ S.W.3d at __, it ultimately issued mandamus in only one of these four cases. *See Fariss*, 463 S.W.2d at 177.

[150] *See* TEX. CONST. art. V, § 5 (amended 1977 and 1980); *Thomas v. Stevenson*, 561 S.W.2d 845, 847 (Tex. Crim. App. 1978) (en banc).

It is also worth noting that the Legislature eventually intervened to fill in the "gap" for each of these cases.[151] That pattern only demonstrates that if the Legislature determines that the failure to give our Court jurisdiction over cases such as these was mere oversight, it knows well how to correct the error. Unless and until it does so, however, it makes little sense to take the lid off this jurisdictional can of worms, particularly when the can belongs to another.

Fourth and finally, the Court claims that the Court of Criminal Appeals has "preferred to defer" to this Court where contempt proceedings arise from civil cases. In support, it points to a case in which the Court of Criminal Appeals, after doing so, was forced to take the case back after a Supreme Court justice explained that this Court did not have jurisdiction.[152] That example should be followed today. The essence of this question is not in how often the Court of Criminal Appeals may err in attempting to pass a case like this to us, but in how often we have erred in accepting it. That we have never done.

Were we the Oklahoma Supreme Court, sorting out jurisdictional spats like this one by simply taking the case might be a more tenable position. But in Texas, it is the Legislature that designs and divvies up the dockets. And the Legislature has not given us the authority to hear this case—whether we call it habeas or mandamus.

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[151] *See* TEX. CIV. PRAC. & REM. CODE § 51.016 (enacting a law authorizing interlocutory appeals under the FAA in Texas courts); Tex. S. J. Res. 18, 65th Leg., R.S., 1977 Tex. Gen. Laws 3359 (amending the Constitution to provide the Court of Criminal Appeals with mandamus jurisdiction over all criminal law matters).

[152] __ S.W.3d at __ (citing *Ex parte Duncan*, 182 S.W. 313, 313 (Tex. Crim. App. 1916)). It also cites to a case in which the Court of Criminal Appeals simply noted that it will not act until we determine whether we have habeas jurisdiction. *Id.* (citing *Ex parte Cvengros*, 384 S.W.2d 881, 882 (Tex. Crim. App. 1965)). That seems to be what has happened here, and we should rule that we do not have jurisdiction.

D. The Court's Reliance on Legislative History is Both Unnecessary and Unwise.

My skepticism of legislative history is well known, and well informed. It is a wariness borne of many years participating in the legislative process at both the state and federal levels, and confirmed by six years on the bench, where I see firsthand the perils of "embarking on a scavenger hunt for extratextual clues prone to contrivance."[153] Any imagined gains from rummaging around in legislative minutiae, particularly absent any textual ambiguity, are more than dwarfed by multiple realities.

One such reality, unfortunate but also undeniable, is that legislative history is prone to manipulation (by lawyers, judges, and legislators alike) and often cited inaccurately, selectively and misleadingly. More fundamentally, the statute alone is what constitutes the Legislature's collective will, and isolated snippets along the way lack the authoritative imprimatur of a Legislature that, we must presume, intended precisely what it enacted.

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[153] *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 475 (Tex. 2009) (Willett, J., concurring) (footnote omitted). *See also, e.g., Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 n.4 (Tex. 2006) ("[W]e are mindful that over-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."); *Summers*, 282 S.W.3d at 475 (Willett, J., concurring) ("Laws exist to guide behavior, and by resting on statutory language rather than embarking on a scavenger hunt for extratextual clues prone to contrivance, we ensure that everyday Texans struggling to decode the law and manage their affairs consistent with it can rely on a statute 'to mean what it says,' without having to hire lawyers to scour the legislative record for unexpressed (and often contradictory) indicia of intent.") (footnotes and citations omitted); *AIC Mgmt. v. Crews*, 246 S.W.3d 640, 650 (Tex. 2008) (Willett, J., concurring) ("The statute itself is what constitutes the law; it alone represents the Legislature's singular will, and it is perilous to equate an isolated remark or opinion with an authoritative, watertight index of the collective wishes of 181 individual legislators, who may have 181 different motives and reasons for voting the way they do.") (footnote omitted); *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 330 n.1 (Tex. 2006) (Willett, J., concurring in part and dissenting in part) ("These dueling snippets of legislative history illustrate the peril of placing undue reliance on secondary materials. Anyone looking for a preferred interpretation can usually find a ready ally lurking in the legislative record, even if the statute's literal text points the opposite direction. I do not reject out of hand the principled use of legislative history to unearth reliable guidance (unless the text's plain language is unequivocal), but it certainly merits a jurisprudential grain of salt. The enacted, voted-on text is what constitutes the law.") (citation omitted).

That said, one need not necessarily subscribe to this view to find the Court's reliance on legislative history unsettling. For this case demonstrates yet another disadvantage to reading through the often-distorting lens of legislative history: It is really no aid at all.

The Court attempts to guess at what the Legislature of 1905 could have meant. The Court's determination to wrestle with the ghost of Section 22.002(e) reveals, perhaps not surprisingly, that wrestling with ghosts is unsatisfying. After reading the House Judiciary Committee's report on Senate Bill 36, the Court can only suggest that "*perhaps* [the Legislature] simply did not envision contempt in civil cases extending beyond [a contemnor's violation of a court order], and so crafted this Court's habeas jurisdiction accordingly."[154] It can only note that the Court of Criminal Appeals has "*suggested* the same purpose."[155]

That shaky assumption is the basis for the Court's assertion that Reece's case has "fall[en] inside the statutory loophole created by the particular division of habeas jurisdiction between the Court of Criminal Appeals and this Court."[156] This is a loophole, of course, but only if one looks beyond the text of the statute—and not clearly even then. As another matter, "loopholes" are usually passageways through which unaddressed matters threaten to escape. Here, the text of Section 22.002(e) limits habeas jurisdiction to exceedingly specific instances with the kind of precision that suggests the Legislature was drawing lines, not holes. If it wasn't, then the Legislature remains free

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[154] __ S.W.3d at __ (emphasis added).

[155] __ S.W.3d at __ (emphasis added).

[156] __ S.W.3d at __.

to clarify matters—especially in a case that springs from a judicial maze that lawmakers are best positioned to simplify.

IV. Granting Relief Poses Few Practical Benefits and Many Potential Practical Burdens.

Even if we *can* issue mandamus here, it is doubly clear that we *should not*. Even if it is legal, it is certainly impractical. Most peculiar about the Court's decision to accept this appeal is the lack of any compelling practical reason to do so. The Court of Criminal Appeals itself acknowledged two years ago—before the case even arrived on our doorstep—that it has jurisdiction to hear the case.[157] If we dismiss, Reece will return to our sister court, where a motion for reconsideration remains pending—presumably awaiting our action. This renders untrue the Court's statement that Reece has "no other procedure to challenge his confinement in our state courts"[158] and "no adequate remedy by appeal."[159] The Court of Criminal Appeals has not refused to act; it has instead deferred final action until we act first.[160] I agree that "mandamus is a proper vehicle for this Court to correct blatant injustice that otherwise would elude review by the appellate courts,"[161] but that scenario simply does not exist here. As discussed above, the Court has utilized mandamus as a flexible

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[157] *In re Reece*, No. WR-72,199-02, at 2 ("Although this Court does have the authority to act in this case pursuant to Article 5, § 5, of the Texas Constitution, we decline to do so.").

[158] __ S.W.3d at __.

[159] __ S.W.3d at __.

[160] That the strange Texas jurisdictional system offers Reece a remedy via the Court of Criminal Appeals easily disposes of his reliance on a United States Supreme Court case for the notion that this scenario is "of such a character as to be an exception to the rule of procedure that other available sources of judicial power may not be passed by for the purpose of obtaining relief by resort to the original jurisdiction of this court." *Ex parte Hudgings*, 249 U.S. 378, 379 (1919).

[161] __ S.W.3d at __.

remedy only where all other meaningful roads were blocked. If adequate appellate relief is available elsewhere, mandamus should not be used as judicial duct tape to cover "gaps" that simply do not exist. Where our sister court has conceded its own authority to act, we should be doubly disinclined to intervene.

A. Hearing Reece's Case Implies a Lack of Equal Sisterhood with Our Supposed Sister Court.

If the instant case offers no reason to seize jurisdiction, the specter of future cases more strongly militates against our doing so. Hearing the case implies that the Supreme Court and the Court of Criminal Appeals are not co-equals. Accepting mandamus jurisdiction when the Court of Criminal Appeals has exclusive habeas jurisdiction over these types of contempt orders would violate the mandated separation with that court. It would evince more respect for an institution we call our equal, and those who created it, to allow it to hear its rightful docket than to encroach pointlessly upon it.

B. Hearing Reece's Case Will Disorient Deciders, Confusing the Two High Courts and Courts of Appeals Alike.

Similarly, this case leaves open the question of whether and when a petitioner may seek review in both courts, and in what order. Such confusion could lead to an unnecessarily increased docket in either court, or at least wasted resources spent shuffling cases between the two systems (or discussing whether to do the shuffle in the first place). While the Court seems concerned that dismissing Reece's case would constitute "a potential waste of judicial and litigant resources as the

case travels between [both courts], with neither court exercising jurisdiction to consider the merits of Reece's petition,"[162] that small, one-time shuffle will save us far more than it will cost. Ignoring the reality that our jurisdiction is limited will only make the ping pong match longer, and with more balls in the air.

The confusion caused in hearing this case will affect both litigants and the courts of appeals below that have understood and applied for years the rule that today the Court contravenes. The court of appeals in the instant case certainly believed it was following that rule when it dismissed Reece's habeas petition for want of jurisdiction. It would be strange to tell those courts that a relator need only style his petition as mandamus to merit jurisdiction, especially when—as the Court acknowledges[163]—those courts have been operating under the assumption that mandamus was the only proper remedy.[164] Even Reece himself assumed this was the rule, as indicated by his decision to file "a motion for reconsideration in the Court of Criminal Appeals, explaining that this Court lacks habeas jurisdiction because the contempt order does not emanate from a violation of an order, judgment, or decree."[165]

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[162] __ S.W.3d at __.

[163] *See id.* at __ ("[S]everal courts of appeals have presumed mandamus is limited to the review of fine-only contempt orders, but not orders that result in confinement.") (citations omitted).

[164] *See, e.g., In re M.J.*, 227 S.W.3d 786, 793 (Tex. App.—Dallas 2006, pet. denied [mand. denied]) ("Contempt orders involving confinement must be challenged by writ of habeas corpus."); *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 671 (Tex. App.—Fort Worth 2001, pet. denied) (en banc) ("A contempt judgment is reviewable only via a petition for writ of habeas corpus (if the contemnor is confined) or a petition for writ of mandamus (if no confinement is involved)."); *In re Zenergy, Inc.*, 968 S.W.2d 1, 12 (Tex. App.—Corpus Christi 1997, orig. proceeding) (reasoning that because the contempt judgment in the case involved confinement, mandamus relief was improper, and any relief "will come through *habeas corpus* review.").

[165] __ S.W.3d at __ (citation omitted).

Further, this issue is before us largely because of the Court of Criminal Appeals' mistaken view that this Court has habeas jurisdiction.[166] Making it a policy to grant cases that arise out of error instead of correcting the error will make neither our court nor our sister court as careful or as diligent in reviewing cases as we ought to be; it will only encourage punting cases—likely, the most difficult cases deserving of the most attention—back and forth between us. Reece claims that these are "unique circumstances" warranting mandamus as a matter of policy; but, contradictorily, Reece also warns that "the next case might involve a party to a civil case sentenced to six months in jail for contempt." It certainly might. But that would be a matter for the Court of Criminal Appeals.

C. Hearing Reece's Case May Manufacture Manipulation.

A lack of jurisdictional clarity threatens to encourage forum shopping. An astute attorney may determine that his client stands to receive a more favorable ruling at one court rather than the other, and arrange jurisdiction-manipulative arguments accordingly. After this case, for example, petitioners seeking an audience with the Supreme Court would be advised to style their petitions as mandamus; with the Court of Criminal Appeals, habeas.

D. Hearing Reece's Case Draws a Blurry, Rather than Bright-Line, Rule.

Finally, the Court's suggestion that today's decision draws helpful lines of clarity between the civil and the criminal is unpersuasive. Today the Court may ostensibly limit itself by allowing this Court to grant mandamus in "situations where the underlying dispute is civil in nature, and the

[166] *In re Reece*, No. WR-72,199-02, at 2 ("Effective 1981, Article 5, § 3(a), of the Texas Constitution was amended to give the Texas Supreme Court and the Justices thereof the authority to issue writs of habeas corpus."). The Court does not acknowledge this mistake.

Court of Criminal Appeals declines to exercise its habeas jurisdiction."[167] This has the semblance of a bright-line rule—we hear appeals arising from underlying civil matters, and the Court of Criminal Appeals from underlying criminal matters. But that is misleadingly simplistic, and contravenes prior precedent in which we explained that case categorization does not dispose of this issue.

In other words, it is still true that "[u]nder the provisions of the Texas Constitution and the pertinent Texas statutes relating to the original jurisdiction of this Court and the Court of Criminal Appeals, the circumstance that the cause out of which a restraint of a person's liberty arises may be classified as a civil case, is not sufficient to vest this Court with habeas corpus jurisdiction."[168] Further, hearing this case, and perhaps future cases like it, may force us to handle appeals from civil cases with criminal penalties, and force us at least in part to take on quasi-criminal matters. An unnecessary, duplicative upsurge in this Court's docket is alarming enough on its own; but one comprised of quasi-criminal cases when there is a separate court designated for criminal matters is even more insupportable.

It is easy to draw a line based upon the nature of the underlying case, but this case alone demonstrates that the line is somewhat meaningless. Even the Court acknowledges that "the distinction between criminal and civil contempt does not turn on whether the underlying litigation is civil or criminal, but rather on the nature of the court's punishment."[169] The instant case, then,

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[167] __ S.W.3d at __.

[168] *Ex parte Hofmayer*, 420 S.W.2d 137, 138 (Tex. 1967) (orig. proceeding).

[169] __ S.W.3d at __ (citation omitted).

demonstrates that the cases—like the courts that hear them—are not always cleanly bifurcated. Here, the Court finds constructive criminal contempt even though it was imposed in a civil trial and not for the violation of a court order.[170]

The world is not nearly as tidy as the approach the Court has designed for it. In those blurry instances, it seems best to follow precedent. And a bright-line rule is particularly without its usual benefits where it comes at the expense of precedent that prohibits such a rule. "[W]e are seldom presented with the opportunity to give a jurisdictional statute a reasonable construction that results in more uniformity and simplicity (even if only slightly more), and given that opportunity in this case, I would seize it."[171] The simplest—and most defensible—approach is not to attempt to create a bright-line rule but to refrain from hearing the case whatsoever. The brightest line is the one drawn between these two courts. After all, the Court of Criminal Appeals has called its original jurisdiction to issue writs of habeas corpus "unlimited."[172]

V. Conclusion

No amount of head-tilting and eye-squinting can manufacture jurisdiction where there is none. Where mandamus relief would mirror the effect of a statutorily prohibited habeas writ, we should not hear the case. We should be particularly hesitant where our own mandamus jurisprudence

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[170] __ S.W.3d at __ (citations omitted).

[171] *Sultan*, 178 S.W.3d at 753 (Hecht, J., dissenting).

[172] *State v. Briggs*, 351 S.W.2d 892, 894 (Tex. Crim. App. 1961).

precludes such relief. We should be triply wary where our sister court concedes it "does have the authority to act in this case."[173]

I understand the Court's commendable desire to correct an erroneous trial-court ruling, but where our labyrinthine judicial structure curbs our ability to hear certain cases, we must obey that limitation. This is not a case where either—or neither—high court has jurisdiction. This case belongs at the Court of Criminal Appeals, and that court is apparently awaiting our decision before ruling on Reece's motion for rehearing.

It makes little sense for us to expand, without clear delineations, our own jurisdiction where our sister high court has already declared it has the power to take action. By inventing jurisdiction without practical or legal reasons for doing so, the Court today further muddles the two-court system in which we find ourselves. We may have inherited a jurisdictional house of cards, but it is imprudent to build more intricate towers upon it.

I would dismiss this petition, and in doing so urge my own: The fastest growing state in the nation requires a modernized top-to-bottom judicial structure fit for the twenty-first century and worthy of our great State. At the very least (and it grieves me to use these six words) Texas should be more like Oklahoma, where one high court is truly supreme and empowered to decide jurisdictional squabbles inherent in a bifurcated scheme. I respectfully dissent.

Don R. Willett

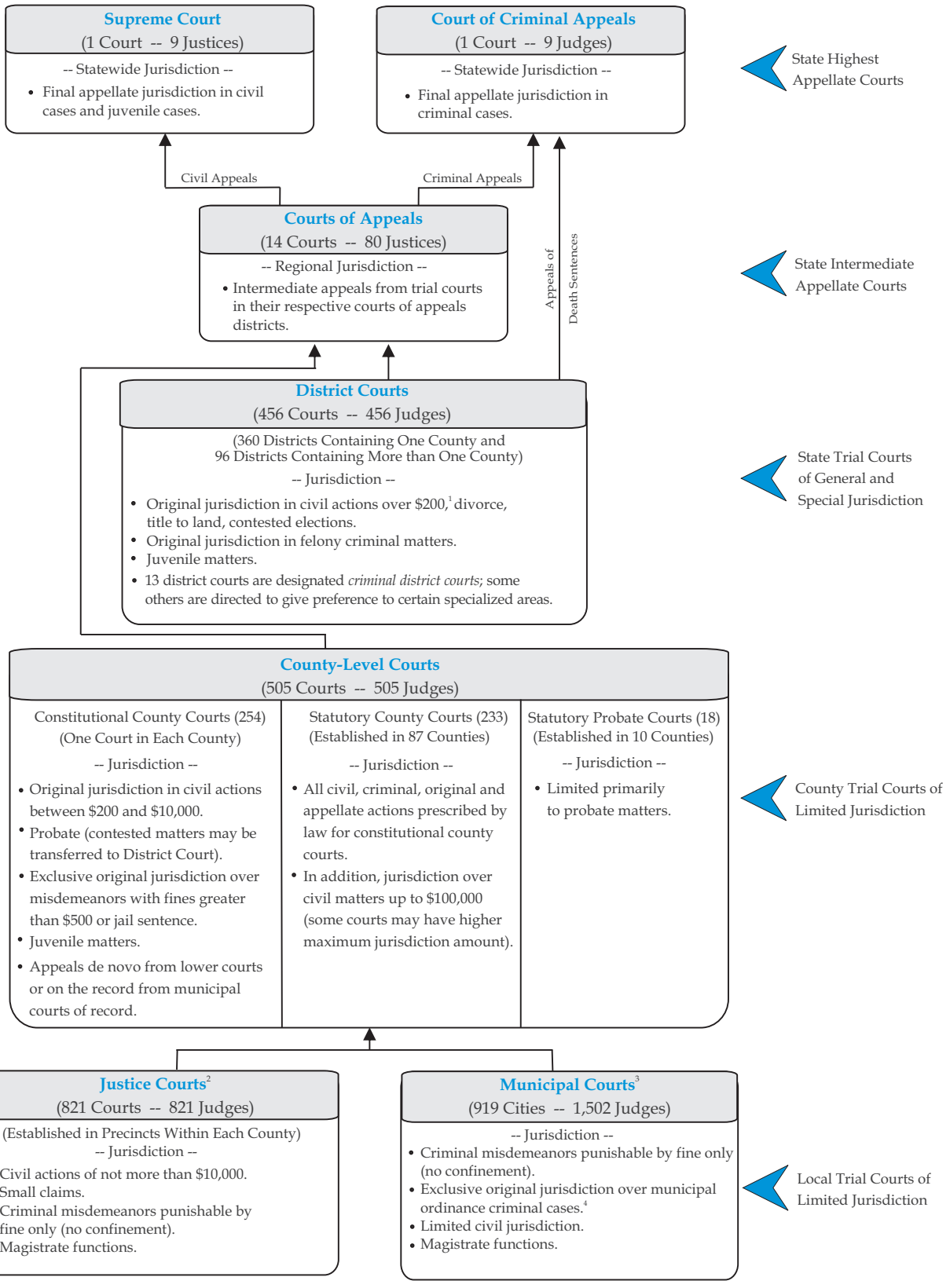
[173] *In re Reece*, No. WR-72,199-02, at 2 ("Although this Court does have the authority to act in this case pursuant to Article 5, § 5, of the Texas Constitution, we decline to do so.").

Justice

OPINION DELIVERED: May 27, 2011

COURT STRUCTURE OF TEXAS

JANUARY 1, 2011



1. The dollar amount is currently unclear.
2. All justice courts and most municipal courts are not courts of record. Appeals from these courts are by trial de novo in the county-level courts, and in some instances in the district courts.
3. Some municipal courts are courts of record -- appeals from those courts are taken on the record to the county-level courts.
4. An offense that arises under a municipal ordinance is punishable by a fine not to exceed: (1) $2,000 for ordinances that govern fire safety, zoning, and public health or (2) $500 for all others.

IN THE SUPREME COURT OF TEXAS

NO. 09-0530

TEXAS DEPARTMENT OF PUBLIC SAFETY, PETITIONER,

v.

COX TEXAS NEWSPAPERS, L.P., AND HEARST NEWSPAPERS, L.L.C., RESPONDENTS

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

Argued September 15, 2010

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE LEHRMANN.

JUSTICE WAINWRIGHT delivered a concurring opinion, joined by JUSTICE JOHNSON.

JUSTICE MEDINA and JUSTICE WILLETT did not participate in the decision.

Our common law protects from public disclosure highly intimate or embarrassing facts. We must decide whether it also protects information that substantially threatens physical harm. We conclude that it does. Both sides raise important questions, not just about safety but also about the public's right to know how the government spends taxpayer money. Those issues could not have been fully litigated under the standard that prevailed before today's decision. Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

I. Background

In separate requests, two reporters representing three newspapers asked the Department of Public Safety for travel vouchers from Governor Rick Perry's security detail. One request was limited to the Governor's out-of-state trips in 2001 and 2007; the other was not confined to a specific period of travel. Believing all of the documents to be excepted from disclosure under the Public Information Act (specifically Government Code section 552.101), DPS sought a ruling from the Attorney General's office.

DPS noted that it is responsible for staffing the governor's protective detail and that it does not publicly discuss security practices or the identity or numbers of officers so assigned. DPS offered to release aggregated expense information, warning that releasing the vouchers themselves would "necessarily reveal the number of officers who traveled with the governor and his family," data that "would be valuable information for someone who intended to cause [the governor] harm."

Based solely on DPS's letter and inspection of a subset of the responsive documents, the Attorney General determined that release of the information would place the governor in imminent threat of physical danger. Accordingly, the Attorney General concluded that the information fell within a "special circumstances" aspect of common law privacy that required DPS to withhold the submitted information in its entirety under Government Code section 552.101.[1] Cox and Hearst, publishers of the newspapers in question, sued DPS, seeking a writ of mandamus to compel

[1] Twice before, the Attorney General ruled that similar vouchers had to be disclosed. *See* Tex. Att'y Gen. OR2004-4723; Tex. Att'y Gen. OR2002-0605. In those instances, however, the only exception DPS urged was Government Code section 552.108, which protects certain law enforcement information. *See* TEX. GOV'T CODE § 552.108. Because he believed that exception to be discretionary, however, the Attorney General ruled that it could not be considered in conjunction with section 552.022. *See id.* § 552.022 (making certain information in vouchers public unless expressly confidential under "other law"). DPS did not appeal either of those rulings.

complete disclosure. *See* TEX. GOV'T CODE § 552.321(a). After a bench trial, the trial court found that public disclosure of the information in the vouchers would not put any person in imminent threat of physical danger or create a substantial risk of serious bodily harm from a reasonably perceived likely threat. The trial court ordered the clerk to issue a writ of mandamus compelling DPS to produce the vouchers in their entirety.

The court of appeals affirmed. 287 S.W.3d 390, 398. It held that the Attorney General's "special circumstances" exception conflicted with *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). *Id*. at 394. According to the court of appeals, *Industrial Foundation* "declared its two-part test to be the 'sole criteria' for the disclosure of information to be deemed a wrongful publication of private information under common law." *Id*. (quoting *Industrial Foundation*, 540 S.W.2d at 686). Because DPS conceded that the first prong of that test (that the information contains highly intimate or embarrassing facts) had not been satisfied, the court held that the vouchers could not be withheld based on the common law right of privacy. *Id*. at 395. The court also rejected DPS's claim that the Fourteenth Amendment to the United States Constitution barred disclosure of information that would create a substantial risk of serious bodily harm from a perceived likely threat. *Id*. at 398. The court observed that "[w]hether the privacy interests at issue here *should* merit protection under the PIA is a question for the legislature." *Id.*

We granted the petition for review to examine whether the public's right to information is subject to reasonable limitations when its production may lead to physical harm.[2] 53 Tex. Sup. Ct. J. 1023 (Aug. 20, 2010). DPS asserts that the vouchers are confidential under the common law and under Government Code section 418.176(a)(2).[3] We address each argument in turn.

II. Does "other law" include a common law right to be free from physical harm?

The PIA guarantees access to public information, subject to certain exceptions. *See generally* TEX. GOV'T CODE ch. 552. Those exceptions embrace the understanding that the public's right to know is tempered by the individual and other interests at stake in disclosing that information. *See generally* TEX. GOV'T CODE ch. 552, subch. C. In 1999, the Legislature excluded certain categories of public information from the exceptions. *See id.* § 552.022. This core public information is currently[4] protected from disclosure only if it is "'expressly confidential *under other law*,' meaning law other than Chapter 552 of the Government Code, which is the Public Information Act." *In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001) (quoting TEX. GOV'T CODE § 552.022(a)). "Other law" includes other statutes, judicial decisions, and rules promulgated by the judiciary. *Id*. at 332. "A law does not have to use the word 'confidential' to expressly impose confidentiality." *Id*. at 334.

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[2] The Freedom of Information Foundation of Texas submitted an amicus curiae brief in support of Cox and Hearst.

[3] DPS no longer makes an argument based on a constitutional right of privacy.

[4] The Legislature has since amended section 552.022(a). Effective September 1, 2011, core public information may be withheld if it is confidential under either the PIA or other law. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified at TEX. GOV'T CODE § 552.022(a)).

The parties agree that the vouchers contain core public information.[5] *See* TEX. GOV'T CODE § 552.022 (a)(3) (including "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body"). For this reason, that information is presently unaffected by the Legislature's passage, five days after the court of appeals' decision, of an amendment excepting public information from disclosure "if, under the specific circumstances pertaining to the [government] employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm." Act of June 3, 2009, 81st Leg., R.S., ch. 283, § 4, 2009 Tex. Gen. Laws 742 (codified at TEX. GOV'T CODE § 552.151). Because this exception is in the PIA, it does not currently apply to core public information.[6] TEX. GOV'T CODE § 552.022(a).

We turn, then, to DPS's argument that "other law" includes a common law right to be free from physical harm. DPS urges an exception for cases in which there is an imminent threat of physical danger. DPS asserts that if the common law protects personal privacy, it must logically protect physical safety as well. Ensuring the physical safety of its citizens, says DPS, is the "primary concern of every government,"[7] and preventing disclosure that would threaten physical safety is deeply rooted in the common law. *See, e.g.*, *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (observing that "'[t]he interest in freedom from intentional and

[5] The parties do not address, and we do not decide, what voucher information is "core" and what is not.

[6] The Legislature recently passed (although the Governor has not yet acted on) an amendment making vouchers confidential, but that amendment would not apply to the vouchers at issue in this case. Act introduced May 31, 2011, 82nd Leg., 1st C.S., S.B. 1, art. 79A (to be codified at TEX. GOV'T CODE ch. 660).

[7] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery'" (quoting WILLIAM L. PROSSER, LAW OF TORTS 32 (3d ed. 1964))).

Freedom from physical harm is indeed a hallmark of our common law. One of our earliest reported cases involving battery was decided by the Supreme Court of the Republic of Texas. Eli Williams sued Jesse Benton for assault and battery. *Benton v. Williams*, Dallam 496, 496 (Tex. 1843). Benton filed a plea asserting that he should not have to answer the complaint because "Williams [was] of African descent, and not entitled by law to maintain his action." *Id*. at 496-97. The Court rejected that contention, even though the constitution at that time provided that the descendants of Africans were not entitled to the rights of citizens and "shall not be permitted to remain permanently in the republic without the consent of congress." *Id*. at 497. The Court held that insulating Benton from Williams's battery claim would be "against law, contrary to the spirit of our institutions, and in violation of the dictates of common humanity." *Id*. The Court affirmed the trial court's judgment against Benton. *Id*.

Our courts have, since then, consistently protected individuals' right to be free from physical harm.[8] Blackstone described three "absolute rights," one of which was "[t]he right of personal security," consisting of "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." 1 WILLIAM BLACKSTONE, COMMENTARIES *125 (1769). The

[8] *See, e.g.*, *Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc.*, 975 S.W.2d 546, 564 (Tex. 1998) (holding that "protecting the health and safety of clinic patients is a compelling state interest justifying restrictions on the demonstrations"); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 5 (stating that "[a]n actor who intentionally causes physical harm is subject to liability for that harm"); *cf. G., C. & S. F. R'y v. Styron*, 2 Posey 275, 276-77 (Tex. Comm'n App. 1883) (not precedential) (noting that the common law recognized actions for injuries "'to the *absolute rights* of persons, as for assaults, batteries, wounding, injuries to the health, liberty and reputation'" (quoting 1 CHITTY ON PLEADINGS 60)(emphasis added)).

common law's recognition of an action for battery emerged as a means of "keep[ing] the peace by affording a substitute for private retribution,"[9] and we have recognized common law battery claims for more than a century. *See, e.g., Sargent v. Carnes*, 19 S.W. 378, 378 (Tex. 1892) (affirming judgment on plaintiff's assault and battery claim). Protection from physical harm is thus more firmly entrenched in our common law than the right of privacy, a relative newcomer. W. PAGE KEETON, ET AL., THE LAW OF TORTS 849 (5th ed. 1984)(noting that "[p]rior to the year 1890, no English or American court ever had granted relief expressly based upon the invasion [of the right of privacy]"). Indeed, we did not formally recognize the privacy tort until 1973, although our courts of civil appeals had hinted at it previously.[10]

Nonetheless, thirty-five years ago, we held that the common law privacy protection exempted documents from disclosure under the PIA. *Indus. Found.*, 540 S.W.2d at 686. We have never addressed whether the common law right to be free from physical harm applies as well. We conclude that it does.

The Legislature has recognized the importance of protecting physical safety, notwithstanding the mandate that courts construe the PIA in favor of disclosure. *See* TEX. GOV'T CODE § 552.001(b). Several PIA exceptions are grounded in a concern for physical safety, and the Legislature's swift

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[9] W. PAGE KEETON, ET AL., THE LAW OF TORTS 41 (5th ed. 1984).

[10] *See Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973) (holding, for the first time, that "an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted"); *Milner v. Red River Valley Pub. Co.*, 249 S.W.2d 227, 229 (Tex. Civ. App.—Dallas 1952, no writ) (refusing to allow recovery for violation of right of privacy, because it was "not . . . recognized under the common law, as it existed when we adopted it," but noting that other actions (such as penalties for libel and eavesdropping) provided some protection).

passage of an exception for information that would pose a "substantial threat of physical harm" confirms the primacy of this interest.[11]

Additionally, since the 1970s, the attorney general has applied a "special circumstances" exception to disclosure in over 230 cases. Often, these special circumstances included situations in which disclosure would place individuals in danger of physical harm.[12] The Attorney General has described the exception as covering a "very narrow set of situations in which release of the information"[13] would cause someone to face "an imminent threat of physical danger." Tex. Att'y Gen. ORD1977-0169, at 6. It must be "more than a desire for privacy or a generalized fear of harassment or retribution." *Id*.

The court of appeals held that the Attorney General's "special circumstances" exception conflicted with *Industrial Foundation*, in which we said that the "sole criteria" for determining

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[11] *See, e.g.*, TEX. GOV'T CODE §§ 552.108 (exempting information held by a law enforcement agency or prosecutor if it involves a threat against a peace officer), 552.1176 (making home address, phone number, and social security number of Texas lawyers and judges confidential), 552.119 (making photographs of peace officers confidential), 552.127 (excepting identifying information from participants in neighborhood crime watch organizations), 552.151 (excepting certain information from disclosure if it would pose a "substantial threat of physical harm"); *see also* House Comm. on State Affairs, Bill Analysis, Tex. H.B. 1237, 80th Leg., R.S. (2007) (noting that release of attorney personal information may "subject attorneys including current and former state and federal judges and prosecutors and their family members to harm relating to their personal safety or possible identity theft"); House Comm. on State Affairs, Bill Analysis, Tex. H.B. 273, 75th Leg., R.S. (1997) (commenting on "threats and acts of retaliation against the members of [neighborhood crime watch organizations]"); House Comm. for Public Safety, Bill Analysis, Tex. H.B. 474, 70th Leg., R.S. (1987) (noting that routine release of peace-officer photographs endangers officers' lives).

[12] *See, e.g.*, Tex. Att'y Gen. OR2008-03289 (holding that home address, telephone number, and other identifying information relating to a Dallas Area Rapid Transit employee fell within the special circumstances exception, as information was requested by a former employee who had threatened that individual); Tex. Att'y Gen. OR2008-01570 (determining that special circumstances justified withholding information, as city showed that former employee had made threatening statements to city staff); Tex. Att'y Gen. OR2004-10845 (holding that special circumstances justified withholding identity of alleged crime victim due to potential threat to victim's safety); Tex. Att'y Gen. ORD1977-0169 (holding that employees' addresses could be withheld because employees showed that their lives would be endangered if the information was disclosed).

[13] Tex. Att'y Gen. OR2004-10845, at 2.

whether information was exempt from disclosure as "confidential by judicial decision" was whether the information was of legitimate public concern and whether its publication would be highly objectionable to a reasonable person. 287 S.W.3d at 394 (citing *Industrial Foundation*, 540 S.W.2d at 686). That is an accurate statement for assessing matters involving that branch of the *invasion-of-privacy* tort (the only exception at issue in *Industrial Foundation*), but not for other matters that are confidential under judicial decision. *See, e.g., Ctr. for Econ. Justice v. Am. Ins. Ass'n*, 39 S.W.3d 337, 348 (Tex. App.—Austin 2001, no pet.) (determining that because the "[c]ommon law protects information that meets the traditional six-factor test for trade-secret protection," information was excepted from disclosure under the PIA). The court of appeals' holding is understandable, given that the Attorney General has characterized the "special circumstances" exception as falling under the common law privacy umbrella. *See, e.g.*, Tex. Att'y Gen. OR2005-07052, at 6 (noting that "information also may be withheld under section 552.101 in conjunction with common law privacy upon a showing of certain 'special circumstances'"). But freedom from physical harm is an independent interest protected under law, untethered to the right of privacy.

The privacy interest protects against four distinct kinds of invasions (intrusion upon seclusion, public disclosure of private facts, false light publicity, and appropriation); physical harm is not among them.[14] KEETON, THE LAW OF TORTS 40, 851 (noting that privacy is "not one tort, but a complex of four"). We have characterized privacy as "the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity." *Billings v. Atkinson*, 489 S.W.2d

[14] As we noted in *Industrial Foundation*, the United States Supreme Court has also recognized a constitutional right of personal privacy in certain situations. *Indus. Found. of the South v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 679 (Tex. 1976).

858, 859 (Tex. 1973) (citing 77 C.J.S. Right of Privacy § 1). By contrast, the common law right to be free from physical harm is an interest in personal integrity, distinct from that covered by the privacy interest. KEETON, THE LAW OF TORTS 40.[15] It is integral to a civil society. Although mischaracterized as a privacy related exception, the "special circumstances" doctrine protects the right we have long recognized at common law.

Both the legislative and executive branches have recognized that, as valuable as the right to public information is, a person's physical safety supersedes it. Those branches are not alone. Our common law protects—and has always protected—that interest, making such information confidential. We must decide, then, the appropriate standard for assessing whether disclosure would violate that interest. While we are not bound by the Legislature's policy decisions when we consider protections afforded by the common law, "the boundaries the Legislature has drawn do inform our decision." *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 383 (Tex. 1998); *see also Austin v. Healthtrust, Inc.*, 967 S.W.2d 400, 403 (Tex. 1998). We conclude that the "substantial threat of physical harm" standard enunciated by the Legislature appropriately describes the interest protected under the common law, and information may be withheld if disclosure would create a substantial threat of physical harm. *See* TEX. GOV'T CODE § 552.151. We next examine that standard in light of the record produced at trial.

The trial court heard testimony from witnesses and reviewed the relevant documents and other exhibits. Although DPS proferred categories of lump sum expenses, showing amounts spent

[15] *See also Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (describing battery as protecting "[t]he plaintiff's interest in the integrity of his person") (quoting PROSSER, LAW OF TORTS 32 (3d ed. 1964)).

on airfare, lodging, meals, car rental, and related matters, it argued that disclosing the vouchers themselves would give those intent on harming the governor the means to accomplish that goal. DPS contended that the information revealed travel patterns, the number and placement of DPS officers on the detail, and how far in advance officers visit a location prior to the governor's arrival. The publishers presented evidence that the itemized vouchers and related documents disclose more information (and are more valuable to taxpayers, who fund the travel) than do line items with lump sum totals. The trial court concluded, categorically, that "public disclosure of the information in the vouchers requested by Cox and Hearst would not put any person in an imminent threat of physical danger or create a substantial risk of serious bodily harm from a reasonably perceived likely threat"—the standard for the Attorney General's "special circumstances" test and the constitutional exception urged by DPS, respectively. This determination is close, but not identical, to the standard we announce today for the common law right of physical safety.

We have remanded a case to the trial court when we have changed our precedent or when the applicable law has otherwise evolved between the time of trial and the disposition of the appeal. *See, e.g.*, *Twyman v. Twyman*, 855 S.W.2d 619, 626 (Tex. 1993) (remand in interest of justice because case was tried on legal theory overruled by Court); *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns, Inc.*, 826 S.W.2d 576, 588 (Tex. 1992) (remand in interest of justice because Court announced new liability standard). We have also remanded for a trial court to determine "in light of [our] opinion, whether any of the information should be withheld from disclosure because confidential." *Indus. Found.*, 540 S.W.2d at 686. Here, our decision recognizes, for the first time, a common law physical safety exception to the PIA. And even though the interest protected under

that exception is well-established in our law, we have never before addressed whether or how it applies to the PIA. We conclude that a remand is appropriate.

On remand, the trial court must closely examine each of the disputed documents. DPS is likely correct in one sense: disclosure of *some* of the information in the vouchers may create a substantial threat of physical harm because it reveals specific details about the number of officers assigned to protect the governor, their general location in relation to him, and their dates of travel. Indeed, the vouchers divulge the number of officers the DPS deemed necessary for the governor's security, the specific location (hotel and room number) where the officers resided when providing that security, and the identity of each officer the Department assigned to the governor's protection. Because the past is prologue, at least when it reveals protocol DPS has implemented for ensuring the safety of government officials, we cannot agree that information from prior trips could not be used to inflict future harm.

But this may not justify withholding all but the ultimate dollar figure for trips abroad, as DPS proposes. In this respect, the publishers' request has merit: the documents themselves provide a more complete picture of how taxpayer money is spent than do the general categories and totals produced by DPS. This fact was not lost on the Legislature, which categorized certain information in vouchers as core public information. *See* TEX. GOV'T CODE § 552.022(a). And we agree with the trial court that the public has a legitimate interest in how public money is spent on official state business. The dividing line between disclosure and restraint must be determined by proof. To the extent DPS can show, with detailed evidence or expert testimony, that revelation substantially threatens harm—as it has with respect to the number of guards protecting the governor—then the

information at issue may be withheld. A certain amount of deference must be afforded DPS officers and other law enforcement experts about the probability of harm, although vague assertions of risk will not carry the day. But the public's right to "complete information"[16] must yield when disclosure of that information would substantially threaten physical harm. On remand, the trial court must ascertain, under this standard, what information may be confidential and what must be disclosed. Accordingly, we remand the case for a new trial.

A brief word in response to the concurrence. The concurrence says our holding would "establish judge-made exceptions to the PIA's required disclosure of information to the public, contradicting the unanimous determination in our precedent, *Industrial Foundation of the South v. Texas Industrial Accident Board*." __ S.W.3d at ___. But *Industrial Foundation* recognized that the PIA is subject to the common law and itself adopted a "judge-made" exception to disclosure: the right of privacy. *Indus. Found.*, 540 S.W.2d at 683 (holding that right of privacy acknowledged in *Billings v. Atkinson* was "the type of information which the Legislature intended to exempt from mandatory disclosure" under the PIA provision excepting matters confidential by judicial decision). We squarely held in *In re Georgetown* (a case involving core public information) that "other law" included not just statutes and rules, but "judicial decisions." *Georgetown*, 53 S.W.3d at 332. To reach that holding, we relied on a United States Supreme Court decision that concluded the phrase "all other law," by itself, "indicates no limitation" and did not allow any distinction "between positive enactments and common-law rules of liability." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128-29 (1991), *quoted in Georgetown*, 53 S.W.3d at 333. The

[16] TEX. GOV'T CODE § 552.001(a).

concurrence's position is not unlike the *Georgetown* dissent's, a position we rejected then. We reject it again today. *Compare* ___ S.W.3d at ___ (suggesting that "'other law' must mean other statutory law where the Legislature has declared certain information confidential"), *with Georgetown*, 53 S.W.3d at 339 (Abbott, J., dissenting) (suggesting that only the Legislature could promulgate laws, so that rules of procedure could not be "other law").

The concurrence argues that because the information itself may not implicate privacy concerns, it cannot be protected from disclosure as "expressly confidential under other law." TEX. GOV'T CODE § 552.022. But information does not exist in a vacuum. When disclosure carries with it a serious risk of bodily harm, we cannot ignore those consequences when deciding whether common law protections apply. *Cf. U.S. Dep't of State v. Ray*, 502 U.S. 164, 177 (1991) (considering retaliatory action that would occur if information was disclosed).[17] Our common law protects individuals from physical harm, and, consistent with the PIA,[18] that protection extends to the disclosure of information that substantially threatens such harm.

III. Are the vouchers confidential under Government Code section 418.176?

[17] *See also* Michael Hoefges et al., *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1, 7 (2003) (noting that "the [Supreme] Court considers derivative uses and secondary effects of disclosure on the privacy side as a matter of course").

[18] TEX. GOV'T CODE § 552.022(a).

Finally, DPS contends the documents are exempt from disclosure under Government Code section 418.176. That statute, passed in 2003,[19] makes certain information relating to emergency response providers confidential. The law provides, in pertinent part:

> Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:
>
> (1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
>
> (2) relates to a tactical plan of the provider; or
>
> (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

TEX. GOV'T CODE § 418.176(a).

DPS contends that section 418.176 is "other law" making the vouchers confidential. *See id.* 552.101. Cox and Hearst argue that the vouchers do not meet section 418.176's requirements and, moreover, that DPS waived the issue by failing to raise it in the trial court and the court of appeals. Because we are remanding for a new trial, DPS may pursue this argument in the trial court in the first instance. *Cf. Kallam v. Boyd*, 232 S.W.3d 774, 776 (Tex. 2007) (deferring decision on issue until it had been fully litigated below "'so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question'"(quoting *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992))).

[19] *See* Act of June 2, 2003, 78th Leg., R.S., ch. 1312, § 3, 2003 Tex. Gen. Laws 4809, 4813.

IV. Conclusion

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).

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0530

TEXAS DEPARTMENT OF PUBLIC SAFETY, PETITIONER,

v.

COX TEXAS NEWSPAPERS, L.P., AND HEARST NEWSPAPERS, L.L.C., RESPONDENTS

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

Argued September 15, 2010

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, concurring in the judgment.

The media requested vouchers that detail expenditure of public funds for the governor's security detail when he travels. Because it concerns how the government spends taxpayer monies, the information in vouchers is not just "public information" under the Public Information Act (PIA), it is "core" public information, with a greater emphasis on disclosure than other public information. *See* TEX. GOV'T CODE § 552.022(a). The Texas Department of Public Safety argues that the information should not be disclosed, even though it is core public information, because of the risk to the safety of elected officials. There is no express exception to disclosure for this core public information. This tension resulted in this Court concluding that it may establish judge-made exceptions to the PIA's required disclosure of information to the public, contradicting the unanimous

determination in our precedent *Industrial Foundation of the South v. Texas Industrial Accident Board*. *See* 540 S.W.2d 668, 682 (Tex. 1976) (plurality op.) ("We decline to adopt an interpretation which would allow the court in its discretion to deny disclosure even though there is no specific exception provided . . . ."); *Id.* at 692 (Reavley, J., dissenting) ("It was not the intention of the Legislature to turn over the administration of the Open Records Act to the judiciary."). The Court concludes that it is "not bound by the Legislature's policy decisions" in deciding common law exceptions to the statute, leaving no apparent boundaries on new common law exceptions to the legislated disclosure requirements in the PIA that courts may now create. ___ S.W.3d ___.

Further complicating the case, the trial court made an express finding that "[p]ublic disclosure of the information in the vouchers requested by [the media representatives] would not put any person in an imminent threat of physical danger or create a substantial risk of serious bodily harm from a reasonably perceived likely threat." The Court acknowledges a lack of expertise in such matters and credits the law enforcement testimony that disclosure of the vouchers would create a threat of injury. While I agree with the Court's strong desire to keep public officials safe, once the Legislature weighed in, the question of keeping public information from the people is not one for the courts. The Court should not judicially create an exception to disclosure that contradicts the Legislature's expressed intent in the PIA. I cannot join the Court's opinion, but because I believe that DPS argued, and the trial court accepted, an exception not allowed by law, I would remand in the interests of justice for the trial court to consider other exceptions grounded in "other law."

I. Background

The Public Information Act contains a comprehensive scheme arming the public with statutory mandates for the government to disclose information "collected, assembled, or maintained under a law or ordinance" or in connection with business by or for a governmental body, and it is to be liberally construed to grant requests for information. TEX. GOV'T CODE §§ 552.001(b), .002(a). All such information is subject to disclosure unless it is either later excepted from the definition of "public information" or it falls under an exception to disclosure. *See id.* §§ 552.101–.151; *cf., e.g.*, TEX. ELEC. CODE § 13.004(c) (defining certain voter registration information as confidential and not "constitut[ing] public information" for purposes of the PIA). "Public information" may be excepted from disclosure under Subchapter C, or may be prohibited from disclosure if the information is deemed "confidential." TEX. GOV'T CODE §§ 552.007, .101, .352.

There is, however, another level of "public information." Members of this Court and the Attorney General's Office have, in the past, called it "super public" information; today the Court calls it "core public information." *See* ___ S.W.3d ___; *In re City of Georgetown*, 53 S.W.3d 328, 341 (Tex. 2001) (Abbott, J., dissenting); Tex. Att'y Gen. OR2004-7388. This is the type of public information at the core of government functions, generally relating to laws actually enacted, decisions of the judiciary, votes of the Legislature, and how the government spends the people's money. *See* TEX. GOV'T CODE §§ 552.022, .0221, .0225. As such, core public information is not subject to the routine exclusions in Subchapter C, but may be withheld from the public only if the information is "expressly confidential under other law." *Id.* § 552.022(a). This rule was important

enough that the Legislature specifically commanded courts to comply with it. Section 552.022(b) mandates that "[a] court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is expressly made confidential under other law." *Id.* § 552.022(b).

Reporters representing the *Austin American-Statesman*, *San Antonio Express-News*, and the *Houston Chronicle* sent requests to DPS officials. One reporter requested "travel vouchers for Gov. Rick Perry's security detail for all trips out of state during two time periods. The first time period is January through December 2001. The second time period is January through June 2007." Another requested "access to or copies of travel vouchers for Gov. Rick Perry's security detail." The parties acknowledge that these requests include "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." *See id.* § 552.022(a)(3). As such, the information requested is core public information. *Id.* § 552.022.

II. Disclosure of Core Public Information as "Expressly Confidential Under Other Law"

Compared to the dozens of exceptions for disclosure of "regular" public information, there is only one exception to the PIA's mandated disclosure of core public information—if it is "expressly confidential under other law." *Id.* The text of section 552.022's narrow exclusion contains three facial requirements: the information must be "confidential," such designation that the information is confidential must be "express," and the source of the confidential designation must be "other law." This requirement was put in place by a 1999 amendment. *See* Act of May 25,

1999, 76th Leg., R.S., ch. 1319, § 5, 1999 Tex. Gen. Laws 4501. Prior to the amendment, section 552.022 of the Government Code merely recognized the types of information enumerated in section 552.022 were "public information." It recognized that vouchers were public information "if the information is not otherwise made confidential by law." *Id.* But the amendment added language to the introductory clause, requiring that all types of core public information enumerated in section 552.022 are public information "and not excepted from required disclosure under this chapter unless they are expressly confidential under other law." *Id.*[1] This 1999 amendment was heralded as a "true success" in providing a "citizen . . . full and complete information regarding official acts of those who represent them and the affairs of government." Rick L. Duncan, *No More Secrets: How Recent Legislative Changes Will Allow the Public Greater Access to Information*, 1 TEX. TECH. J. TEX. ADMIN. L. 115, 133 (2000). We should give effect to all the words in a statute, and to changes in the words of legislative acts. *See Indep. Life Ins. Co. of Am. v. Work.*, 77 S.W.2d 1036, 1039 (Tex. 1934). As discussed below, the Court's opinion does not, as it ignores the "express," "confidential," and "other law" requirements of the statute.

A. Other Law

"Other law" means law other than the Public Information Act. *City of Georgetown*, 53 S.W.3d at 332–33. I disagree with the Court's assertion that "other law" exceptions to disclosure of core public information can mean " judicial decisions." ___ S.W.3d ___. The Court cites as

[1] Recently, the Texas Legislature amended section 552.022's "expressly confidential under other law" provision, and also added specific exceptions in the PIA for certain confidential information. *See generally* Act of May 20, 2011, 82nd Leg., R.S. (to be codified at TEX. GOV'T CODE chs. 51, 552). After the effective date, core public information may be withheld from disclosure if it is "made confidential under this chapter or other law." *Id.* § 2 (to be codified at TEX. GOV'T CODE § 552.022). This amendment does not apply to the case at bar, because the statute's effective date is September 1, 2011. *Id.* § 41.

authority for its holding the case of *In re City of Georgetown*, a case in which the Court examined whether rules in the Texas Rules of Civil Procedure regarding attorney-client privilege constituted "other law" under section 552.022. *Id.* (citing *City of Georgetown*, 52 S.W.3d at 332). In *City of Georgetown*, the Court held that because our enacted rules of court "have the same force and effect as statutes," and the rules were derived from previously enacted statutes, such rules constitute "other law" under section 552.022. 53 S.W.3d at 332 (quotation omitted). The Court today misreads *City of Georgetown*, asserting that it serves as the basis for creating common law exceptions to the PIA. The Court cites no other Texas authority for this holding.

Other provisions in the PIA also indicate that judicial decisions should not be "other law" for the purpose of the section. *See Molinet v. Kimbrell*, ___ S.W.3d ___ (Tex. 2011) (noting that we examine the "entire act" to glean the meaning of a statute's text (citations and quotations omitted)). In section 552.101 of the PIA, the Legislature excepted from disclosure information that is "considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. This provision applies to "public information" defined and disclosable pursuant to section 552.021, and not to the core public information delineated in section 552.022. If we were to interpret "other law" in section 552.022 to include law made pursuant to a judicial decision, we would effectively apply section 552.101's "judicial decision" exception to disclosure to core public information. This is contrary to the Legislature's explicit statement that core public information is "*not excepted from required disclosure under this chapter*," including section 552.101. *Id.* § 552.022 (emphasis added). The most logical reading, then, is that "other law"

must mean other statutory law where the Legislature has declared certain information confidential,[2] or rules of court drafted by this Court that are commensurate with statutes. *See City of Georgetown*, 53 S.W.3d at 333.

The Court argues that the "other law" in this case is the "individual['s] right to be free from physical harm," as manifested in the tort of battery. ___ S.W.3d ___. The Court posits that because physical safety is "the primary concern of every government," and the PIA protects private information, then it must surely protect physical safety as well. *Id.* at ___ (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). The reasoning is a sound policy argument in drafting legislation. Elected officials should not be subjected to harm by dangerous persons whose task may be made easier through public information requests. But the policy decision of how to satisfy that objective is not ours. The Legislature has made nondisclosure of the core public information at issue dependent on it being specifically designated confidential by rules or statutes outside of the PIA.

Further, this Court has never held that other torts would protect the disclosure of core public information under section 552.022. In *Industrial Foundation of the South v. Texas Industrial Accident Board*, we decided the scope of information protected by "judicial decision" under the predecessor to Government Code section 552.101. 540 S.W.2d at 683. This is not an interpretation of "other law" under section 552.022, and, as discussed above, the two provisions are not coterminous.

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[2] This is essentially the limited exception under the federal Freedom of Information Act. *See* 5 U.S.C. § 552(b)(3) (excluding from FOIA's reach "matters that are specifically exempted from disclosure by statute . . . if that statute . . . (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and specifically references § 552(b), if passed after 2009").

In *Industrial Foundation*, all members of the Court agreed that the scope of the "judicial decision" exception did not give the Court a blank check to create common law exceptions to the PIA. *Id*. at 681–82 (plurality op.). "It was not the intention of the Legislature to turn over the administration of the Open Records Act to the judiciary." *Id*. at 692 (Reavley, J., dissenting, joined by Steakley, Pope, and Denton, JJ.); *see also Tex. Comptroller of Pub. Accounts v. Att'y Gen. of Tex.*, ___ S.W.3d ___ (Tex. 2010) (Wainwright, J., dissenting) ("[C]ourts do not have the discretion to classify information as confidential on an ad hoc basis; confidentiality of public information is to be determined by the terms of the Act."). As I discussed in *Texas Comptroller*, the Legislature limited our ability to create judicial exceptions to the PIA. *Id.* at ___. Thus, the Legislature's definition of the "judicial exception" includes only the privacy torts recognized at the time of *Industrial Foundation*. *See* 540 S.W.2d at 678–81. There was one such tort at that time—public disclosure of private facts. I would thus limit the scope of the "judicial decision" exception to that tort. My fundamental concern is the Court's willingness to create common law exceptions to the comprehensive disclosure scheme of the PIA, weakening the PIA in three consecutive opinions interpreting the Act—*City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (extending response periods by governmental entities to requests for public information when the request was unclear), *Texas Comptroller*, ___S.W.3d at ___ (holding dates of birth "confidential" under "judicial decision" and excepting them from disclosure under the PIA), and this case, *DPS v. Cox*.

Immediately after the dispute over the disclosure of travel vouchers arose, the Legislature considered making such voucher information confidential.[3] But it did *not* declare vouchers from security details "confidential," nor did it except these vouchers from the definition of "public information" under 552.022(a). Instead, the Legislature passed what is currently codified as section 552.151 of the Government Code.[4] That section provides:

> Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

TEX. GOV'T CODE § 552.151 (to be recodified at TEX. GOV'T CODE § 552.152). The amendment applies only to information to be disclosed pursuant to section 552.021, *i.e.*, regular "public information." It is an exception in Subchapter C, which specifically does not apply to core public

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[3] Parallel bills in the Texas House and Senate during the current legislative session attempted to specifically make "a voucher submitted or to be submitted under [Chapter 660 of the Government Code] confidential and may not be disclosed under the PIA" if the voucher was for expenses incurred in protecting an elected official or the official's family. H.B. 3131, 82nd Leg. R.S., § 1 (introduced March 10, 2011); S.B. 1923, 82nd Leg., R.S., § 1 (introduced April 29, 2011). Neither bill came to a vote before each bill's respective chamber during the regular session. During the special session in June 2011, Senate Bill 1 was amended to make vouchers or other reimbursement forms confidential for a period of eighteen months following the date of travel "if the reimbursement or travel expense incurred by a peace officer while assigned to provide protection for an elected official of this state or a member of the elected official's family." S.B. 1, 82nd Leg., 1st C.S., § 79A.01 (introduced May 31, 2011). Following the eighteen-month period, the vouchers "become subject to disclosure under Chapter 552 and are not excepted from public disclosure or confidential under that chapter or other law," with seven exceptions, including the personal safety exception. *Id.* During the eighteen-month period, agencies are required to submit expense summaries providing specified, detailed information. *Id.* The Legislature has provided that this Court will have "original and exclusive mandamus jurisdiction" over the construction, applicability, or constitutionality of the amendment, and the amendment applies only to vouchers created on or after September 1, 2011. *Id.*; *see also id.* § 80. The Governor has not yet taken action on the bill.

Because the vouchers at issue in this case are not covered by the new section, its interpretation is not before this Court.

[4] The original enacting legislation added the exception as section 552.151. *See* Act of May 31, 2009, 81st Leg., R.S., ch. 283, § 4, 2009 Tex. Gen. Laws 742, 743 (codified at TEX. GOV'T CODE § 552.151). This session, the Legislature redesignated the section as section 552.152, effective September 1, 2011. *See* Act of May 5, 2011, 82nd Leg., R.S., S.B. 1303, § 27.001(20). For the sake of clarity, this opinion will refer to the provision as presently in force, section 552.151.

information, like information in the vouchers at issue in this case. The Court argues that the Legislature's "swift passage" of section 552.151 of the Government Code "confirms the primacy" of the government's interest in protection against physical harm. ___ S.W.3d___. But the Legislature's intent is best manifested in what actually becomes law. *Molinet*, ___ S.W.3d at ___ ("The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent . . . ."). The promulgation of section 552.151 demonstrates the opposite. Section 552.151 is not an exception to the mandated disclosure of core public information. The Court's opinion grafts the Legislature's test found in section 552.151 onto situations in which the Legislature unambiguously did not intend. The Court would rewrite section 552.151 to hold that such information is "excepted from the requirements of sections 552.021 or 552.022" and moves the section out of the PIA such that it can be considered "other law." ___ S.W.3d ____ (emphasis added). The Court should not by common law override a specific statutory mandate.

B. Confidential

Even if "other law" may include judicial decisions and the common law, section 552.022 requires that the "other law" declare the information "confidential." "Confidential" may have a fluid meaning, such as "protected," "secured," or "safeguarded." *Cf. City of Georgetown*, 53 S.W.3d at 334 ("A law does not have to use the word 'confidential' to expressly impose confidentiality."). The Legislature has enacted a plethora of laws that deem certain information "confidential" for myriad purposes. *See Tex. Comptroller*, ___ S.W.3d ___ (Wainwright, J., dissenting) (noting that "no fewer than 100 Texas statutes classify information as confidential for purposes of the PIA"); *City of Georgetown*, 53 S.W.3d at 339–40 (Abbott, J., dissenting) (providing four examples of information

"expressly made confidential" in the Transportation Code, Education Code, and Family Code). Likewise, there are a number of tort actions, both statutory and common law, that recognize that certain types of information are private or confidential.[5] But in every instance, the *information itself* is the issue, and the statute, decision, rule, or crime exists to protect the information itself or a person who will be directly harmed by the information's release.

Once again, the Court creates a judicial exception to disclosure of information in the PIA based on a possible use of the information rather than the nature of the information itself. In *Texas Comptroller*, the Court, for the first time, considered derivative harm arising from the release of information—whether disclosure of birth dates of public employees, along with other information, could be used for identity theft. The Court held that such potential tortious use of the public information constituted grounds to withhold the information because it would constitute a "clearly unwarranted invasion of personal privacy." *Tex. Comptroller*, ___ S.W.3d at ___. But the courts are not "free to balance the public's interest in disclosure against the harm resulting to an individual by reason of such disclosure." *Indus. Found.*, 540 S.W.2d at 681–82 (plurality op.). "This policy determination was made by the Legislature when it enacted the statute." *Id.* at 82. The Legislature granted the people's right to the information after considering its potential uses and harms. The Court, apparently believing the Legislature did not sufficiently execute its task, finds a new common

[5] Examples include trade secrets, privilege, public disclosure of private facts, and gag orders during trial. *See In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003) (defining trade secrets); RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 39, 40, 41 (similarly defining trade secrets and remedies available for protection of trade secrets); TEX. R. CIV. P. 193.3 (setting standards for asserting privileges in discovery); *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 222–23 (Tex. 2004) (per curiam) (providing for mandamus relief for erroneous rulings on privileged documents); *Indus. Found. of the S. v. Tex. Ind. Accident Bd.*, 540 S.W.2d 668, 682–83 (Tex. 1976) (plurality op.) (discussing the tort of public disclosure of private facts); *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992) (discussing a court's authority to issue gag orders).

law exception to disclosure based on its own views of harm in the potential use of, on this occasion, core public information.

In *Texas Comptroller*, as here, the Court did not restrict itself to considering whether the actual release of the information (state employees' birth dates) was harmful, but rather whether, in the wrong hands and in combination with other information, such as Social Security numbers, state employees might be at higher risk for identity theft. *Tex. Comptroller*, ___ S.W.3d ___. The harm was derivative, and the analysis allowed for post-hoc, judicially created exceptions to disclosure. For the same reasons as in *Texas Comptroller*, I believe the Court's analysis and application of derivative harm to create an exception to disclosure is inappropriate, particularly so because of the core public nature of the information at issue, and because the Court's rule could permit unfettered judicial discretion in declaring any information not subject to disclosure. Its discovery of this common law right may even inadvertently have the effect of creating some common law cause of action for "wrongful disclosure of information," and may have the potential to randomly and unnecessarily subject various government agencies and officers to criminal liability for simply disclosing what the Legislature determined, and the Court admits, is core public information. *See* TEX. GOV'T CODE § 552.352 (defining the misdemeanor crime of distribution of information "considered confidential under the terms of this chapter").

C. Expressly

Even if our common law torts are "other law," and even if, somehow, the threat of the tort of battery declares some unknown information "confidential," the final requirement of section 552.022 is that the "other law" must "expressly" make the information "confidential." The Court

does not address how it believes that the information at issue here is "expressly" confidential. Merriam-Webster's dictionary defines "express" as "directly, firmly, and explicitly stated." MERRIAM-WEBSTER DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/express (last visited June 21, 2011). The tort of battery is when a person "(a) . . . acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." RESTATEMENT (SECOND) OF TORTS § 13 (1965); *see also Bailey v. C.S.*, 12 S.W.3d 159, 162 (Tex. App.—Dallas 2000, no pet.) ("A person commits a battery if he intentionally or knowingly causes physical contact with another when he knows or should reasonably believe the other person will regard the contact as offensive or provocative."). Nowhere in the tort's elements, or in any of our cases, is it "directly, firmly, and explicitly stated" that battery protects information from disclosure. The tort concerns harmful or offensive intentional contact. The Court ignores this critical requirement of the statute limiting a court's ability to protect information from disclosure.

Simply put, common law battery is not "other law" under which the information at issue here is "expressly confidential." The Court oversteps legislated limits recognized in *Industrial Foundation* to interpret exceptions to disclosure under the PIA. For this reason, I do not join in the Court's opinion.

III. Remand Is Appropriate

Although I cannot join the Court's opinion, I join its judgment that remand is appropriate. I believe DPS's and the trial court's improper reliance on the "special circumstances" exception, and

the possibility of harm to public officials, warrants a remand in the interests of justice. I also believe that DPS should have the opportunity to argue that a specific exception to disclosure made by the Homeland Security Act should apply.

The Court relies on and builds upon the Attorney General's "special circumstances" test, which the Attorney General has applied numerous times in various letter rulings, in support of its holding today. However, this test, and its rulings, do not apply to the information at issue here nor to the legal theory upon which the Court relies in withholding the information.

The genesis of the test is a one-page letter ruling from 1974, that was later expanded in 1977. It was not a freestanding test to withhold information, but rather was used in determining whether information could be withheld as a "clearly unwarranted invasion of personal privacy," a separate, statutory exception to disclosure of non-core public information in the Act. Tex. Att'y Gen. ORD-54 (1974); Tex. Att'y. Gen. ORD-169 (1977); *see also* TEX. GOV'T CODE § 552.102 (providing an exception for regular "public" information for information in a personnel file, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). In other words, the attorney general examined "special circumstances," such as an employee's specific history of being threatened, harassed, or stalked, to see if information in a state employee's personnel file should not be disclosed under what is now section 552.102 of the PIA. Rather than protecting more information from disclosure, the "special circumstances" test, as initially articulated by the attorney general, actually required *more* information to be disclosed, because only if the "special circumstances" existed could an employee's personnel information (including his or her home

address, phone number, and other personal information) be withheld. Tex. Att'y Gen. ORD-54 (1974); Tex. Att'y Gen. ORD-169 (1977).

In later attorney general opinions, though, the "special circumstances" test was not discussed in conjunction with section 552.102's "clearly unwarranted invasion of personal privacy" in employees' personnel files, but rather as a privacy exception or "other judicial decision" under section 552.101. *See, e.g.*, Tex. Att'y Gen. OR2004-10845. No party extensively discussed the evolution of this test in the attorney general's office from 1977 until today. However, it appears that the attorney general's basis for applying the "special circumstances" test to information not subject to disclosure was based on the application of the tort of public disclosure of private facts (discussed in *Industrial Foundation* and analyzed under the employment file exception, predecessor to section 552.102) as another "judicial decision" excluding information pursuant to section 552.101.

It also appears that the Attorney General has determined that section 552.101 is "other law" for the purpose of deciding whether core public information can be withheld. I agree that the tort of public disclosure of private facts may be a "judicial decision," as it was extant at the time the PIA was promulgated, that could be the basis of an exclusion from disclosure under section 552.101 and may also be "other law" by which core public information is "expressly confidential" under section 552.022. However, section 552.101, in and of itself, cannot be "other law" to withhold core public information. To enact such a rule would thwart the Legislature's expressed intent that core public information is not subject to the Subchapter C exceptions, including section 552.101. This is further evidenced by the fact that the Legislature's new "special circumstances" exception, which appears to be similar to the Attorney General's so-called common law privacy "special circumstances"

exception, is in Subchapter C, thus currently applying to "public information" but not core public information that must be disclosed pursuant to section 552.022. Therefore, the Attorney General's "special circumstances" exception should not apply to the information here.

The Attorney General's "special circumstances" test cannot apply in this situation. However, because the use of the test as an independent basis for withholding information was reasonably well established in a number of attorney general letter rulings for a number of years, because DPS and the trial court erroneously relied upon the test, and because of the serious personal safety concerns at issue in this case, I would remand in the interest of justice to allow DPS to argue any and all exceptions that are based on "other law," such as one based on Government Code section 418.176, the exception from the Homeland Security Act. *See* TEX. R. APP. P. 60.3; *Low v. Henry*, 221 S.W.3d 609, 621 (Tex. 2007) (remanding "to allow the parties to present evidence responsive to [the Court's] new guidelines").

On remand, the trial court should consider whether specific information in the vouchers raises serious security concerns and should be redacted. For example, in the sample submitted *in camera* to the Court, one cannot only identify at which specific hotels the Governor's security detail stayed and, inferentially, whether they stayed in the same hotel as the Governor, but also when the members of the detail arrived and departed from the foreign country. Other information in the vouchers, such as total amounts spent for lodging or costs of meals, may not present the same security concerns. The trial court should carefully consider the varying levels of concern for the different types of information in the vouchers.

IV. Conclusion

There is legitimate concern about fashioning a rule that could allow those who want to do harm to government officials to gain information to help them do so through the government's own records. The rule the Court announces today—that it can fashion common law exceptions to disclosure of core public information—is based on a genuine concern to protect our public officials from physical harm and acts of terrorism, but it thwarts the Legislature's clear statement that it, not the courts, grants exceptions to the public's access to public information. There are many statutes and rules that make information "expressly confidential," but the judge-made tort of battery is not one, and we should guard against any court creating reasons to keep government information from its citizens. That policy-laden task, as emphasized in *Industrial Foundation*, belongs to the Legislature. Because the Court's rule opens the door to new judicially created exceptions to disclosure of core public information and weakens what was one of the strongest, most robust freedom of information statutes in the nation,[6] I respectfully cannot join the Court's opinion. But because I believe remand in the interest of justice is appropriate, I join the Court's judgment.

_____

Dale Wainwright
Justice

OPINION DELIVERED: July 1, 2011

[6] *See City of Dallas*, 304 S.W.3d at 395 n.5 (Wainwright, J., dissenting) (citing 151 Cong. Rec. S1525-26 (Feb. 16, 2005) (statement of Senator John Cornyn)).

IN THE SUPREME COURT OF TEXAS

NO. 09-0544

JEREMY MOLINET, PETITIONER,

v.

PATRICK KIMBRELL, M.D. AND JOHN HORAN, M.D., RESPONDENTS

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

Argued October 13, 2010

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

JUSTICE LEHRMANN filed a dissenting opinion, in which JUSTICE MEDINA joined.

In this case we consider a statutory conflict regarding whether limitations bars Jeremy Molinet's health care liability claims against two doctors he sued after they had been designated as responsible third parties pursuant to Texas Civil Practice and Remedies Code section 33.004. *See* TEX. CIV. PRAC. & REM. CODE § 33.004.[1] Molinet joined the doctors as defendants within sixty days after they were designated as responsible third parties but more than two years after they last treated him. Section 33.004(e) provides that if a defendant designates a responsible third party the claimant

[1] Further references to provisions of the Civil Practices and Remedies Code will generally be by reference to section and number.

may, within sixty days, join the designated party "even though such joinder would otherwise be barred by limitations." *Id.* However, section 74.251(a) provides a two-year limitations period for health care liability claims that applies "[n]otwithstanding any other law," and section 74.002(a) provides that chapter 74 controls in the event its provisions conflict with other law. *See id.* §§ 74.251(a), 74.002(a).

We hold that section 74.251(a) prevails and Molinet's claims against the doctors are barred by its two-year limitations period.

I. Background

On July 15, 2004, Jeremy Molinet injured his Achilles tendon. On July 18, 2004, Dr. John Horan surgically repaired the tendon, after which Molinet re-injured it. Dr. Marque Allen performed a second operation later that year. Dr. Patrick Kimbrell, a wound treatment specialist, treated Molinet for several weeks beginning in early November 2004.

In September 2005, Molinet filed suit against several parties seeking damages related to his injury and medical treatment. He sued Dr. Allen and various health care providers, but did not sue either Dr. Horan or Dr. Kimbrell. In both May and September 2006, Molinet amended his pleadings and added additional healthcare providers as defendants but still did not sue Dr. Horan or Dr. Kimbrell. On August 1, 2007, more than two-and-a-half years after either Dr. Horan or Dr. Kimbrell last treated Molinet, Dr. Allen moved to designate them as responsible third parties pursuant to section 33.004(a). The trial court granted Dr. Allen's motion on August 21, 2007. On August 24, 2007, Molinet amended his pleadings to join Drs. Horan and Kimbrell as defendants. *See id.* § 33.004(e). The doctors moved for summary judgment on the basis that Molinet's claims against

them were barred by the two-year statute of limitations in section 74.251(a).

The trial court denied the motion for summary judgment. Pursuant to agreement of the parties, the court authorized an interlocutory appeal. *See id.* § 51.014(d) (permitting a trial court to issue a written order for interlocutory appeal in a civil action if the parties agree to the order and agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation).

The court of appeals reversed the trial court's order and rendered judgment dismissing Molinet's claims against Drs. Horan and Kimbrell. 288 S.W.3d 464, 468. The court of appeals held that section 74.251(a) contains an absolute two-year limitations period and trumps the contradictory language in section 33.004(e). *Id.* at 467-68.

In this Court, Molinet argues that sections 74.251(a) and 33.004(e) do not truly conflict and both can be given effect. Alternatively, he argues that even if the statutes conflict, the language of section 33.004(e) controls and provides an exception to the two-year limitations period in section 74.251(a).

Drs. Horan and Kimbrell contest our jurisdiction to review the court of appeals' judgment because this is an interlocutory appeal. Alternatively, they urge that the court of appeals correctly resolved the issue.

We conclude that we have jurisdiction to clarify the issue and that section 74.251(a) controls. Thus, we affirm the court of appeals' judgment.

II. Jurisdiction

This Court has jurisdiction over interlocutory appeals if the justices of the court of appeals disagree on a material question of law or if the court of appeals' decision conflicts with a prior decision of this Court or another court of appeals. TEX. GOV'T CODE § 22.225(c); *In re H.V.*, 252 S.W.3d 319, 324 (Tex. 2008). Decisions conflict "when there is inconsistency in the[] respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." TEX. GOV'T CODE § 22.225(e).

In *Moreno v. Palomino-Hernandez*, 269 S.W.3d 236 (Tex. App.—El Paso 2008, pet. denied), the El Paso Court of Appeals considered a health care liability suit in which Dr. Palomino-Hernandez was designated as a responsible third party and then named as a defendant by the plaintiffs. The underlying facts of the case are not entirely clear in the opinion, but Dr. Palomino-Hernandez had been named as a defendant and served with an expert report in a case filed in August 2003. *Id.* at 237-38. The plaintiffs nonsuited that case and in April 2005, filed the suit out of which the appeal arose, apparently based on the same injuries as the 2003 suit. *Id.* at 238. They did not name Dr. Palomino-Hernandez as a defendant. *Id.* The trial court entered a scheduling order in January 2006 that stated the deadline for joining additional parties had passed. On January 30, 2006, a defendant filed a motion for leave to designate Dr. Palomino-Hernandez as a responsible third party, and the trial court granted the motion on February 22. *Id.* On March 21, the plaintiff filed an amended petition naming Dr. Palamino-Hernandez as a defendant. *Id.* Dr. Palamino-Hernandez filed a motion to dismiss, urging that the plaintiffs neither timely joined him nor timely served an expert report. *Id.* The trial court granted the motion to dismiss. *Id.*

The court of appeals held that an expert report had been timely served. *Id.* at 242. It also

held that the trial court abused its discretion by allowing the defendant to designate a responsible third party and yet refusing to allow the plaintiffs' timely joinder of that party pursuant to section 33.004(e). *Id.* at 243. Although the court of appeals did not directly address the relationship between section 33.004(e) and section 74.251(a), it indicated that section 33.004(e) effectively provided an unqualified sixty-day period for joinder of a responsible third party beginning with the date the third party was designated. *See id.* at 243 & n.6.

The ostensible effect of *Moreno* and the court of appeals' decision in this case are not in accord regarding whether section 33.004(e) effectively establishes a new sixty-day window in which a plaintiff can sue a defendant even if the limitations period in section 74.251(a) has run. We have jurisdiction to clarify the issue "to remove unnecessary uncertainty in the law." TEX. GOV'T CODE § 22.225(e). We need not address Molinet's argument that the concurrence in the court of appeals was sufficient to give this Court jurisdiction.

III. Analysis

A. Standard of Review

We review issues of statutory construction de novo. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). Our primary objective in construing statutes is to give effect to the Legislature's intent. *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008).

B. The Statutory Provisions

Section 33.004(e) states:

> If a person is designated under this section as a responsible third party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third party.

TEX. CIV. PRAC. & REM. CODE § 33.004(e). However, section 74.251 provides:

> (a) Notwithstanding any other law and subject to Subsection (b), no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed . . . .
>
> (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. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

Id. § 74.251. Additionally, section 74.002(a) contains a general conflict-of-law provision that states "[i]n the event of a conflict between [chapter 74] and another law, including a rule of procedure or evidence or court rule, [chapter 74] controls to the extent of the conflict." *Id.* § 74.002(a).

Molinet first argues that sections 74.251(a) and 33.004(e) do not conflict. He urges that section 33.004(e) does not change the statute of limitations by either altering when the limitations period begins to run or by tolling it for a certain period of time. Rather, he posits, section 33.004(e) simply provides that the statute of limitations is not applicable to the joinder of a party when that party has been designated as a responsible third party.

In support of this argument, Molinet cites *Chilkewitz v. Hyson*, 22 S.W.3d 825 (Tex. 1999). In *Chilkewitz*, the plaintiff named "Morton Hyson, M.D." as a defendant in a health care suit within the limitations period. *Id.* at 827. After the limitations period had run, Hyson filed a motion for

summary judgment alleging that he did not perform the surgery individually, but that it was performed by his professional association, "Morton Hyson, M.D., P.A." *Id.* Hyson then argued that the "notwithstanding any other law" language in former Texas Revised Civil Statutes article 4590i, section 10.01,[2] the predecessor to section 74.251, precluded the operation of Texas Rule of Civil Procedure 28, which provides that "any . . . individual doing business under an assumed name may sue or be sued in its . . . assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted." *Id.* at 828; *see* TEX. R. CIV. P. 28. We disagreed and held that rule 28 did not conflict with section 10.01 because it was not a tolling provision that operated to extend the limitations period. *Chilkewitz*, 22 S.W.3d at 830.

In reaching our decision we recognized that several cases had interpreted section 10.01 and held that the "notwithstanding any other law" language prevented the tolling of the statute of limitations in medical malpractice cases. *Id.* at 829-30. But as Molinet points out, we also held that rule 28 was not a tolling provision that extended limitations. *Id.* at 830. We stated:

> But in all the foregoing cases, the issue was either when limitations began to run or whether limitations could be tolled or interrupted. Rule 28 concerns none of those issues. That procedural rule simply provides that if an entity conducts business under an assumed or common name, it may be sued in that name. Limitations is not tolled.

Id.

Although his argument is not entirely clear, Molinet asserts that, like rule 28, section

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[2] Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 10.01, 1977 Tex. Gen. Laws 2052, 2058, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 884.

33.004(e) is not a tolling provision; instead, it allows a plaintiff to join a party who has already been properly implicated in the pending lawsuit. Thus, Molinet essentially argues that the statute of limitations is only applicable when an action is "commenced" in the traditional sense, and that *Chilkewitz* held that when a party is subsequently joined in a pending proceeding the statute of limitations does not apply. We disagree.

Rule 28 is predicated on the notion that a case has already commenced against the proper party, but the party's legal name is incorrect. *See* TEX. R. CIV. P. 28 (allowing that "the true name may be substituted"); *see also Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 53 (Tex. 2003) ("Rule 28 requires that the correct legal name be substituted . . . ."). Thus, in *Chilkewitz* the doctor's professional association was effectively already a party to the suit even though Chilkewitz only named the doctor as an individual. *See Chilkewitz*, 22 S.W.3d at 829 ("[A]lthough Chilkewitz described Hyson as an individual in his original petition, his suit against Morton Hyson, M.D. was effective to commence suit against the Association doing business under the name of Morton Hyson, M.D.").

In contrast, the effect of chapter 33 is not to statutorily determine when a suit is commenced against parties designated as responsible third parties. The filing and granting of a motion for leave to designate a person as a responsible third party does not artificially establish the "commencement" of the case against a party as of some date before the party was in fact joined. *See* TEX. CIV. PRAC. & REM. CODE § 33.004(i).

In short, the plaintiff in *Chilkewitz* was allowed to amend his pleadings to reflect the defendant's proper legal name, but that defendant was a party to the lawsuit before limitations

expired. Here, we are dealing with whether section 33.004(e) allows the plaintiff to commence an action outside the two year limitations period against two entirely new defendants.

We disagree with Molinet's argument that the statutes are not in conflict as to the issue presented. The limitations provision of section 74.251(a) would bar Molinet's action against Drs. Horan and Kimbrell, while section 33.004(e) would prevent that limitations provision from barring it.

C. Construing the Statutes

We recently considered a similar situation in *Texas Lottery Commission v. First State Bank of DeQueen*, 325 S.W.3d 628 (Tex. 2010). In that case, both the Uniform Commercial Code and the Texas Lottery Act addressed assignability of future lottery payments, which the UCC designated as "accounts." *Id.* at 631. We held that because the UCC contained a conflict-of-law provision specifying that a conflicting statute is "ineffective to the extent that the . . . statute . . . prohibits [or] restricts" the assignment of an account, the Legislature intended for the UCC to control the assignments in question. *Id.* at 638.

Similarly, chapter 74's language reflects legislative intent for section 74.251(a) to be the controlling statute as to claims such as Molinet's against Drs. Horan and Kimbrell. First, section 74.251(a) explicitly states that "notwithstanding any other law" a health care liability claim must be commenced within two years after "the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed." TEX. CIV. PRAC. & REM. CODE § 74.251(a). Second, section 74.002(a) provides "in the event of a conflict between [chapter 74] and another law, including a rule of

procedure or evidence or court rule, [chapter 74] controls to the extent of the conflict." *Id.* § 74.002(a).

In *Chilkewitz*, we held that section 74.251(a)'s predecessor statute foreclosed operation of any statute "that would otherwise extend limitations." *Chilkewitz*, 22 S.W.3d at 829-30. As the court of appeals correctly held, adopting Molinet's position would extend the limitations period as to his claims against Drs. Horan and Kimbrell. 288 S.W.3d 464, 468. Thus, by the specific provisions stating that section 74.251(a) applies "notwithstanding any other law," and that chapter 74 prevails over conflicting law, the Legislature has resolved the otherwise-conflicting provisions of sections 74.251(a) and 33.004(e). *See Tex. Lottery Comm'n*, 325 S.W.3d at 639.

The dissent argues that our analysis in *Lottery Commission* is not applicable here because in that case "strong policy considerations" dictated that the use of canons of construction was inappropriate. ___ S.W.3d at ___. Despite making this argument, the dissent specifically notes that in *Lottery Commission* we did not even discuss the policy provision that the dissent references. *Id.*

Policy considerations involving the UCC were not the basis of our holding in *Lottery Commission*. In *Lottery Commission*, we discussed in depth the language of the UCC provision in dispute and concluded that canons of construction were not necessary because the express provision was unambiguous. *See Tex. Lottery Comm'n*, 325 S.W.3d at 637-39 ("We agree with FSB that because the Legislature expressly and unambiguously set out the method for resolving conflicts between the UCC and other statutes, it would be improper to go outside the language of the statute and use canons of construction to resolve the question."). We looked only to the plain language of the UCC's conflict-of-law provision, which expressly stated a conflicting statute may not prohibit

or restrict the assignment of an account, and held that the Legislature intended for the UCC to control the assignments in question. *Id.* at 639. Here, section 74.251(a) and section 74.002(a) contain express, unambiguous conflicts-of-law provisions. Applying the same analysis as we did in *Lottery Commission*, we conclude that section 74.251(a) should apply "notwithstanding any other law."

We also disagree with the court of appeals' statement that section 74.002(a) is not instructive on the issue presented as to Molinet's claims against Drs. Horan and Kimbrell because the provision was neutralized by chapter 33's own conflict-of-law provision. 288 S.W.3d at 467.

Section 33.017 states:

> Nothing in this chapter shall be construed to affect any rights of indemnity granted by any statute, by contract, or common law. To the extent of any conflict between this chapter and any right to indemnification granted by statute, contract, or common law, those rights of indemnification shall prevail over the provisions of this chapter.

Section 33.017 is not applicable in this situation for two reasons. First, while it preserves indemnity rights, it does not provide that chapter 33 generally controls over conflicting laws. Second, even if section 33.017 were a general conflict-of-law provision, this case does not concern the rights of indemnified parties.

Thus, both section 74.002(a) and section 74.251(a) evidence clear legislative intent that the two year statute of limitations in section 74.251(a) applies to Molinet's claims against Drs. Horan and Kimbrell notwithstanding section 33.004(e).

D. Legislative History

In support of their arguments that section 33.004(e) controls over section 74.251(a), Molinet and the dissent urge us to consider and give overriding weight to statements made by a senator during floor debates and published by unanimous consent in the Senate Journal. We decline to do so. Statements made during the legislative process by individual legislators or even a unanimous legislative chamber are not evidence of the collective intent of the majorities of both legislative chambers that enacted a statute. *See Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993). Moreover, the Legislature expresses its intent by the words it enacts and declares to be the law. *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006) ("Ordinarily, the truest manifestation of what legislators intended is what lawmakers enacted, the literal text they voted on."). Construing clear and unambiguous statutes according to the language actually enacted and published as law—instead of according to statements that did not pass through the law-making processes, were not enacted, and are not published as law—ensures that ordinary citizens are able to rely on the language of a statute to mean what it says. *See Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999). When a statute's language is clear and unambiguous "'it is inappropriate to resort to the rules of construction or extrinsic aids to construe the language.'" *Tex. Lottery Comm'n*, 325 S.W.3d at 637 (quoting *City of Rockwall*, 246 S.W.3d at 626); *Tex. Dep't of Protective and Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004); *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997).

It is the Legislature's prerogative to enact statutes; it is the judiciary's responsibility to interpret those statutes according to the language the Legislature used, absent a context indicating a different meaning or the result of the plain meaning of the language yielding absurd or nonsensical

results. *See* TEX. GOV'T CODE § 311.011(a) (words and phrases shall be read in context and construed according to rules of grammar and common usage); *Tex. Lottery Comm'n*, 325 S.W.3d at 637-38. And our interpretation of the language the Legislature used in section 74.251(a) is neither contradicted by its context nor does it create an absurd or nonsensical result.

Molinet could have avoided the limitations difficulty in which he finds himself by taking action such as seeking a scheduling order requiring responsible third parties to be designated in time to allow their joinder as parties before limitations expired. If that failed, he could have added the doctors as defendants within the limitations period, just as he timely named several other healthcare providers as defendants. He did not do so, however, and it is not absurd or nonsensical for him to bear the consequences of his decisions.

E. Is an Exception to Section 74.251(a) Appropriate?

Molinet argues that even if section 74.251(a) controls we should create an exception to the two-year limitations period under the circumstances addressed by section 33.004(e). He bases his argument on the proposition that we have previously recognized exceptions to the limitations period in section 74.251(a), although he does not argue that any of the exceptions are applicable here. He references *Morrison v. Chan*, where we held that there was no violation of the open courts provision of the Texas Constitution by former section 10.01's abolishing of the discovery rule in cases governed by chapter 74. 699 S.W.2d 205, 207-08 (Tex. 1985). Molinet also refers to cases involving fraudulent concealment and notes the Court has said that fraudulent concealment in health care liability claims estops a health-care provider from relying on limitations to bar a plaintiff's claim. *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001); *see also Borderlon v. Peck*, 661 S.W.2d 907,

908-09 (Tex. 1983).

Thus, he notes, we have recognized exceptions to section 74.251's two-year statute of limitations in limited circumstances even though several of our decisions have characterized the two-year statute of limitations as "absolute." *See Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex. 1997) ("We have repeatedly held that section 10.01 [74.251's predecessor] establishes an absolute two-year statute of limitation for health care liability claims . . . ."); *Bala v. Maxwell*, 909 S.W.2d 889, 892-93 (Tex. 1995) (holding that section 10.01 controls over the limitations provision of the wrongful death statute); *see also In re USAA*, 307 S.W.3d 299, 310-11 (Tex. 2010) (suggesting that section 74.251(a) controls over the tolling provision in section 16.064 of the Civil Practice and Remedies Code in health care liability claims).

Molinet argues that our cases applying former section 10.01 are not instructive to the application of 74.251(a). But the language in section 74.251(a) is almost identical to the language in section 10.01. Section 10.01 provided: "Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed . . . ." We disagree with Molinet; our interpretation of the language in section 10.01 is instructive regarding our application of section 74.251(a). And our cases construing both 74.251(a) and its predecessor have characterized the two-year statute of limitations as absolute absent very narrow exceptions. But none of the recognized exceptions apply in this case, and to create an exception here would require us to give effect to section 33.04(e) and construe the plain provisions of sections 74.251(a) and 74.002(a) to mean

something other than what they clearly say. We will not do so.

The dissent also argues that the Legislature's enactment of section 74.251(b), creating a ten year statute of repose, evidences intent to allow an exception for 33.004(e) to the two-year limitations period in section 74.251(a). ___ S.W.3d at ___. We disagree.

Before the Legislature enacted the statute of repose in 2003,[3] we had recognized fraudulent concealment and open courts provision exceptions to the two-year statute of limitations. *See Shah*, 67 S.W.3d at 841; *Morrison*, 699 S.W.2d at 208; *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985); *Borderlon*, 661 S.W.2d at 908-09. Neither the language nor the context of section 74.251(b) implies legislative intent for section 33.004(e) to be an exception to the express, clear language in sections 74.251(a) and 74.002(a). We recently noted in *Walters v. Cleveland Regional Medical Center* that "a ten-year repose period has no purpose unless the two-year limitations period has exceptions." 307 S.W.3d 292, 298 (Tex. 2010). But in *Walters* we were discussing the interaction of section 74.251(a), section 74.251(b), and provisions of the Texas Constitution. This case pits chapter 74 against chapter 33, not the Texas Constitution. And the Legislature has declared that when another statutory provision conflicts with chapter 74, chapter 74 controls. The dissent concludes that section 74.251(b) reflects legislative intent to negate two clear conflict-of-law provisions in chapter 74; we conclude that the Legislature meant what it clearly said in sections 74.251(a) and 74.002(a).

We are mindful of concerns expressed by the dissent and Molinet that not permitting a plaintiff to join designated responsible third parties outside the limitations period may create an

[3] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 864, 864-82 (current version at TEX. CIV. PRAC. & REM. CODE § 74.251(b)).

imbalance in the proportionate responsibility framework. But to the extent it does so, that balancing—or imbalancing—has been accomplished by the Legislature. The statute of limitations in health care liability claims "reflect[s] a considered legislative judgment in favor of the prompt resolution of such claims." *Yancy v. United Surgical Partners Int'l*, 236 S.W.3d 778, 784 (Tex. 2007). Imbalances the statutes allegedly create are matters to be addressed by the Legislature.

IV. Conclusion

The court of appeals correctly concluded that section 74.251(a) bars Molinet's suit against Drs. Horan and Kimbrell. Accordingly, we affirm the court of appeals' judgment.

Phil Johnson
Justice

OPINION DELIVERED: January 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0544

JEREMY MOLINET, PETITIONER,

v.

PATRICK KIMBRELL, M.D. AND JOHN HORAN, M.D., RESPONDENTS

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

Argued October 13, 2010

JUSTICE LEHRMANN, joined by JUSTICE MEDINA, dissenting.

As the Court acknowledges, we have repeatedly recognized that certain constitutional restrictions and common law doctrines may override the two-year limitations period established by section 74.251(a) of the Civil Practice and Remedies Code and its statutory predecessors. *See, e.g.*, *Walters v. Cleveland Reg'l Med. Ctr.*, 307 S.W.3d 292, 298 (Tex. 2010); *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985); *Borderlon v. Peck*, 651 S.W.2d 907, 909 (Tex. 1983). Nevertheless, the Court concludes that the deadline is "absolute," trumping the statutory override the Legislature established in section 33.004(e) of the Texas Civil Practice & Remedies Code. ___ S.W.3d at ___. The same legislative Act that implemented the current version of section 33.004(e) also enacted a ten-year statute of repose which "contemplates it is at least possible for certain [health care liability] claims to be brought up to eight years after limitations expires." *Walters*, 307 S.W.3d at 298; *see*

TEX. CIV. PRAC. & REM. CODE § 74.251(b). In my view, the Legislature's simultaneous adoption of a provision allowing for the post-limitations initiation of health care liability claims and a provision allowing joinder of responsible third parties against whom limitations has run, at a minimum, clouds the purportedly unambiguous, "[n]otwithstanding any other law" language of section 74.251(a) the Court relies on. And, with several specified exceptions not relevant here, chapter 33 applies to "*any cause of action* based on tort." TEX. CIV. PRAC. & REM. CODE § 33.002(a)(1) (emphasis added). Viewing the Act as a whole and absent any other expression of legislative intent to exclude health care liability claims from section 33.004(e)'s purview, I respectfully dissent.

Before the 2003 amendments to chapter 33 of the Civil Practice and Remedies Code, adopted as part of the sweeping tort reform implemented by House Bill 4,[1] defendants in tort suits, including health care liability defendants, were permitted to attempt to shift liability to responsible third parties by joining them as third-party defendants. Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 972–73, amended by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.02–4.04, 2003 Tex. Gen. Laws 847, 855–56; *see* Gregory J. Lensing, *Proportionate Responsibility and Contribution Before and After the Tort Reform of 2003*, 35 TEX. TECH L. REV. 1125, 1186 (2004). Like the present version of chapter 33, a claimant was permitted to assert a claim against a responsible third party a defendant had joined under chapter 33 within sixty days of the party's joinder, even if limitations had expired. Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, 1995

[1] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.03, 2003 Tex. Gen. Laws 847, 855–56.

Tex. Gen. Laws 971, 973, amended by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.04, 2003 Tex. Gen. Laws 847, 855–56. A responsible third party could be joined only if the party (1) was or might have been liable to the claimant for all or part of the claimant's damages; (2) was subject to the court's jurisdiction; and (3) could have been sued by the claimant, but was not. Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 972, amended by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.04, 2003 Tex. Gen. Laws 847, 855–56.

The 2003 amendments to chapter 33, however, dramatically altered this third-party practice. Under the current version of the statute, the trier of fact may allocate a percentage of responsibility to a third party designated by a defendant, even if the party has not been made a party to the lawsuit. TEX. CIV. PRAC. & REM. CODE §§ 33.003, 33.004. A jury's allocation of responsibility to a designated third party has no legal impact upon the designee: adverse findings impose no liability, and "may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory . . . ." TEX. CIV. PRAC. & REM. CODE § 33.004(i)(2). But the defendant has "much to gain strategically by designating a responsible third party because the defendant has a possibility of shifting a large percentage of responsibility onto the responsible third party, thereby avoiding joint and several liability," Jas Brar, *Friend or Foe? Responsible Third Parties and Leading Questions*, 60 BAYLOR L. REV. 261, 275 (2008), or possibly evading any liability at all. *See* Elaine A. Carlson, *Tort Reform: Redefining the Role of the Court and the Jury*, 47 S. TEX. L. REV. 245, 259 (2005) (hereinafter Carlson); TEX. CIV. PRAC. & REM CODE § 33.001. As the concurring justice in the court of appeals in this case observed, the designee has no legal incentive to vigorously contest liability or attempt to assign responsibility to the defendant. 284 S.W.3d 464, 470 (SIMMONS, J., concurring);

see also Carlson at 261. Read in light of proper canons of construction, the relevant provisions do not dictate the imbalanced scheme stemming from the Court's decision.

In construing a statute, our ultimate goal is to determine the meaning the Legislature intended. *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010). We begin with the statute's text, and "'examine the *entire act* to glean its meaning.'" *Id.* (quoting *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001)) (emphasis added). We also presume that the Legislature intended a just and reasonable result. *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010); *see* TEX. GOV'T CODE § 311.021(3).

The Court grounds its decision on the assumption that the language of section 74.251(a), providing for a two-year limitations period "[n]otwithstanding any other law," is clear and unambiguous, and mandates the application of the limitations period to Molinet's claims against Kimbrell. But section 33.002 of the Code unambiguously provides that chapter 33 applies to "any cause of action based on tort" and Deceptive Trade Practices Act claims, and specifies the claims to which it does not apply. TEX. CIV. PRAC. & REM. CODE § 33.002. More importantly, the Court reads section 74.251(a)'s language in isolation. House Bill 4, the source of both sections 74.251(a) and 33.004(e), also enacted section 74.251(b), a provision that clearly allows some health care liability claims to be brought after limitations has run.[2] *Walters*, 307 S.W.3d at 298. While the

[2] That section provides:

> (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. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred. TEX. CIV. PRAC. & REM. CODE § 74.251(b).

Legislature could have conceivably enacted subsection (b) to give effect to previously recognized common law or constitutionally mandated exceptions to limitations, as the Court posits, no language in House Bill 4 supports that assumption. On the other hand, section 33.004(e) was a portion of the very bill enacting the ten-year repose statute; thus, the Legislature's own words undermine the Court's conclusion that section 74.251(a) imposes an absolute deadline. *See Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (construing statutes "passed at the same time as part of the same tort-reform bill [House Bill 4]" in harmony).

This Court has been reluctant to look to legislative history to divine the Legislature's meaning, and rightly so when the statute's words clearly convey legislative intent. *See In re Collins*, 286 S.W.3d 911, 918 (Tex. 2009) (citing *Alex Sheshunoff Mgmt. Servs., L.P. v Johnson*, 209 S.W.3d 644, 652 n.4 (Tex. 2006)). In this instance, however, the Legislature's simultaneous adoption of a ten-year repose period for medical liability claims and its amendments to chapter 33 create an ambiguity that justifies consideration of legislative history bearing on the specific issue before us. *See HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 356 (Tex. 2009) (looking to legislative history to determine meaning of term that lent itself to two equally plausible interpretations); *see also Robinson v. Crown Cork & Seal Co.*, ____ S.W.3d ___, ___ (Tex. 2010) (looking to legislative record to determine public interest Legislature sought to serve in enacting Chapter 149 of the Civil Practice and Remedies Code).

In the Senate proceedings to consider the Conference Committee Report on House Bill 4, the following exchange between Senator Hinojosa and Senator Ratliff, House Bill 4's sponsor and a

member of the conference committee that crafted the substitute that was ultimately enacted, is recorded in the Senate Journal:

> Senator Hinojosa: When a defendant names a responsible third party, as I understand it, the plaintiff has 60 days to bring the third party into the suit, even if limitations would otherwise have run against that person. . . . Is that true in a medical malpractice claim too, because on page 63 of the bill it seems to say that the two-year statute in those cases applies notwithstanding any other law?
>
> Senator Ratliff: Yes, if health care providers are going to have the benefit of the designation of responsible third parties, then they have to abide by the same rules as everyone else. This 60-day provision would apply in health care liability claims.

78th Leg., R.S., Journal of the Texas Senate 5005 (citations omitted). That exchange, which addresses the precise issue before the Court, was "ordered reduced to writing and printed in the Senate Journal" by unanimous consent "to establish legislative intent regarding HB4." *Id.* at 5003.

According to the Court, its reading of the statute does not create an absurd or nonsensical result, and if it does, it is the Legislature's doing. ___ S.W.3d at ___. But the Legislature crafted a scheme that permits defendants to attempt to minimize their liability by designating other responsible parties, while allowing plaintiffs to join the designees even if limitations have run. Under the Court's reading of the statute, which ignores the impact of section 74.251(b), health care liability defendants will be in a position to force plaintiffs to "prove the liability of the party defendant (or defendants), while at the same time defending the empty chair." Wes Christian & Alexandra Mutchler, *Musical Chairs: Apportioning Liability*, 44 THE ADVOC. 118, 123 (2008). The distortion inherent in such a procedure has been noted:

> "A plaintiff . . . has no knowledge, possession, or control of evidence that a [responsible third party] could use to protect himself from a finger-pointing defendant. The empty chair defense, therefore . . . places an impossible burden

> upon plaintiffs to represent [the responsible third party's] interests as well as their own, while giving defendants a great advantage in diminishing their own liability by allowing them to allocate fault to [the responsible third party]. The result would likely be an inaccurate diminution of fault allocated to defendants and an increase of fault attributed to unrepresented [responsible third party]."

Id. at 124 (quoting Nancy A. Costello, *Allocating Fault to the Empty Chair: Tort Reform or Deform*, 76 U. DET. MERCY L. REV. 571, 597 (1999)). According to the sponsor of House Bill 4, Representative Joe Nixon, the bill's purpose was "'to establish an equitable and efficient system of justice in Texas that provides meaningful remedies for those who have been wronged while protecting the rights of those who have done no wrong.'" Carlson at 248–249 (quoting Press Release, House Chairman Joe Nixon Files Legislation to Curb Medical Lawsuit Abuse (Feb. 12, 2003) (http:// www.house.state.tx.us/news/release.php?id=91 (web page no longer available)); *see also Leland v. Brandal*, 257 S.W.3d at 208 (noting that the reforms applicable to health care liability claims House Bill 4 effected were intended to be implemented "in a manner that will not unduly restrict a claimant's rights") (citing Act of June 2, 2003, 78th Leg., R. S., ch. 204, § 10.11(b)(3), 2003 Tex. Gen. Laws 847, 884)). The Court's decision today disrupts the balance the Legislature sought to implement in section 33.004(e).

Moreover, contrary to the fundamental purposes of the reforms implemented in House Bill 4, the Court's reading of the statute will have the unintended consequence of encouraging lawsuits against health care providers. In the wake of today's decision, cautious health care liability claimants will be motivated to sue every health care provider involved in the patient's care, no matter how minimal their involvement, in order to circumvent an empty-chair defense by more likely responsible defendants.

Finally, the posture of this case differs significantly from *Texas Lottery Commission v. First State Bank of DeQueen*, 325 S.W.3d 628 (Tex. 2010). In that case, we were called upon to resolve an apparent conflict between provisions of the Lottery Commission Act and the Uniform Commercial Code. We gave effect to the UCC provision, declining to resort to canons of construction that might have eliminated the conflict, instead applying a section of the UCC providing "that 'a rule of law, statute, or regulation that prohibits [or] restricts' an assignment of a prize won in a state lottery 'is ineffective.'" *Id.* at 638 (quoting TEX. BUS. & COM. CODE § 9.406(f)). The Act implementing the UCC provision at issue in that case, unlike House Bill 4, contained no explicit exceptions; any exception would have had to have been imported from a distinct piece of legislation, the bill amending the Lottery Act.

Further, strong policy considerations dictated by the Legislature necessarily shape our decisions interpreting the UCC; while our opinion did not discuss them, those considerations made the application of otherwise-applicable canons of construction inappropriate in *Lottery Commission*. The UCC is intended to simplify, clarify, and modernize commercial practices. *See Sw. Bank v. Info. Support Concepts, Inc.*, 149 S.W.3d 104, 110 (Tex. 2004); TEX. BUS. & COM. CODE § 1.103. Our decision in *Lottery Commission* is consistent with the mandate that the UCC "is to be regarded as particularly resistant to implied repeal." TEX. BUS. & COM. CODE § 1.104 cmt. 1. The considerations that precluded our application of canons of construction in *Lottery Commission* are simply not present in this case.

It is apparent from the context in which section 74.251(a) and section 33.004(e) were enacted that section 74.251(a)'s "[n]otwithstanding any other law" language is not unambiguous. The

Court's construction ignores section 74.251(b)'s impact, gives no effect to section 33.004(e)'s joinder provision in health care liability claims, and disrupts a carefully constructed scheme balancing the interests of both defendants and claimants, despite explicit expressions of contrary legislative intent. Accordingly, I respectfully dissent.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: January 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0558

MARSH USA INC. AND MARSH & MCLENNAN COMPANIES, INC., PETITIONERS

v.

REX COOK, RESPONDENT

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

Argued September 16, 2010

JUSTICE WAINWRIGHT delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE MEDINA, JUSTICE JOHNSON, and JUSTICE GUZMAN joined.

JUSTICE WILLETT delivered an opinion concurring in the judgment.

JUSTICE GREEN delivered a dissenting opinion, in which CHIEF JUSTICE JEFFERSON and JUSTICE LEHRMANN joined.

In this case, we decide whether a covenant not to compete signed by a valued employee in consideration for stock options, designed to give the employee a greater stake in the company's performance, is unenforceable as a matter of law because the stock options did not give rise to an interest in restraining competition. We hold that, under the terms of the Covenants Not to Compete Act (Act), the consideration for the noncompete agreement (stock options) is reasonably related to

the company's interest in protecting its goodwill, a business interest the Act recognizes as worthy of protection. The noncompete is thus not unenforceable on that basis. We reverse the court of appeals' judgment and remand to the trial court for further proceedings.

I. BACKGROUND

Rex Cook had been employed by Marsh USA Inc. (Marsh) since 1983 and rose to become a managing director. Marsh & McLennan Companies, Inc. (MMC) is the parent company for various risk management and insurance businesses, including Marsh. On March 21, 1996, MMC granted Cook the option to purchase 500 shares of MMC common stock pursuant to its 1992 Incentive and Stock Award Plan (Plan). The Plan was developed to provide "valuable," "select" employees with the opportunity to become part owners of the company with the incentive to contribute to and benefit from the long-term growth and profitability of MMC. Under the Plan, stock option awards would vest in twenty-five percent increments each year, becoming fully vested and exercisable after a period of four years. To exercise a stock option under the Plan's terms, employees must provide MMC with a Notice of Exercise of Option Letter, a signed Non-Solicitation Agreement (Agreement), and payment for the stock at the discounted strike price. The term of the option was ten years. Cook's option was set to expire on March 20, 2006.

In February 2005, Cook signed the Agreement and a notice form stating that he wanted to exercise the stock options to acquire 3000 shares[1] of MMC common stock at the strike price. The

[1] The increase in the number of shares subject to Cook's option is apparently due to MMC stock splits.

Agreement Cook signed provided that if he left the company within three years after exercising the options, then for a period of two years after termination Cook would not:

> (a) solicit or accept business of the type offered by [MMC] during [Cook's] term of employment with [MMC], or perform or supervise the performance of any services related to such type of business, from or for (I) clients or prospects or [MMC] or its affiliates who [Cook] solicited or serviced directly . . . or where [Cook] supervised, directly, indirectly, in whole or in part, the solicitation or servicing activities related to such clients or prospects; or (II) any former client of [MMC] or its affiliates who was such within two (2) years prior to [Cook's] termination of employment and who was solicited or serviced directly by [Cook] or where [Cook] supervised directly or indirectly, in whole or in part, the solicitation or servicing activities related [to] such former clients; or
>
> (b) solicit any employee of [MMC] who reported to [Cook] directly or indirectly to terminate his employment with [MMC] for the purpose of competing with [MMC].

In addition, the Agreement provided that Cook would keep MMC's confidential information and trade secrets confidential during and after his employment with Marsh.

Less than three years after signing the Agreement and exercising the stock options, Cook resigned from Marsh and immediately began employment in Dallas with Dallas Series of Lockton Companies, LLC (Lockton), a direct competitor of MMC. Within a week after Cook's resignation, MMC sent Cook a letter including allegations that he violated the Agreement through his efforts to solicit Marsh clients and employees.

MMC filed suit against Cook and Lockton for breach of contract and breach of fiduciary duty, claiming, among other things, that Cook had solicited and accepted business from clients and prospects of Marsh who were serviced directly by Cook or where Cook supervised, directly or indirectly, the solicitation activities related to the client or potential client. Cook filed a motion for

partial summary judgment on the ground that the Agreement constituted an unenforceable contract because it was not ancillary to or part of an otherwise enforceable agreement under *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 643, 647 (Tex. 1994). The trial court granted Cook's motion for partial summary judgment on the breach of contract claim, concluding in the order that the Agreement was unenforceable as a matter of law. Marsh non-suited its other claims and appealed the partial summary judgment. Relying on *Light*, the court of appeals affirmed the trial court's judgment, holding that the transfer of stock did not give rise to Marsh's interest in restraining Cook from competing. *Marsh USA Inc. v. Cook*, 287 S.W.3d 378, 382 (Tex. App.—Dallas 2009, pet. granted). Marsh appealed.

We granted Marsh's petition for review to address the enforceability of the covenant at issue. We review de novo issues of statutory construction and application of the law to undisputed facts in summary judgments. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

II. ENFORCEABILITY OF THE COVENANT NOT TO COMPETE

The Agreement generally prohibits Cook from soliciting or accepting business of the type offered by MMC and in which Cook was involved from clients, prospective clients, and former clients of MMC or its affiliates who were such within the two years prior to Cook's termination. It also provides that Cook may not solicit any MMC employee who reported directly or indirectly to Cook and includes a nondisclosure requirement to keep confidential MMC's trade secrets during and after his employment with Marsh.

Covenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' customers and employees are restraints on trade and are governed by the Act. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681–82 (Tex. 1990); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 599–600 (Tex. App.—Amarillo 1995, no writ) (stating that non-solicitation covenants prevent the employee from soliciting customers of the employer and effectively restrict competition); *see also Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464–65 (5th Cir. 2003) (applying Texas law and stating that non-solicitation covenants restrain trade and competition and are governed by the Act); *Rimkus Consulting Grp., Inc. v. Cammarata*, 255 F.R.D. 417, 438–39 (S.D. Tex. 2008) (holding that a "nonsolicitation covenant is also a restraint on trade and competition and must meet the criteria of section 15.50 of the Texas Business and Commerce Code to be enforceable" (citations omitted)). Agreements not to disclose trade secrets and confidential information are not expressly governed by the Act. *See, e.g.*, *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 265 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. App.—Dallas 1992, no writ); *see also Olander v. Compass Bank*, 172 F. Supp. 2d 846, 852 (S.D. Tex. 2001). The parties concur that the Agreement in this case is governed by the Act. To the extent this Agreement extends beyond the non-disclosure of Marsh's trade secrets and confidential information, we address its enforceability under the Act.

A. Rationale for Enforcement of Covenants Not to Compete

The Texas Constitution protects the freedom to contract. *See* TEX. CONST. art. I, § 16; *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 663–64 (Tex. 2008); *see also In*

re Prudential Ins. Co. of Am., 148 S.W.3d 124, 128–29 (Tex. 2004). Entering a noncompete is a matter of consent; it is a voluntary act for both parties. However, the Legislature may impose reasonable restrictions on the freedom to contract consistent with public policy. *See Fairfield Ins. Co.*, 246 S.W.3d at 664–65. It has done so with the Texas Free Enterprise and Antitrust Act of 1983, TEX. BUS. & COM. CODE ch. 15, which includes the Act, TEX. BUS. & COM. CODE §§ 15.50–.52.

The purpose of Chapter 15 is "to maintain and promote economic competition in trade and commerce" occurring in Texas. TEX. BUS. & COM. CODE § 15.04. Unreasonable limitations on employees' abilities to change employers or solicit clients or former co-employees, *i.e.*, compete against their former employers, could hinder legitimate competition between businesses and the mobility of skilled employees. *See id.*; *Potomac Fire Ins. Co. v. State*, 18 S.W.2d 929, 934 (Tex. Civ. App.—Austin 1929, writ ref'd) (holding that a contract between two insurance companies to limit compensation and not hire their competitors' companies was unenforceable as it was intended to "crush and destroy competition"). On the other hand, valid noncompetes constitute reasonable restraints on commerce agreed to by the parties and may increase efficiency in industry by encouraging employers to entrust confidential information and important client relationships to key employees. *See Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 176–77 (Tex. 1987) (Gonzalez, J., dissenting) (citing RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. c (1981)), *superseded by statute*, TEX. BUS. & COM. CODE § 15.50(a). Legitimate covenants not to compete also incentivize employers to develop goodwill by making them less reluctant to invest significant resources in developing goodwill that an employee could otherwise immediately take and use against them in business. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1 (2d ed. 1977),

cited in Hill, 725 S.W.2d at 176 (Gonzalez, J., dissenting); *Patterson v. Crabb*, 51 S.W. 870, 871 (Tex. Civ. App. 1899, writ dism'd) (recognizing under the common law the inequity of allowing a former employee to compete against an employer by using that employer's goodwill against him when the employee had agreed not to compete with the employer). Stated differently, valid covenants not to compete ensure that the costs incurred to develop human capital are protected against competitors who, having not made such expenditures, might appropriate the employer's investment. Greg T. Lembrick, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2296 (2002) (noting the employers' high cost of developing human capital, including extensive training, revelation of confidential information and exposure to key customers); *see* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 652 (1960), *cited in Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 660 (Tex. 2006) (Jefferson, C.J., concurring).

The House Business and Commerce Committee echoed this purpose of the Act:

> It is generally held that these covenants, in appropriate circumstances, encourage greater investment in the development of trade secrets and goodwill employee training, providing contracting parties with a means to effectively and efficiently allocate various risks, allow the freer transfer of property interests, and in certain circumstances, provide the only effective remedy for the protection of trade secrets and good will [sic].

House Comm. on Bus. & Commerce, Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989).[2]

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[2] The English common law reasoned:

> Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. . . . [T]he public derives an advantage in the . . . security [a reasonable noncompete covenant] affords that the master

The Legislature, presumably recognizing these interests could conflict, crafted the Act to prohibit naked restrictions on employee mobility that impede competition while allowing employers and employees to agree to reasonable restrictions on mobility that are ancillary to or part of a valid contract having a primary purpose that is unrelated to restraining competition between the parties.[3] *See* TEX. BUS. & COM. CODE §§ 15.05(a), .50(a). By doing so, the Legislature facilitates its stated objective of promoting economic competition in commerce. *Id.* § 15.04.

In section 15.05(a) of the Business and Commerce Code, the Legislature included a policy limitation on the freedom between employers and employees to contract: "Every contract,

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> will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business.

Mallan v. May, 11 Mees. & W. 652, 665–66 (Ex. of P. 1843). The Massachusetts Supreme Court recognized nearly two centuries ago:

> [S]mall discouragements will have no injurious effect in checking in some degree a spirit of competition. An agreement with a tradesman to give him all the promisor's custom or business, upon fair terms, and not to encourage a rival tradesman to his injury, can hardly be considered as a restraint of trade. Certainly it is not such a restraint as would be injurious to the public, for in proportion as it discourages one party it encourages another.

Palmer v. Stebbins, 3 Pick. 188, 192–93 (Mass. 1825). Valuing "honesty and fidelity" among businesspeople in the consideration of restrictive covenants, the Georgia Supreme Court explained that it would be a "scandal" if the law is forced to uphold a "dishonest act" as in denying enforcement of contract terms with a person "in violation of his solemn engagement." *Hood v. Legg*, 128 S.E. 891, 896–97 (Ga. 1925) (internal quotation omitted).

[3] Numerous courts espoused a similar practical common law rationale for enforcing consensual noncompetition covenants that constitute limited restraints on trade. Such reasonable restraints "afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public." *Horner v. Graves*, 7 Bing. 735, 743 (C.P. 1831); *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282–83 (6thCir. 1898), *aff'd* 175 U.S. 211 (1899); *McClain & Co. v. Carucci*, No. 3:10-cv-00065, 2011 WL 1706810, at *4–5 (W.D. Va. May 4, 2011) (quoting *Merriman v. Cover, Drayton & Leonard*, 51 S.E. 817, 819 (Va. 1905)); *Gafnea v. Pasquale Food Co.*, 454 So. 2d 1366, 1368–69 (Ala. 1984); *Freeman v. Brown Hiller, Inc.*, 281 S.W.3d 749, 754–55 (Ark. Ct. App. 2008); *Freudenthal v. Espey*, 102 P. 280, 284 (Colo. 1909); *Scott v. Gen. Iron & Welding Co.*, 368 A.2d 111, 114 (Conn. 1976); *Hood v. Legg*, 128 S.E. 891, 896–97 (Ga. 1925); *Hursen v. Gavin*, 44 N.E. 735, 735 (Ill. 1896); *Hammons v. Big Sandy Claims Serv., Inc.*, 567 S.W.2d 313, 315 (Ky. Ct. App. 1978); *Montgomery v. Getty*, 284 S.W.2d 313, 317 (Mo. Ct. App. 1955); *Eldridge v. Johnston*, 245 P.2d 239, 250–51 (Ore. 1952); *Turner v. Abbott*, 94 S.W.64, 66–69 (Tenn. 1906); *Kradwell v. Thiesen*, 111 N.W. 233, 234 (Wis. 1907).

combination, or conspiracy in restraint of trade or commerce is unlawful." *Id.* Our cases recognize that such naked restraints on trade are unlawful. *See, e.g.*, *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 849 (Tex. 2009); *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973) (citations omitted); *Weatherford Oil Tool Co. v. Campbell*, 340 S.W.2d 950, 952 (Tex. 1960). Where the object of both parties in making such a contract "is merely to restrain competition, and enhance or maintain prices," there is no primary and lawful purpose of the relationship "to justify or excuse the restraint." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282–83 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899), *cited in Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 738 (1988) (Stevens, J., dissenting); *see also Potomac Fire Ins. Co.*, 18 S.W.2d at 934. This is the basis for the requirement that the covenant be ancillary to a valid contract or transaction having a primary purpose that is unrelated to restraining competition between the parties.

The Legislature also recognized that, even though it may restrain trade to a limited degree, a valid covenant not to compete facilitates economic competition and is not a naked restraint on trade. TEX. BUS. & COM. CODE § 15.04. A noncompetition agreement is enforceable if it is reasonable in time, scope and geography and, as a threshold matter, "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(a).

We engage in a two-step inquiry to determine this threshold requirement for enforceability under the Act. First, we determine whether there is an "otherwise enforceable agreement" between the parties, then we determine whether the covenant is "ancillary to or part of" that agreement. *Mann Frankfort*, 289 S.W.3d at 849; *Light*, 883 S.W.2d at 644.

B. History of the Threshold Standards to Enforceability

At one time the common law generally prohibited all restraints on trade, *Addyston Pipe & Steel Co.*, 85 F. at 279–80,[4] and Texas jurisprudence once held covenants not to compete to be unenforceable because they were in restraint of trade and contrary to public policy. *Chenault v. Otis Eng'g Corp.*, 423 S.W.2d 377, 381–82 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.) (citations omitted). But "people and the courts" came to recognize that "it was in the interest of trade that certain covenants in restraint of trade should be enforced." *Addyston Pipe & Steel Co.*, 85 F. at 280; *see also Cline v. Frink Dairy Co.*, 274 U.S. 445, 461 (1927); *Justin Belt Co.*, 502 S.W.2d at 685. And the rule became well-established in Texas that reasonable noncompete clauses in contracts pertaining to employment are not considered to be contrary to public policy as constituting an invalid restraint of trade. *DeSantis*, 793 S.W.2d at 681; *Chenault*, 423 S.W.2d at 381. Texas courts have enforced reasonable covenants not to compete dating back at least to 1899. *Patterson*, 51 S.W. at 871–72. "The courts of this State have in numerous cases enforced negative restrictive covenants not to compete when ancillary to employment involving trade or professions although such covenants may be in limited restraint of trade, provided they are reasonably limited as to duration and area." *Chenault*, 423 S.W.2d at 381–82 (citations and quotations omitted); *see also McAnally v. Person*, 57 S.W.2d 945, 949 (Tex. Civ. App.—Galveston 1933, writ ref'd); *Koenig v. Galveston Ice & Cold Storage Co.*, 18 S.W.2d 1099, 1100 (Tex. Civ. App.—Galveston 1929, no writ); Michael D. Paul & Ian C. Crawford, *Refocusing* Light*:* Alex Sheshunoff Management Services, L.P. v.

[4] In the thirteenth through the sixteenth centuries, the English common law generally regarded all restraints in employment contracts as departures from the principle of economic freedom and therefore void. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. at 631–32.

Johnson *Moves Back to the Basics of Covenants Not to Compete*, 38 ST. MARY'S L.J. 727, 731 (2007). In 1973, we articulated for the first time the common law requirement recognized by courts of appeals in Texas and other states that a covenant not to compete must be "ancillary" to another contract, transaction or relationship. *Justin Belt Co.*, 502 S.W.2d at 683–84; *see also Potomac Fire Ins. Co.*, 18 S.W.2d at 934; *Chenault*, 423 S.W.2d at 382; *Novelty Bias Binding Co. v. Shevrin*, 175 N.E.2d 374, 376 (Mass. 1961). *See generally Bond Elec. Corp. v. Keller*, 166 A. 341, 342 (N.J. Ch. 1933).

In the short-lived opinion of *Hill v. Mobile Auto Trim* in 1987, the Court adopted the Utah common law precept that covenants not to compete are unenforceable if they prohibit employees from obtaining jobs that share a "common calling" with their current employment. 725 S.W.2d at 172. This essentially barred noncompete agreements that protected even reasonable business interests of an employer. *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652–53 (Tex. 2006) (citing Sen. Research Ctr., Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989)).

In *DeSantis v. Wackenhut Corp.*, a covenant not to compete was held to be unreasonable and unenforceable because the employer had not shown that it needed the protection a noncompete would afford. 793 S.W.2d at 684. In that case, the interest allegedly being protected was confidential information, but the employer failed to prove that the information could create a competitive advantage and was not obtainable by persons outside of its employ. *Id.* There was no dispute in *DeSantis* that the agreement was ancillary to an otherwise valid relationship, but in defining the common law principles that govern in Texas, we stated that, for noncompete agreements to be valid and enforceable, the common law required that they be "part of and subsidiary to an

otherwise valid transaction or relationship which gives rise to an interest worthy of protection." *Id.* at 682 (citing RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b (1981)).

While *DeSantis* was pending before this Court, the Legislature passed the Act, adding to Chapter 15, Monopolies, Trusts and Conspiracies in Restraint of Trade, of the Texas Business and Commerce Code. *Id.* at 684 (citing Act of May 23, 1989, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852). Section 15.50(a) of the new Act provided:

> Notwithstanding section 15.05 of this code, and subject to any applicable provision of Subsection (b), a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COM. CODE § 15.50(a). The Act was intended to reverse the Court's apparent antipathy to covenants not to compete and specifically to remove the obstacle to their use presented by the narrow "common calling" test instituted by *Hill*, and to "restore over 30 years of common law developed by Texas Courts and remove an impairment to economic development in the state." *Sheshunoff*, 209 S.W.3d at 653 (quoting House Research Org., Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989)). Quite simply, "[t]he purpose of the act was to return Texas' law generally to the common law as it existed prior to *Hill v. Mobile Auto Trim*." *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991) (citation omitted).[5] Under the common law prior to *Hill*, the "rule

[5] In addition to legislatively overruling *Hill*'s "common calling" requirement, the Act also made explicit that a court could reform covenants that contained unreasonable restrictions on time, geographical area, or scope of activity or restrictions that were greater than necessary to make them reasonable and no greater than necessary, and could provide money damages for a violation occurring after reformation. *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991); TEX. BUS. & COM. CODE § 15.51(c); *see also Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994) (citing TEX. BUS. & COM. CODE § 15.52) (stating that the Act supplanted prior common law).

[was] well established in Texas that non-competition clauses in contracts pertaining to employment [were] not normally considered to be contrary to public policy as constituting an invalid restraint of trade." *Chenault*, 423 S.W.2d at 381.

In the two-step threshold inquiry to determine if a covenant not to compete is enforceable under the Act, we determine whether there is an "otherwise enforceable agreement" between the parties, and, if so, we determine whether the covenant is "ancillary to or part of" that agreement. *Mann Frankfort*, 289 S.W.3d at 849 (quoting *Light*, 883 S.W.2d at 644). The "otherwise enforceable agreement" requirement is satisfied when the covenant is "part of an agreement that contained mutual non-illusory promises." *Sheshunoff*, 209 S.W.3d at 648–49 (quoting *Light*, 883 S.W.2d at 646); *see also DeSantis*, 793 S.W.2d at 681 (noting that "the agreement not to compete must be ancillary to an otherwise valid transaction or relationship," including purchase and sale of a business and employment relationships (citations omitted)). No one contests that an "otherwise enforceable agreement" exists in this case—Cook entered into an agreement that he would not solicit Marsh's clients, recruit Marsh's employees, or disclose confidential information in exchange for the stock option price. There is offer, acceptance, and consideration for the mutual promises, and the nonsolicitation and nondisclosure agreements are "otherwise" enforceable agreements. *See Sheshunoff*, 209 S.W.3d at 648; *see also Mann Frankfort*, 289 S.W.3d at 850 (noting that an implied promise may support an "otherwise enforceable agreement"). The question in this case is whether Cook's covenants are "ancillary to or part of" the otherwise enforceable agreement.

In *Light v. Centel Cellular Co. of Texas*, we first considered a two-pronged approach to determine whether the covenant is "ancillary to or part of" the otherwise enforceable agreement, requiring that:

> (1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement.

883 S.W.2d at 647. Today we address the first prong of *Light's* explication of the "ancillary to or part of" requirement, *i.e.*, whether the Act requires that consideration for covenants not to compete must "give rise" to the employer's interest in restraining the employee from competing. *Id.*

C. The "Give Rise" Requirement

It is important to note that the Act itself does not include a "give rise" requirement, nor does it define "ancillary." In Texas, the common law "give rise" requirement was first stated in *DeSantis* in 1987. 793 S.W.2d at 682. We held that the common law prior to the enactment of the Act required that noncompete agreements be "part of and subsidiary to an *otherwise valid transaction or relationship* which gives rise to an *interest worthy of protection*." *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b (1981)) (emphasis added). *Light* diverged from the common law definition of "give rise" as articulated in *DeSantis*. *See id.* Rather than requiring that the otherwise enforceable agreement give rise to "an interest worthy of protection," *Light* imposed a stricter requirement: that the consideration give rise to "the employer's *interest in restraining the employee from competing*." *Light*, 883 S.W.2d at 647 (emphasis added). *Light*'s "give rise" condition on the enforceability of noncompetes was more restrictive than the common law rule the

Legislature intended to resurrect. Although we have recognized on multiple occasions that goodwill, along with trade secrets and other confidential or proprietary information, is a protectable business interest, *Light*'s "give rise" language narrowed the interests the Act would protect, excluding much of goodwill as a protectable business interest. *See id.*; *DeSantis*, 793 S.W.2d at 682; *see also Sheshunoff*, 209 S.W.3d at 649; *Olander*, 172 F. Supp. 2d at 855 & n.12 (noting that *Light* recognized covenants to protect confidential information as otherwise enforceable agreements but suggesting that the stock options at issue could give rise to protection of goodwill); *cf. McAnelly v. Brady Med. Clinic, P.A.*, No. 03-04-00095-CV, 2004 WL 2556634, at *2–3 (Tex. App.—Austin Nov. 12, 2004, no pet.) (stating that noncompetes are "disfavored contract[s]" and holding that the sale of a medical practice was merely a sale of medical supplies and thus not an interest worthy of protecting through a covenant not to compete). Commentators noticed that in Texas caselaw, "[o]ther than a promise not to disclose trade secrets and confidential information, little else seems to satisfy this prong of the statute." Paul & Crawford, *Refocusing* Light:, 38 ST. MARY'S L.J. at 752.[6] This, despite the apparent objective of the Legislature in overruling *Hill* to "restore over 30 years of common law developed by Texas Courts and remove an impairment to economic development in the state." *Sheshunoff*, 209 S.W.3d at 653 (quoting House Research Org., Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989)); *see also Peat Marwick*, 818 S.W.2d at 388.

In the two instances after *Light* in which this Court interpreted the Act, *Light*'s "give rise" standard was not at issue. However, we retreated from some of *Light*'s other precepts. Under *Light*,

[6] The covenant also had to be designed to enforce a return promise of the covenantee, which further narrowed beyond the common law precepts the applicability of covenants not to compete. *See* Paul & Crawford, *Refocusing* Light, 38 ST. MARY'S L.J. at 752.

a unilateral contract (formed when one of the promises was illusory) could not support a covenant not to compete because it was not "'an otherwise enforceable agreement at the time the agreement [was] made.'" *Light*, 883 S.W.2d at 645 n.6 (quoting TEX. BUS. & COM. CODE § 15.50). In *Alex Sheshunoff Management Services, L.P. v. Johnson*, we revisited the meaning of the phrase "at the time the agreement is made," and determined that *Light* was overly restrictive. 209 S.W.3d at 651. We held that "at the time the agreement is made" modified "ancillary to or part of" rather than the "otherwise enforceable agreement," and thus a unilateral contract that was unenforceable when made could support a covenant not to compete as long as the covenant was "ancillary to or part of" the agreement at the time the agreement was made. *Id.*; *see also Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 302–03 (Tex. 2009) (applying *Sheshunoff*'s unilateral contract rationale). The covenant not to compete in *Sheshunoff* was enforceable despite being supported by an executory unilateral contract. *Sheshunoff*, 209 S.W.3d at 651. In addition, we re-emphasized that the focus in applying section 15.50 should be on the reasonableness of the covenant. *Id.* at 655–56.

In *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, we took another step away from *Light*'s restrictiveness and toward greater enforceability of noncompete agreements. 289 S.W.3d 844 (Tex. 2009). The employer did not expressly promise to provide the employee with confidential information, but the employee's position mandated such information be provided. *Id.* at 850. The employee promised not to disclose confidential information obtained. *Id.* We held that "[w]hen the nature of the work the employee is hired to perform requires confidential information to be provided . . . the employer impliedly promises confidential information will be provided." *Id.*

Turning to the "give rise" question, the Legislature did not include a requirement in the Act that the *consideration* for the noncompete must give rise to the interest *in restraining competition with the employer*. Instead, the Legislature required a nexus—that the noncompete be "ancillary to" or "part of" the otherwise enforceable agreement between the parties. TEX. BUS. & COM. CODE §15.50(a). There is nothing in the statute indicating that "ancillary" or "part" should mean anything other than their common definitions. "[A]ncillary means 'supplementary' and part means 'one of several . . . units of which something is composed.'" *Sheshunoff*, 209 S.W.3d at 651, 665 (Wainwright, J., concurring) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 84, 857 (9th ed. 1990)).

In this case, the trial court and court of appeals held that the covenant not to compete was not ancillary to an otherwise enforceable agreement under the *Light* test. 287 S.W.3d at 381–82. The court of appeals concluded that "the fact that a company's business goodwill benefits when an employee accepts the offered incentive and continues his employment does not mean that the incentive gives rise to an employer's interest in restraining the employee from competing." *Id.* Under section 15.50 and the Texas common law, it does not have to. The statute requires that a covenant not to compete be ancillary to an otherwise enforceable agreement. TEX. BUS. & COM. CODE § 15.50(a). The common meaning of those words control; the covenant not to compete must be ancillary to (supplementary) or part of (one of several units of which something is composed) an otherwise enforceable agreement. *See Sheshunoff*, 209 S.W.3d at 664–65 (Wainwright, J., concurring). This interpretation is confirmed by the pre-existing common law requirement that the otherwise enforceable agreement must be reasonably related to the interest worthy of protection.

DeSantis, 793 S.W.2d at 682. Furthermore, there is no compelling logic in *Light*'s conclusion that consideration for the otherwise enforceable agreement gives rise to the interest in restraining the employee from competing. *See Sheshunoff*, 209 S.W.3d at 664–65 (Wainwright, J., concurring). Consideration for a noncompete that is reasonably related to an interest worthy of protection, such as trade secrets, confidential information or goodwill, satisfies the statutory nexus; and there is no textual basis for excluding the protection of much of goodwill from the business interests that a noncompete may protect. *Light*'s requirement is contrary to the language of the Act; thwarts the purpose of the Act, which was to expand rather than restrict the enforceability of such covenants; and contradicts the Act's intent to return Texas law on the enforceability of noncompete agreements to the common law prior to *Hill*. *See Sheshunoff*, 209 S.W.3d at 652–63.

Requiring that a covenant not to compete be ancillary to an otherwise enforceable agreement or relationship ensures that noncompete agreements that are naked restraints of trade will not be enforceable under the Act. *See* RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b (1981). The common law requirement that there be a nexus between the otherwise valid transaction and the interest worthy of protection bolsters the ancillary requirement. *DeSantis*, 793 S.W.2d at 681–82. The stated purpose of the Act is to "maintain and promote economic competition in trade and commerce," and it countenances the enforcement of reasonable covenants not to compete. TEX. BUS. & COM. CODE §§ 15.04, .50(a). Robust competition and reasonable covenants not to compete can co-exist. Adding more stringent requirements on top of those in the Act is unnecessary to prevent naked restraints on trade and would thwart the Legislature's attempt to enforce reasonable covenants under the Act. *See Mann Frankfort*, 289 S.W.3d at 858–59 (Hecht, J., concurring).

D. MMC's Covenant Not to Compete

"A person's right to use his own labor in any lawful employment is . . . one of the first and highest of civil rights." *Int'l Printing Pressmen & Assistants' Union of N. Am. v. Smith*, 198 S.W.2d 729, 740 (Tex. 1947) (citing 2 COOLEY'S LAW OF TORTS 584, 587 (3d ed. 1906)). This value is protected by sections 15.05 and 15.50(a) of the Texas Free Enterprise and Antritrust Act of 1983 and is not offended by enforcing covenants not to compete that comply with section 15.50(a). *See* TEX. BUS. & COM. CODE §§ 15.05, .50(a); Michael Newman & Shane Crase, *The Rule of Reason in Drafting Noncompete Agreements*, FED. LAW., Mar.–Apr. 2007, at 21 (discussing how noncompete agreements can benefit both the employer and employee). *See generally* B. Prater Monning, III, Note, *Employee Covenants Not to Compete: The Justin Bootstrap Doctrine*, 28 Sw. L.J. 608, 613 (1974).

In this instance, Cook exercised the stock options and became an owner. Sally Dillenback, the head of Marsh's Dallas office, explained in her uncontested affidavit:

> The purpose of the Incentive Plan was to advance the interests of MMC and its stockholders by providing a means to attract, retain, and motivate employees of MMC and its affiliates, including Marsh, and to strengthen the mutuality of interest between employees and MMC's stockholders. The Incentive Plan was designed so that a valuable employee could ultimately benefit from an increase in the value of the business and profits, whereas, as an employee without stock options, Cook was limited to only those benefits provided to any employee of the firm. The Incentive Plan provides select employees with an incentive to stay with Marsh long-term; namely, an ownership interest in the company. This, in turn, gives employees an interest in ensuring that the company performs well and that its stock rises (thereby increasing the value of their options). The Incentive Plan also serves to enhance the relationships between Marsh and its customers by helping the company retain highly-motivated employees with an interest in the long-term success of the company, which, in turn enhances the goodwill of Marsh. The covenant not to compete provision of the Non-Solicitation Agreement prevents employees from using that

> goodwill, *i.e.*, the relationship between Marsh, the employee, and the customer, to attract the customer to a competitor.

Cook was a managing director of Marsh, and as affirmed by Dillenback, he was a "valuable employee who had successfully performed at his position at Marsh . . . and had been successful with attracting and retaining business for Marsh." She further explained that in the insurance brokerage industry, "long-term, personal contact between the employee and customer is especially important due to similarity in the product offered by competitors. The advantage acquired through the employee's long-term relationship and contact with customers is part of MMC's goodwill." For those reasons, he was awarded the stock options. Cook's exercise of the stock options to purchase MMC stock at a discounted price provided a reasonable nexus between the noncompete and the company's interest in protecting its goodwill.

By awarding Cook stock options, Marsh linked the interests of a key employee with the company's long-term business interests. Stockholders are "owners" who, beyond employees, benefit from the growth and development of the company. Owners' interests are furthered by fostering the goodwill between the employer and its clients. The stock options are reasonably related to the protection of this business goodwill. Thus, this covenant not to compete is ancillary to an otherwise enforceable agreement.[7] And, in the Legislature's apparent judgment, reasonable noncompetes encourage greater investment in the development of goodwill and employee training. The dissent concedes that exercising stock options to become an owner "could motivate an employee to create

[7] The second prong of the *Light* test to determine if a covenant not to compete is ancillary to an otherwise enforceable agreement, which requires that the covenant be designed to enforce the employee's promise, is not at issue in this case. *Light*, 883 S.W.2d at 647. However, we re-emphasize that the Act provides for the enforcement of *reasonable* covenants not to compete. TEX. BUS. & COM. CODE § 15.50(a).

goodwill, thus increasing the value of the interest worthy of protection." ___ S.W.3d ___ n.9 (Green, J., dissenting).

The hallmark of enforcement is whether or not the covenant is reasonable. *See Sheshunoff*, 209 S.W.3d at 655 (citing TEX. BUS. & COM. CODE § 15.50(a)). The enforceability of the covenant should not be decided on "overly technical disputes" of defining whether the covenant is ancillary to an agreement. *Sheshunoff*, 209 S.W.3d at 655. "Rather, the statute's core inquiry is whether the covenant 'contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.'" *Id.* (quoting TEX. BUS. & COM. CODE § 15.50(a)).

Marsh sought an agreement not to compete from Cook to protect the company's goodwill—namely, the relationships the company has developed with its customers and employees and their identities, due in part to Cook's performance as a valued employee. The Act provides that "goodwill" is a protectable interest. TEX. BUS. & COM. CODE § 15.50(a); *see also Mann Frankfort*, 289 S.W.3d at 848 (quoting TEX. BUS. & COM. CODE § 15.50(a)); *Sheshunoff*, 209 S.W.3d at 648 (same); *Peat Marwick*, 818 S.W.2d at 386. Texas law has long recognized that goodwill, although intangible, is property and is an integral part of the business just as its physical assets are. *Alamo Lumber Co. v. Fahrenthold*, 58 S.W.2d 1085, 1088 (Tex. Civ. App.—Beaumont 1933, writ ref'd); *Taormina v. Culicchia*, 355 S.W.2d 569, 573 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.). Goodwill is defined as:

> the advantage or benefits which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant and

> habitual customers on account of its local position, or common celebrity, or reputation for skill, or influence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

Taormina, 355 S.W.2d at 573; *see also* BLACK'S LAW DICTIONARY 703 (7th ed. 1999) (defining "goodwill" as "[a] business's reputation, patronage, and other intangible assets that are considered when appraising the business . . ."). The Act recognizes Marsh's goodwill as an interest worthy of protection.

We do not decide whether the Agreement is reasonable as to time, scope of activity, and geographical area. If the trial court determines that any particular provision is unreasonable or overbroad, the trial court has the authority to reform the Agreement and enforce it by injunction with reasonable limitations. TEX. BUS. & COM. CODE § 15.51(c); *Campbell*, 340 S.W.2d at 952. We hold that if the relationship between the otherwise enforceable agreement and the legitimate interest being protected is reasonable, the covenant is not void on that ground.

III. TIMING REQUIREMENT

Marsh also contends that the court of appeals imposed a new timing requirement, where the employer's interest in restraining the employee cannot exist before the employer's consideration is given. 287 S.W.3d at 382. Such a requirement is inconsistent with our ruling in *Sheshunoff*. In *Sheshunoff*, the employer agreed to provide confidential information in exchange for the employee's agreement to keep the information confidential and covenant not to compete, however the employee had already received confidential information from the employer. 209 S.W.3d at 647. We concluded that the agreement was reasonable and enforceable despite the passage of confidential information from employer to employee prior to the agreement. *Id.* at 647, 657. We did note that

the parties disputed whether the nature of the confidential information received prior to the agreement differed from the confidential information received after the agreement, but focused on the fact that confidential information was provided after the agreement, fulfilling the employer's promise. *Id.* at 647. There is no requirement under Texas law that the employee receive consideration for the noncompete agreement prior to the time the employer's interest in protecting its goodwill arises.

IV. RESPONSE TO DISSENT

The dissent argues that our opinion thwarts the legislative intent. ___ S.W.3d ___ (Green., J., dissenting). Legislative intent is discerned from the words used. As determined from the language of the statute, our opinion requires that the covenant not to compete be ancillary to or part of an otherwise enforceable agreement. The former judicial requirement that the "consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing" is not anchored in the text of the Act. *See Light*, 883 S.W.2d at 647. We attempt to construe the Legislature's words. *See* Eric Behrens, *A Trend Toward Enforceability: Covenants Not to Compete in At-Will Employment Relationships Following* Sheshunoff *and* Mann Frankfort, 73 TEX. B.J. 732, 738 (Oct. 2010) (stating that the Court's interpretations of section 15.50(a) "show a trend toward enforceability of non-compete clauses that is true to the legislative intent behind the Covenants Not to Compete Act and the 1993 amendments").

The Legislature passed the Act to overturn this Court's opinion *Hill v. Mobile Trim*. Reinforcing this point, the House Research Organization indicated that the purpose was to reverse

the Court's antipathy toward such covenants. House Research Org., Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989). We are somewhat befuddled by the continued antipathy to reliance on consensual and reasonable noncompetes as one means "to encourage greater investment in the development" of business goodwill. *Id.* The dissent frowns on noncompetes reasonably related to goodwill that are not tied specifically to trade secrets, confidential information or special training. ___ S.W.3d ___ (Green, J., dissenting) (stating that "[t]rade secrets, confidential information, and special training" may support a covenant not to compete but failing to include goodwill). The comparison is presumably to trade secrets and confidential information, which, the dissent's logic suggests, are well-defined and easily proved or disproved, a position with a number of detractors. *See In re Bass*, 113 S.W.3d 735, 740 (Tex. 2003) (recognizing that the six factor test for trade secrets in the Restatement (Third) of Unfair Competition is "relevant but not dispositive," and that it is appropriate to weigh trade secret factors in the context of surrounding circumstances); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. d (1995) ("It is not possible to state precise criteria for determining the existence of a trade secret."). There are close calls in disputes over trade secrets, confidential information, and goodwill. Irrespective of differing views of the importance of business goodwill, the issue has been resolved. The Act expressly provides that goodwill is an interest worthy of protection, and the common law before that agreed. TEX. BUS. & COM. CODE § 15.50(a); *Mann Frankfort*, 289 S.W.3d at 858; *Sheshunoff*, 209 S.W.3d at 649 (citations omitted); *DeSantis*, 793 S.W.2d at 682.

Further, *stare decisis* does not compel perpetuating an interpretation of section 15.50 that the entire Court agrees cannot be discerned from the text of the statute. *See* ____ S.W.3d ___ (Green,

J., dissenting). Construing statutes as written is necessary to predictability in statutory interpretation and to validating the public's trust in and reliance on the words they read in the statute books. Certainly, the doctrine of *stare decisis* is essential to the stability of the law, which is the reason departures from it are rare. Here, the doctrine has little force as we have questioned *Light* each time we have discussed it and have never affirmed *Light*'s "give rise" requirement. We explained in *Southwestern Bell Telephone Co. v. Mitchell*:

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

276 S.W.3d 443, 447 (Tex. 2008) (internal quotation marks omitted, alterations in original). Our brethren have reasoned that *stare decisis* does not compel them to follow a past decision when its rationale does not withstand "careful analysis." *Arizona v. Gant*, 129 S. Ct. 1710, 1722 (2009) (citation omitted). The Court agreed twice before that careful analysis compels a modification of our construction of section15.50, and it is appropriate to modify *Light* here as well.

V. CONCLUSION

In this case, the covenant not to compete is "ancillary to or part of" an otherwise enforceable agreement because the business interest being protected (goodwill) is reasonably related to the consideration given (stock options). Section 15.50 requires that there be a nexus between the

covenant not to compete and the interest being protected. TEX. BUS. & COM. CODE § 15.50(a). This requirement is satisfied by the relationship that exists here. We reverse the judgment of the court of appeals and remand to the trial court for further proceedings consistent with this opinion.

_____
Dale Wainwright
Justice

OPINION DELIVERED: June 24, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0558

MARSH USA INC. AND MARSH & MCLENNAN COMPANIES, INC.,
PETITIONERS,

v.

REX COOK, RESPONDENT

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

Argued September 16, 2010

JUSTICE GREEN, joined by CHIEF JUSTICE JEFFERSON and JUSTICE LEHRMANN, dissenting.

The Court today decides that a non-solicitation agreement extracted from an employee in exchange for stock options can be enforceable solely because the employer's goodwill, which purportedly benefits from the gift of stock options, is an interest worthy of protection. ___ S.W.3d ___, ___. This decision is directly at odds with our holding in *Light v. Centel Cellular Co.*, 883 S.W.2d 642 (Tex. 1994), which required that an employer's consideration for a covenant not to compete must give rise to an interest in restraining trade. Yet the Court refuses to say that it is overruling *Light*. While I agree that goodwill is an interest worthy of protection—the Covenants

Not to Compete Act expressly refers to goodwill as a protectable interest[1]—the enforceability of this covenant does not hinge upon that determination. It hinges upon *consideration*—whether stock options given to an employee can justify a restraint of trade. The Act mentions nothing about stock options, and equating stock options with goodwill creates a rule by which any financial incentive given to an employee could justify a covenant not to compete. Our law prior to *Light*, and since, has applied the rule that covenants not to compete must be ancillary to an exchange of valuable consideration that justifies or necessitates a restraint of trade. *See, e.g.*, *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 849 (Tex. 2009) (holding that unless the consideration given by the employer gives rise to an interest in restraining competition and the covenant is designed "to enforce the employee's consideration or return promise[,] . . . the covenant is a naked restraint of trade and unenforceable"); *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 683 (Tex. 1973) (holding that a restraint of trade must be "ancillary to and in support of another contract"). Because today's decision nullifies that requirement, and favors the enforcement of covenants not to compete based on financial incentives (something we've repeatedly held is unacceptable), I respectfully dissent.

The Court today abandons our previous application of the "ancillary to or part of" requirement codified in Texas Business and Commerce Code § 15.50(a) and instead defines the phrase as "reasonably related to." *See* ___ S.W.3d at ___. If the Legislature intended for enforceability of a covenant not to compete to depend upon whether the covenant was "reasonably

[1] TEX. BUS. & COM. CODE § 15.50(a) (referring to an enforceable covenant as one that is created to protect "goodwill or other business interest[s]").

related to an otherwise enforceable agreement," the Legislature could have easily chosen such language. Instead, the Legislature used a phrase from the common law prior to *Light*. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681–82 (Tex. 1990) (explaining the established common law principles governing covenants not to compete); RESTATEMENT (SECOND) OF CONTRACTS §§ 187, 188 (1981). *Light*'s application of the consideration prong of the statute, far from being a departure from the common law, seems consistent with the "relatively well established" common law as expressed in *DeSantis*, where we held that an enforceable covenant not to compete must be "ancillary to an otherwise valid transaction or relationship,"[2] and that under this requirement, a "restraint on competition is unreasonable unless it is part of and subsidiary to an otherwise valid transaction or relationship which *gives rise* to an interest worthy of protection." *DeSantis*, 793 S.W.2d at 681–82 (emphasis added). In *Light*, we held that under Texas Business and Commerce Code § 15.50, in order for a covenant to be "ancillary to an otherwise enforceable agreement": (1) "the consideration given by the employer in the otherwise enforceable agreement must *give rise* to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement." 883 S.W.2d at 647 (emphasis added). The Court today holds that "*Light* diverged from the common law definition of 'give rise' as articulated in *DeSantis*," stating that "[r]ather than requiring that the otherwise enforceable agreement give rise to 'an interest worthy of protection,' *Light* imposed a stricter requirement: that the consideration give rise to 'the employer's interest in

[2] *See also Justin Belt Co.*, 502 S.W.2d at 683 (holding that a restraint of trade must be "ancillary to and in support of another contract").

restraining the employee from competing.'" ___ S.W.3d at ___ (emphasis omitted). I fail to see the difference between "an interest worthy of protection" (in this case, Marsh's goodwill), and "the employer's interest in restraining the employee from competing" (in this case, Marsh's protection of goodwill). I also fail to see how the Court can defend the "give rise" language of *DeSantis* and overrule, or "modify," the "give rise" language as used in *Light*, which relied on the language of *DeSantis*. *See Light*, 883 S.W.2d at 647. As the Court points out, the Act was intended to codify the common law;[3] therefore, the Act should also incorporate our common law interpretations of the term "ancillary to or part of." The Court's main problem with the "give rise" standard appears to be this: Stock options do not give rise to an interest in restraining trade, and therefore, the give rise standard cannot accompany the enforcement of a covenant based on stock options.

Goodwill is not the dispute in this case. The dispute is whether the *consideration* given to allegedly protect the employer's goodwill gives rise to an interest in restraining competition. There is no evidence in the record of whether Cook actually created goodwill for Marsh or whether he used any goodwill in competition with Marsh, circumstances remarkably similar to *DeSantis*. *See DeSantis*, 793 S.W.2d at 683–84.[4] Any financial incentive given to an employee can arguably

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[3] ___ S.W.3d at ___ (citing *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 653 (Tex. 2006) (quoting House Research Org., Bill Analysis, Tex. S.B. 946, 71st Leg., R.S. (1989))).

[4] The Court seems to characterize *DeSantis* as a case dealing solely with confidential information. *See* ___ S.W.3d at ____. *DeSantis* was also a case about protecting goodwill, where we held that the evidence supporting the existence and misappropriation of goodwill was insufficient and that the covenant was therefore unenforceable. *See* 793 S.W.2d at 683–84. Wackenhut, like Marsh in this case, argued that the employee had created goodwill for the company and had used that goodwill to attract clients to a competitor. *Id.* at 683. Despite recognizing goodwill as an "interest worthy of protection," we held that Wackenhut failed to produce enough evidence that DeSantis actually increased Wackenhut's goodwill or "that he did or even could divert that goodwill to himself for his own benefit after leaving Wackenhut." *Id.* at 682–83 (considering that at least one of Wackenhut's clients had left Wackenhut to give business to DeSantis's new employer).

motivate the employee to increase his employer's goodwill, and every employee, if he performs his job as expected, creates goodwill for his employer. If any financial incentive that can encourage an employee to create more goodwill can satisfy the consideration prong of the Act, then we might as well ignore the consideration requirement all together. Under the Court's reasoning, a raise, a bonus, or even a salary could support an enforceable covenant.

Noticeably missing in § 15.50(a) is language enforcing a covenant ancillary to an employment "relationship," which is the language of the Restatement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981); *Sheshunoff*, 209 S.W.3d at 653–54 (tracking the evolution of the Act and how the Legislature rejected a version that would have enforced covenants "ancillary to an otherwise valid transaction or *relationship*" (emphasis added)). A mere employment relationship is not enough under the statute, which requires a separate enforceable agreement, but under today's ruling, it very well could be. *See* TEX. BUS. & COM. CODE § 15.50(a). Financial compensation accompanies virtually every form of employment.[5] Under the Court's ruling, the otherwise

[5] While goodwill is an interest worthy of protection, under the common law, its valuation and protection applies more in the sale of a business than the restriction of a former employee:

> The extent to which the restraint is needed to protect the promisee's interests will vary with the nature of the transaction. Where a sale of good will is involved, for example, the buyer's interest in what he has acquired cannot be effectively realized unless the seller engages not to act so as unreasonably to diminish the value of what he has sold. The same is true of any other property interest of which exclusive use is part of the value. In the case of a post-employment restraint, however, the promisee's interest is less clear. Such a restraint, in contrast to one accompanying a sale of good will, is not necessary in order for the employer to get the full value of what he has acquired. Instead, it must usually be justified on the ground that the employer has a legitimate interest in restraining the employee from appropriating valuable trade information and customer relationships to which he has had access in the course of his employment. Arguably the employer does not get the full value of the employment contract if he cannot confidently give the employee access to confidential information needed for most efficient performance of his job. But it is often difficult to distinguish between such information and normal skills of the trade, and preventing use of one may well prevent or inhibit use of the other. Because of this difference in the interest of the promisee, courts have generally been more willing to uphold promises to refrain from competition made in connection with sales of good

enforceable agreement could well be an agreement as to compensation. The Legislature expressly decided there must be an otherwise enforceable transaction, and in *DeSantis* and *Light*, we held that the transaction itself needs to create an interest worthy of protection and in restraining trade, or else the covenant is an unenforceable naked restraint of trade. *See Light*, 883 S.W.2d at 647; *DeSantis*, 793 S.W.2d 682 (referring to "unreasonable" restraints on competition as those that are not "part of and subsidiary to an otherwise valid transaction or relationship which gives rise to an interest worthy of protection"). To argue that Cook created goodwill for Marsh that he would not have created absent stock options is not only incapable of being proven, but blurs the true issue. The true issue is that Texas courts have stated time and again that an employer cannot *buy* a covenant not to compete, and the Court's decision allows Marsh and other employers to do exactly that.[6]

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will than those made in connection with contracts of employment.

RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. b (1981). The distinction between what type of agreement is enforceable to protect goodwill in the context of the sale of a business and the context of post-employment restriction is unaddressed by §15.50, which applies to both contexts. *But see Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 177 (Tex. 1987) (Gonzalez, J., dissenting) (noting that Texas courts "scrutinize covenants not to compete in employment relationships more closely than covenants not to compete associated with the sale of a business"). Regardless, an employer's assertion of goodwill as the interest being protected does not end the inquiry, even under the consideration prong of the statute. How that employer protects its goodwill, and what it gives its employee in exchange for a covenant not to compete, are what matters. Here, Marsh's reasons for giving stock options are irrelevant; stock options do not justify a restraint of trade.

[6] *See, e.g.*, *Sheshunoff*, 209 S.W.3d at 650 (holding that allowing an employer to enforce a covenant "merely by promising to pay a sum of money" would be "inconsistent with *Light*'s requirements"); *Valley Diagnostic Clinic v. Dougherty*, 287 S.W.3d 151, 157 (Tex. App.—Corpus Christi 2009, no pet.) ("A compensation provision made only in exchange for a non-compete promise is precisely the sort of restraint of trade that Texas law prohibits."); *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 463 (Tex. App.—Austin 2004, pet. denied) ("[F]inancial benefits do not give rise to an 'interest worthy of protection' by the covenant not to compete."); *Strickland v. Medtronic, Inc.*, 97 S.W.3d 835, 839 (Tex. App.—Dallas 2003, pet. dism'd w.o.j.) (holding that the employer's promise to compensate the employee "in the event of economic hardship resulting from the non-compete agreement" did not give rise to an interest worthy of protection); *see also, e.g.*, *Oxford Global Res., Inc. v. Weekley-Cessnun*, No. Civ.A. 3:04-CV-0330, 2005 WL 350580, *4 n.8 (N.D. Tex. Feb. 8, 2005) (mem. op.) ("[S]tock options do not give rise to an employer's interest in restraining competition or solicitation."); *Olander v. Compass Bank & Compass Banchsares, Inc.*, 172 F. Supp. 2d 846, 855 (S.D. Tex. 2001) (explaining that the employer failed to "articulate[] any coherent theory explaining how [a] promise . . . to grant the right to buy stock at a set price . . . gives rise to an interest in restraining [the

The Court cannot rely on the second prong of § 15.50(a) to ensure that covenants which are "unreasonable" will not be enforced. Under the express language of the statute, only the first prong—the consideration prong—determines whether covenants are enforceable, while reasonableness defines only *the extent* to which they are enforceable. TEX. BUS. & COM. CODE §§ 15.50(a), 15.51(c) (stating that "[i]f the covenant is found to be ancillary to or part of an otherwise enforceable agreement . . . but contains limitations . . . that are not reasonable and impose a greater restraint than is necessary ," then the court "shall reform the covenant"). Therefore, the only method by which a covenant is unenforceable as a matter of law is when it is not ancillary to or part of an otherwise enforceable agreement. Despite the dicta of *Sheshunoff* defining reasonableness as the core inquiry in that case, the consideration prong remains an equally crucial inquiry under the Act, and its application is rendered meaningless by the Court's decision to concoct a new, broad definition of "ancillary or part of" as "reasonably related to."

The Legislature has not clarified or altered the meaning of the term "ancillary" since the Court defined it in *Light* seventeen years ago. Stare decisis applies with greater force to statutory construction for this very reason. *Sw. Bell Tel. Co. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008) ("'[I]n the area of statutory construction, the doctrine of stare decisis has its greatest force' because the Legislature can rectify a court's mistake, and if the Legislature does not do so, there is little reason for the court to reconsider whether its decision was correct." (quoting *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex.1968))). If Legislative intent were thwarted by our decision in *Light*, as the Court claims, the Legislature could have clarified its meaning of "ancillary

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employee] from competing *after* he has left [the employer]").

to or part of" at some point during the past seventeen years.[7] "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." *Grapevine Excavation, Inc. v. Md. Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000) ("Stare decisis has its greatest force in statutory construction cases."). The Legislature has amended other portions of the Covenants Not To Compete Act three times in the seventeen years since *Light* and has not changed the wording or meaning of the phrase "ancillary to or part of" since our application of the phrase in *Light*. Act of May 26, 1999, 76th Leg., R.S., ch. 1574, § 1, 1999 Tex. Gen. Laws 5408, 5408 (adding subsection (b) concerning physicians and covenants not to compete); Act of May 22, 2001, 77th Leg., R.S., ch. 1420, § 14.729, 2001 Tex. Gen. Laws 4210, 4515 (amending subsection (b)); Act of May 26, 2009, 81st Leg., R.S., ch. 971, § 1, 2009 Tex. Gen. Laws 2565, 2565 (amending subsection (b)).

Under this "firmly established statutory construction rule," we must presume the Legislature has adopted our previous definition of "ancillary to or part of" under the Act. *See Grapevine Excavation, Inc.*, 35 S.W.3d at 5. By instead concocting a more expansive definition of "ancillary to or part of" based on Black's and Webster's dictionaries, the Court ignores the will of the Legislature and the well established principles of stare decisis. *See generally Sw. Bell Tel. Co.*, 276 S.W.3d at 447 ("Generally, the doctrine of stare decisis dictates that once the Supreme Court announces a proposition of law, the decision is considered binding precedent." (internal quotation

[7] As the Court points out, the Legislature is capable of correcting our pronouncements on covenants not to compete that it disagrees with, as it passed the Act in 1989 to overturn our decision in *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987), within two years of its issuance. *See* ___ S.W.3d at ___.

omitted)); *Grapevine Excavation, Inc.*, 35 S.W.3d at 5. Despite the Court's assertion that we have consistently disapproved of the holding in *Light*, our cases on covenants not to compete since *Light* have merely liberalized *Light*'s holding so that the *timing* of consideration given for a covenant not to compete is no longer a technical concern. *See Mann Frankfort*, 289 S.W.3d at 851–53 (holding that a promise to provide confidential information can be implied from a covenant when confidential information is later provided); *Sheshunoff*, 209 S.W.3d at 650, 655 (holding that we should focus less on "overly technical disputes" engendered by *Light*'s footnote six regarding whether the consideration was transferred to the employee at the *time* of the agreement). Yet none of the Court's decisions since *Light* have questioned the rule requiring consideration for a covenant not to compete to give rise to an interest in restraining trade. *See Mann Frankfort*, 289 S.W.3d at 851–53; *Sheshunoff*, 209 S.W.3d at 649 ("We do not disturb the holding in *Light*."). In this case, unlike those others, we deal with the very nature of the consideration itself, and not its quantity, timing, or degree. This is not the type of overly technical dispute that *Sheshunoff* warned against. *See* 209 S.W.3d at 655–56 (listing, in dicta, that "the amount of information an employee has received, its importance, its true degree of confidentiality, and the time period over which it is received . . . are better addressed in determining whether and to what extent a restraint on competition is justified" rather than whether the covenant is enforceable).

Whether stock options constitute valid consideration is an essential inquiry under the prong of the statute requiring that the agreement be "ancillary to or part of an otherwise enforceable agreement." The fact that the Court now holds stock options satisfy this prong ignores the consensus amongst Texas courts that mere financial compensation as consideration will not support an

enforceable restraint of trade. *See, e.g., id.* at 650 (holding that allowing an employer to enforce a covenant "merely by promising to pay a sum of money" would be "inconsistent with *Light*'s requirements"); *Valley Diagnostic Clinic v. Dougherty*, 287 S.W.3d 151, 157 (Tex. App.—Corpus Christi 2009, no pet.) ("A compensation provision made only in exchange for a non-compete promise is precisely the sort of restraint that Texas law prohibits."); *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 463 (Tex. App.—Austin 2004, pet. denied) ("[F]inancial benefits do not give rise to an 'interest worthy of protection' by the covenant not to compete."); *Strickland v. Medtronic, Inc.*, 97 S.W.3d 835, 839 (Tex. App.—Dallas 2003, pet. dism'd w.o.j.) (holding that the employer's promise to compensate the employee "in the event of economic hardship resulting from the non-compete agreement" did not give rise to an interest worthy of protection); *see also, e.g., Oxford Global Res., Inc. v. Weekley-Cessnun*, No. Civ.A. 3:04-CV-0330, 2005 WL 350580, *4 n.8 (N.D. Tex. Feb. 8, 2005) (mem. op.) ("[S]tock options do not give rise to an employer's interest in restraining competition or solicitation."); *Olander v. Compass Bank & Compass Bancshares, Inc.*, 172 F. Supp. 2d 846, 855 (S.D. Tex. 2001) (explaining that the employer failed to "articulate[] any coherent theory explaining how [a] promise . . . to grant the right to buy stock at a set price . . . gives rise to an interest in restraining [the employee] from competing *after* he has left [the employer]"). Marsh cannot point to one thing of value that it gave Cook which now allows him to compete unfairly and which necessitates a restraint of trade. The affidavit submitted by Sally Dillenback, head of Marsh's Dallas office, explained that Marsh intended to make its valued employees owners so that they would contribute greater efforts to increase Marsh's goodwill. ___ S.W.3d at ___. Giving this affidavit any weight ignores the fact that the relevant question under

this Court's precedent is whether the consideration given by the employer for the covenant not to compete—not the employer's motivation or some other characteristic of the agreement or events leading up to the transaction—gives rise to an interest in restraining competition. *See Mann Frankfort*, 289 S.W.3d at 849; *Sheshunoff*, 209 S.W.3d at 648–49; *Light*, 883 S.W.2d at 647. *Why* consideration was given has never mattered so much as *what* was given. Trade secrets, confidential information, and special training are all forms of consideration that we have recognized may give rise to an interest in restraining trade. *See Mann Frankfort*, 289 S.W.3d at 852 (confidential information); *Sheshunoff*, 209 S.W.3d at 649–50 (confidential information and specialized training); *Light*, 883 S.W.2d at 647 n.14 (trade secrets). They are given to an employee for one reason: to allow the employee to perform his job better. They make the employee more valuable to the company, and more valuable to other companies, which is why they justify covenants not to compete.[8] An employee who receives deferred compensation or similar benefits is not in a better position to compete against his employer than an employee who has not received such benefits. Stock options are not a form of consideration this Court has ever held may support such a covenant.[9]

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[8] In this case there was no transfer to Cook of anything that allowed him to perform his job better or be more competitive against Marsh; as Marsh admits,"in the insurance brokerage business, because the products and services offered by brokers are largely the same, the ability to develop quality customer relationships" is what truly sets one firm apart from another. What Marsh does not address, however, is that in this situation, non-compete agreements may simply be a cheaper alternative to paying a higher salary or bonus. The Court recognizes that Texas clearly disfavors the use of non-compete agreements for such a purpose. *See* ___ S.W.3d at ___ (citing *Potomac Fire Ins. Co. v. State*, 18 S.W.2d 929, 934 (Tex. Civ. App.—Austin 1929, writ ref'd) (holding that a contract between two insurance companies to limit compensation was unenforceable as it was intended to "crush and destroy competition")).

[9] *See Sheshunoff*, 209 S.W.3d at 660 (explaining that the consideration is usually of the type that increases the employee's market value by, for example, giving the employee "special knowledge and skills" that "increase [the employee's] value and compensation"). "The covenant, in turn, ensures that the costs incurred to develop human capital are protected against competitors who, having not made such expenditures, might offer higher salaries to employees and thereby appropriate the employer's investment." *Id.* Stock options do not develop the kind of human capital that can be taken by competitors, nor do they develop "special knowledge and skills." While stock options could motivate an

Allowing employers to obtain covenants not to compete by providing such financial incentives without actually giving the employee anything that gives rise to an interest in restraining trade is bad policy for Texas, and will make covenants not to compete much more commonplace in instances where there is little risk of unfair competition. The "give rise" requirement ensures that an employer seeking to restrain competition has given consideration for the covenant that fairly necessitates a restraint of trade, while respecting the fundamental tenet that at-will employment otherwise permits employees to put their talents to fair, competitive use elsewhere. *See Sheshunoff*, 209 S.W.3d at 659 (Jefferson, C.J., concurring) (explaining that only a covenant that protects a "legitimate business interest" is enforceable because it is consequently "not a direct restraint of trade in violation of public policy"); *see also* TEX. BUS. & COM. CODE § 15.04 (explaining that the purpose of Chapter 15 is to "maintain and promote economic competition in trade and commerce").

Lastly, if we are to ignore the doctrine of stare decisis, we must at least give trial courts some guidance in the enforcement of covenants not to compete, lest we face the multitude of issues raised by our new definition of "ancillary to or part of" in the coming years.[10]

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employee to create goodwill, thus increasing the value of the interest worthy of protection, they don't themselves create an interest worthy of protection. The fact that an employee makes his employer's net worth grow does not alone justify a restraint of trade absent the employer's investment in making the employee more valuable to competitors. The employee is no more valuable to competitors after he receives stock options in the way that he would be after he receives special training, trade secrets, or confidential information.

[10] Stare decisis "results in predictability in the law, which allows people to rationally order their conduct and affairs." *Grapevine Excavation, Inc.*, 35 S.W.3d at 5. "[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). "To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability." *Id.* "[I]f we did not follow our own decisions, no issue could ever be considered resolved. The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy." *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995).

The Court's new rule not only thwarts the legislative intent behind § 15.50, but also contradicts the strong policy goals inherent in Chapter 15, which protect the interests of free trade and a competitive market. *See* TEX. BUS. & COM. CODE § 15.04 ("The purpose of this Act is to maintain and promote economic competition in trade and commerce . . . and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose . . . ."). For this reason, I dissent.

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Paul W. Green
Justice

OPINION DELIVERED: June 24, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0558

MARSH USA INC. AND MARSH & MCLENNAN COMPANIES, INC.,
PETITIONERS,

v.

REX COOK, RESPONDENT

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

Argued September 16, 2010

JUSTICE WILLETT, concurring in the judgment only.

I agree the trial court should take first crack at assessing whether today's noncompetition covenant "contains limitations as to time, geographical area, and scope of activity . . . that are reasonable and do not impose a greater restraint than is necessary."[1] That inquiry—essentially, "Are the restrictions *too* restrictive?"—received scant attention below, rendering the record before us underdeveloped. The affidavit submitted by Marsh USA (Marsh) asserts that the stock-incentive plan aimed to boost goodwill by giving Cook a stake in Marsh's long-term success.[2] Growing

[1] TEX. BUS. & COM. CODE § 15.50(a).

[2] Though styled a "Non-Solicitation Agreement," the agreement also operates as a kitchen-sink noncompetition agreement. Besides stating Cook may not "solicit" business from Marsh's clients or prospects, it also says Cook may not "accept," "perform," or "supervise" business involving them.

goodwill is all well and good, but the affidavit then says this: The noncompete "prevents employees from using that goodwill . . . to attract the customer to a competitor." On the surface, this seems just another way of saying the noncompete's purpose is to stifle competition, but perhaps a fuller record on remand will paint a less protectionist picture.

So I agree to remand, but I write separately to underscore this admittedly obvious point: Restrictions on employee mobility that exist only to squelch competition are per se illegal in Texas, and for good reason. Economic dynamism in the 21st century requires speed, knowledge, and innovation—imperatives that must inform judicial review of efforts to sideline skilled talent.[3] Courts must critically examine noncompetes in light of our contemporary, knowledge-based economy that prizes ingenuity and intellectual talent. This much is clear: Courts cannot countenance covenants too contemptuous of competition.

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Amid increasing labor fluidity, there is no shortage of debate surrounding the propriety of enforcing restrictive covenants that tie up skills, knowledge, ideas, and expertise. The fault line runs between first principles—freedom of contract versus freedom of competition—and judicial treatment

[3] The efficacy of restrictions on employee mobility is a matter of spirited debate among economists, lawyers, and legal scholars. A growing body of nascent scholarship contends that overbroad noncompete agreements actually harm innovation rather than foster it when they irrationally impede job-hopping. *See, e.g.*, Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation From Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 306–07 (2006) [hereinafter "Bishara, *Covenants Not to Compete in a Knowledge Economy*"]; Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 594–619 (1999); Charles Tait Graves and James A. DiBoise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?*, 1 ENTREPRENEURIAL BUS. L. J. 323, 323 (2006) [hereinafter "Graves and DiBoise, *Strict Trade Secret and Non-Competition Laws*"]; Alan Hyde, *Should Noncompetes Be Enforced?*, REGULATION (Cato Inst.), Winter 2010–11, at 6; Alan Hyde, *The Wealth of Shared Information: Silicon Valley's High-Velocity Labor Market, Endogenous Economic Growth, and the Law of Trade Secrets* (Sept. 1998), http://andromeda.rutgers.edu/~hyde/WEALTH.htm.

of noncompetes has been, well, eclectic.[4] Some jurisdictions favor freedom of contract (enforcing a noncompete because the employee signed it) and fret little about whether the company's interest is legitimate;[5] other jurisdictions (most notably, California) champion freedom of competition and void virtually all noncompetes;[6] Texas courts, like most, enforce "reasonable" ones necessary to protect legitimate interests.[7] This multiplicity of standards across states—dubbed "fifty ways to leave your employer"[8]—makes for an unsteady legal landscape, particularly for far-flung employers that operate throughout the country.

Today's case, like many before it, involves a familiar tension between company and employee, both intent on self-protection. The interest Marsh aims to protect, though, is less familiar. Marsh does not argue that the noncompete was needed here to protect costly investments in specialized training or to ensure its trade secrets or other confidential information[9] do not wind up

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[4] As noted in 1960—and this persists a half-century later—court precedent "has reflected the evolution of industrial technology and business methods, as well as the ebb and flow of such social values as freedom of contract, personal economic freedom, and business ethics. But the fundamental interests which come into conflict have not basically changed." Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 626–27 (1960) [hereinafter "Blake, *Employee Agreements*"].

[5] *See* Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295, 1302–03 (2005) ("For instance, some courts have found that freedom of contract principles support enforcing all contracts made between competent parties, so long as those contracts are neither illegal nor unconscionable.") (footnote omitted).

[6] CAL. BUS. & PROF. CODE § 16600; Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem With Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 877 n.5 (2010) [hereinafter "Moffat, *The Wrong Tool*"].

[7] Moffat, *The Wrong Tool*, at 880.

[8] Bishara, *Covenants Not to Compete in a Knowledge Economy*, at 317.

[9] The mere fact that the noncompete prohibited Cook from disclosing trade secrets or confidential or proprietary information is immaterial given the absence of anything in the record showing that Cook ever received such information. *See* Plaintiffs' Resp. to Defendant's Mot. Summ. J. at 18 ("Cook's reliance on *Sheshunoff* is particularly misplaced. *Sheshunoff* involved confidential information, not stock.") (citation omitted); Pet. Br. at 11 n.10 ("[C]onfidential information was not at issue."); Transcript of Oral Argument at 2, *Marsh USA Inc. v. Cook*, __ S.W.3d __ (2011) (No.

on WikiLeaks.[10] Marsh speaks of safeguarding its goodwill, and that is a protectable interest. But uttering the word goodwill is not enough; magic words do not boast auto-enforceability. Marsh must demonstrate that it is not invoking goodwill to camouflage a less noble interest: escaping future competition from Cook.[11]

As the trial court begins its examination, I add these two points:

First, while goodwill is a protectable interest, protectionism—going too far to protect what may be protectable—is verboten. Texas courts must probe noncompete covenants in that pro-free-market spirit. The Free Enterprise and Antitrust Act declares the public policy of Texas: "Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful."[12] The Act's paramount purpose "is to maintain and promote economic competition in trade and commerce . . . and to provide the benefits of that competition to consumers in the state."[13]

09-0558) ("This is a not a confidential information case . . . ."). As we explained in *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, the employer must at some point provide consideration for the agreement, such as confidential information, in order for the agreement to be enforceable. 209 S.W.3d 644, 650–51 (Tex. 2006).

[10] As *Light v. Centel Cellular Co. of Tex.* demonstrates, however, even these alleged interests would not automatically render the covenant valid. *See* 883 S.W.2d 642, 646–48 (Tex. 1994) (holding invalid a covenant not to compete that pertained to specialized training, even though confidential or proprietary information was involved).

[11] There is no significance to the fact that Cook was paid in stock options for the covenant not to compete. Where the goal is restricting competition, the manner of payment is irrelevant. If stock options permit such a covenant because, as the affidavit states, they align the interests of the employee with "the long-term success of the company, which, in turn enhances the goodwill of" the employer, then *any* reward for a job well done—a raise, promotion, bonus, or pension—could justify a noncompete on grounds it aligns employer/employee interests and thus bolsters "goodwill." At bottom, none of these rewards, like "merely promising to pay a sum of money to the employee," can be used to purchase a noncompete whose only purpose is to eliminate competition. *Sheshunoff*, 209 S.W.3d at 650. Absent some other legitimate reason, such a restraint on trade is unenforceable.

[12] TEX. BUS. & COM. CODE § 15.05(a).

[13] *Id.* § 15.04.

One obvious exception is the Covenants Not to Compete Act,[14] which permits a noncompete clause, but only "to the extent it contains limitations as to time, geographical area, and scope of activity to be restrained that are *reasonable* and do not impose a greater restraint than is *necessary* to protect the goodwill or other business interest of the promisee."[15] This exception is just that—an exception—with the rule favoring robust competition.

As for who decides whether limitations (1) are reasonable, (2) are more severe than necessary, and (3) relate to a legitimate business interest, the Covenants Not to Compete Act expressly vests that duty with courts.[16] Judges must divine when competition becomes *unfair* competition and when a restraint becomes an *unreasonable* or *unnecessarily restrictive* restraint. To be sure, the standard has a certain eye-of-the-beholder flavor—a vagueness that inexorably produces the case-by-case unpredictability that haunts this area of employment law.[17]

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[14] *See id.* § 15.50(a) ("Notwithstanding Section 15.05 of this code . . . a covenant not to compete is enforceable . . . .").

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

[16] *Id.* §§ 15.50–.51.

[17] In a sense, the "reasonableness" inquiry resembles the oversight long exercised by courts when applying the rule of reason under antitrust laws. While "reasonableness" analysis in noncompete cases and "rule of reason" analysis in antitrust cases are not identical, both inquiries envision a front-and-center judicial role in scrutinizing agreements that curb competition.

> Rule of reason analysis under antitrust laws must not be confused with reasonableness analysis under the common law. Rule of reason analysis tests the effect of a restraint of trade on *competition*. By contrast, whether a noncompetition agreement is reasonable depends upon its effect on the parties, the *competitors*, as it were. The two standards are not directly related.

DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 688 (Tex. 1990). While this portion of our analysis draws upon the instant contract's effect on competition, that analysis stems from an initial consideration of the contract's effect on the parties, who are—at bottom—actors in a broader competitive scheme. This slight distinction demonstrates that while the two standards may not be directly related, in practice they are indirectly related.

Alongside "reasonableness," the statute also requires that the agreement "not impose a greater restraint than is necessary."[18] We have never squarely addressed whether the Act envisions two separate inquiries: (1) that the time/geography/scope limitations be "reasonable," and also (2) that the restraint not reach beyond that which is "necessary" to protect the company's protectable interests. The latter suggests more exacting scrutiny than mere "reasonableness." The Act separates the latter from the former with the conjunction "and," suggesting separateness, while the pre-1993 version of the Act fused the two explicitly.[19] None of our cases declares whether "reasonable" and "necessary" are two separate inquiries or whether the latter is simply blended into the former. Many courts implicitly subsume everything under an overarching banner of reasonableness,[20] while others treat them as separate prongs.[21] Either way, it is not an issue we reach today.

So while Texas law allows limited noncompetes, it does not allow protectionism to trump individual or societal interests in a dynamic marketplace. And even assuming a company is trying to guard a bona fide business interest, Texas courts must strike down restrictions that are unreasonable or more severe than necessary.

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[18] TEX. BUS. & COM. CODE § 15.05(a).

[19] Under the pre-1993 version, a noncompete was enforceable to the extent it "contains reasonable limitations as to time, geographical area, and scope of activity to be restrained *that* do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee." Act of May 23, 1989, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852 (amended 1993) (current version at TEX. BUS. & COM. CODE § 15.50(a)) (emphasis added). The current version reads, "contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable *and* do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee." TEX. BUS. & COM. CODE § 15.50(a); Act of May 29, 1993, 73d Leg., ch. 965, § 1, 1993 Tex. Gen. Laws 4201 (emphasis added).

[20] *See, e.g.*, *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 660 (Tex. App.—Dallas 1992, no writ).

[21] *See, e.g.*, *Am. Express Fin. Advisors, Inc. v. Scott*, 955 F. Supp. 688, 691 (N.D. Tex. 1996).

The underpinnings of this principle long predate Texas (or America) and draw from the recognition that bustling markets best spur and reward ingenuity.[22] The Lone Star State lauds economic dynamism. And while it is perhaps natural for a profit-maximizing company to bend toward collusive or monopolistic restriction,[23] Texas law is hostile to such noncompetitive impulses. Nor can it be doubted that some companies try to tilt the playing field via dubious noncompete covenants, even facially unenforceable ones, knowing that even the *specter* of enforcement action will chill employees (and their potential employers) into preemptive capitulation.[24]

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[22] Adam's Smith ode to laissez-faire economics, *The Wealth of Nations*, remains worthy of study today:

> It is the interest of [the] sovereign . . . to open the most extensive market for the produce of his country, to allow the most perfect freedom of commerce, in order to increase as much as possible the number and the competition of buyers; and upon this account to abolish, not only all monopolies, but all restraints upon the transportation of the home produce from one part of the country to another . . . . He is in this manner most likely to increase both the quantity and value of that produce, and consequently of his own share of it, or of his own revenue.

ADAM SMITH, THE WEALTH OF NATIONS: BOOK II 411–12 (P.F. Collier & Son 1902) (1776). Similarly, the domino effect that would result from permitting such restraints to remain cannot be understated. *See id.* at 371 ("[A monopoly] not only hinders, at all times, . . . capital from maintaining so great a quantity of productive labor as it would otherwise maintain, but it hinders it from increasing so fast as it would otherwise increase, and consequently from maintaining a still greater quantity of productive labor.").

[23] *See id.* at 412 ("Their mercantile habits draw [merchants] in this manner, almost necessarily, though perhaps insensibly, to prefer upon all ordinary occasions the little and transitory profit of the monopolist to the great and permanent revenue of the sovereign . . . .").

[24] *See infra* note 40 and related text. Some legal commentators are unsubtle in their market-based objections to non-solicitation agreements specifically:

> As to the non-solicitation of customers, such covenants are monopolistic and overreaching. What if the customer would prefer to do business with the former employee, or at least seek a competing price quote, but does not know that the former employee has resigned and started a new business? Something is amiss when consenting businesses cannot transact business together, merely because another business got there first. As with non-competition covenants generally, such contracts appear to restrict competitive activities that might lower prices, provide better services for customers, and allow businesses to partner together where that might be most productive.

Graves and DiBoise, *Strict Trade Secret and Non-Competition Laws*, at 334.

Given this firm foundation, courts' broad discretion in scrutinizing noncompetes, and the Legislature's clearly stated opposition to contracts that unduly restrain competition, I would underscore that a noncompete rooted in protectionism alone is per se invalid under the Covenants Not to Compete Act and surely offends the Act's purpose of giving Texans the benefits of competition that is fierce yet also fair. Restraint of trade for its own sake is not a protectable "business interest" under Section 15.50, any more than violations of employee wage, hour, or safety laws are legitimate business interests that can be protected through a restrictive covenant.

More to the point, while "goodwill" is a bona fide business interest under the Act, it is not enough merely to mutter the word. You cannot simply buy a covenant not to compete. A court cannot uphold a noncompete on goodwill grounds absent a record that demonstrates the limitations are reasonable and as nonburdensome as possible. Every company has customer relationships and attendant goodwill it wants to cultivate by incentivizing employees to stay, but merely *asserting* goodwill is not enough. Marsh contends "Cook could take the customer relationships grown as a result of the stock incentive and use them to compete with Marsh,"[25] but that unadorned assertion is insufficient. And even assuming the incentive spurred Cook to grow Marsh's goodwill (which strikes me as a curious and slippery proposition), does that prove too much, lest any workplace benefit—a bonus, a raise, a promotion, a better parking space—suffice to justify a noncompete because it theoretically motivates an employee to strengthen client relationships? The evidentiary record must demonstrate special circumstances beyond the bruises of ordinary competition such that, absent the covenant, Cook would possess a grossly unfair competitive advantage. And even then

[25] Pet. Br. at 31.

the restrictions imposed must be as light as possible and not restrict Cook's mobility to an extent greater than Marsh's legitimate need.

Second, naked restraints of trade are particularly onerous because, besides stifling beneficial competition, they also meddle with people's right to earn an honest living. Sixty-five years ago, we declared the right to use one's "own labor in any lawful employment . . . one of the first and highest of civil rights."[26] The right to pursue a chosen occupation and career path is indeed highly cherished, but it is also highly vulnerable. For many people, their livelihood is inextricably tied to a certain pursuit of happiness, and losing this liberty should never be lightly regarded. Fittingly, courts have recognized a right to work of constitutional dimension, at least in cases where state action was alleged. Nearly a century ago, the United States Supreme Court explained that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."[27] The Court made a similar point around that time in a case arising from Texas:

> In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.[28]

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[26] *Int'l Printing Pressmen & Assistants' Union of N. Am. v. Smith*, 198 S.W.2d 729, 740 (Tex. 1946) (Brewster, J., dissenting).

[27] *Truax v. Raich*, 239 U.S. 33, 41 (1915) (citations omitted). *See also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (recognizing the right "to engage in any of the common occupations of life" as a constitutional liberty interest); *Stidham v. Tex. Comm'n on Private Sec.*, 418 F.3d 486, 491 (5th Cir. 2005) ("We have confirmed the principle that one has a constitutionally protected liberty interest in pursuing a chosen occupation.") (citations omitted).

[28] *Smith v. Texas*, 233 U.S. 630, 636 (1914).

Such eloquence has spanned centuries. Saint Thomas Aquinas addressed the connection between work and existence itself: "[I]t is natural to a man to love his own work (thus it is to be observed that poets love their own poems); and the reason is that we love to be and to live, and these are made manifest especially in our action."[29] Ralph Waldo Emerson, typically transcendentalist, called it "the high prize of life, the crowning fortune of a man . . . to be born with a bias to some pursuit, which finds him in employment and happiness,—whether it be to make baskets, or broadswords, or canals, or statues, or songs."[30] Voltaire took the utilitarian, albeit narrow, view: "[O]ur labour keeps off from us three great evils," he said, "idleness, vice, and want."[31] We would be unwise not to linger where a priest, a poet, and a polemicist all miraculously agree. Where the judiciary is empowered to pass upon a subject that so viscerally affects the citizenry, it should do so with utmost care. Sometimes that care will demand a painstaking weighing of interests. In other moments, it will demand that certain constraints—those that restrict the right to work for no better reason than to erase the competition a company sought by entering the marketplace—be declared categorically void. In *all* cases, it requires chary judges who respect our law's rootedness in economic liberty and vitality.

This is doubly true in times of economic hardship. President Franklin Roosevelt's first inaugural address is largely remembered for the iconic phrase, "the only thing we have to fear is fear

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[29] 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II, q. 26, art. 12, at 519 (Fathers of the English Dominican Province trans., Daniel J. Sullivan rev., Encyclopedia Britannica, Inc. 1952) (1265–74).

[30] RALPH WALDO EMERSON, CONDUCT OF LIFE 234 (1860).

[31] VOLTAIRE, CANDIDE 119 (Samuel Johnson ed., George Rutledge and Sons 1884) (1694).

itself"[32]—a potent sound bite that is often removed from the crucial context that surrounded it. The fear President Roosevelt spoke about in 1933 sprang largely from the financial crater left by the Great Crash of 1929 and the agonizing Great Depression that followed. The Depression's devastating effects prompted the new president to couple his discussion of fear with an emphasis on the salve to that fear: the importance of "[t]he joy and moral stimulation of work."[33] It was the process—the act of committing oneself—that mattered. "Happiness lies not in the mere possession of money," he explained, "it lies in the joy of achievement, in the thrill of creative effort."[34] The virtue of work is no less fundamental today. Companies must tread lightly when undertaking to curb that liberty. And if employers pass uncalled-for limits, we call on judges to pass upon them.

The "true beginning of the modern law"[35] on post-employment restraints is *Mitchel v. Reynolds*,[36] a 1711 English-court decision that stood as the most cited case on the subject for two-and-a-half centuries.[37] While introducing the so-called "rule of reason" for evaluating such agreements—whether a legitimate economic or business purpose justified the restriction[38]—*Mitchel* expressed concern that such agreements were subject to "great abuses . . . from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to

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[32] President Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933).

[33] *Id.*

[34] *Id.*

[35] 8 SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 60 (2d ed. 1973).

[36] (1711) 24 Eng. Rep. 347 (Q.B.); 1 P. Wms. 181.

[37] Blake, *Employee Agreements*, at 629.

[38] *See* Moffat, *The Wrong Tool*, at 880.

procure such bonds from them, lest they should prejudice them in their custom, when they come up to set up for themselves."[39] Though the contours of noncompete doctrine have changed as the American economy has changed, this astute observation merits remembering. The "vexation" feared in 1711 is no less real 300 years later. In 2011, overbroad restrictions can strain the gears of an economic engine that has propelled this country so well, and so far. In 2011, terms too severe to be enforced can also escape challenge altogether, instead acting *in terrorem* to freeze an untold number of employees in place rather than allowing human capital to find its highest and best use and thus augment economic and technological growth.[40] This seems especially notable in today's era of dizzying technological change, when implicit lifetime tenure is obsolete and frequent job-hopping is ordinary (unless someone has been forced to sign away his or her right to compete).[41]

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[39] *Mitchel*, 24 Eng. Rep. at 350; 1 P. Wms. at 190.

[40] *See* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 406 (2006) ("An overbroad non-compete—one that lasts too long or that covers activities that do not threaten the employer's legitimate interests—may deter the employee from quitting and competing even when she has a right to do so, or it may deter a competitor from hiring the employee."). The *in terrorem* effect is magnified in jurisdictions like Texas, where judges simply "blue pencil" overbroad noncompetes to make them enforceable. *See* TEX. BUS. & COM. CODE § 15.51(c); *e.g.*, *Prod. Action Int'l, Inc. v. Mero*, 277 F. Supp. 2d 919, 931 (S.D. Ind. 2003) ("A current employee may be frozen in his or her job by an unreasonably broad covenant. Even if the employee believes the covenant is too broad, she may be able to test that proposition only through expensive and risky litigation."); *Richard P. Rita Pers. Servs. Int'l., Inc. v. Kot*, 191 S.E.2d 79, 81 (Ga. 1972) ("If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable.").

[41] Noncompetes also shelter struggling companies that are facing headwinds of recession or industry turmoil. An at-will employee might see dire times ahead for the company but is unable to find new employment if the prospect of litigation spooks the employee or a potential new employer. "As a result, the individual may lose opportunities to advance her career and compensation, and the employer may be able to insulate itself at least temporarily from the competition of more vibrant enterprises for productive employees." Kate O'Neill, *"Should I Stay or Should I Go?"–Covenants Not to Compete in a Down Economy: A Proposal for Better Advocacy and Better Judicial Opinions*, 6 HASTINGS BUS. L. J. 83, 118 (Winter 2010).

Restrictive covenants are not costless, and even a mutually acceptable noncompete can impose a deadweight loss on broader society. Courts should not confuse a noncompete's impact on the employee with its impact on competition. A restraint may be perfectly agreeable to both parties today but still harm consumers tomorrow. Moreover, as our economy becomes even more technologically advanced and knowledge-based (key contributors to a so-called high-velocity labor market), overreaching restrictions lock up human capital and decelerate the beneficial knowledge spillover that accrues from greater mobility. It remains the job of courts to be vigilant for practices that tend to servility, that deprive the public of desired services, and that quash rivals via forced restriction rather than forceful competition.[42]

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I recognize that a free market is not innately utopian, with frictionless edges that never need sanding. "If men were angels, no government would be necessary,"[43] much less antitrust laws to curb monopolistic impulses. Under Texas law, we must dutifully enforce noncompetes that impose reasonable limitations that are no more restrictive than necessary in order to advance legitimate business interests. But this duty requires circumspection, lest the "Covenants Not to Compete Act" exception swallow the "Free Enterprise and Antitrust Act" rule. The latter sides with the virtues of economic liberty—the basic right to pursue what you choose, where you choose, and among whom you choose—not the vice of unduly denying skilled people the rewards of their earned success or

[42] Burdens on inter-firm mobility are especially acute in a fast-paced and tumultuous 21st-century economy. Greater mobility would, one suspects, spur, not curb, the pace of high-tech advances and the dissemination of ideas and knowledge.

[43] THE FEDERALIST NO. 51 (James Madison).

injuring society by depriving the wider public of someone's talents and enterprise. So while free enterprise recognizes—*demands*, actually—that economic actors will doggedly pursue self-interest, Texas noncompete law recognizes the difference between constructive self-interest and destructive selfishness. Where a naked restraint of trade masquerades as a covenant not to compete, we must strike it down—always.

Summing up: Post-employment restrictions are restraints on trade and, as such, deserve rigorous legal scrutiny, particularly given today's pace of warp-speed economic change. Noncompetes tailored to protectable business interests have their lawful place, but they should be used sparingly and drafted narrowly. And employers must demonstrate special facts that legitimize the noncompete agreement. Squelching competition for its own sake is an interest unworthy of protection. Competition by a former employee may well rile an employer, but companies do not have free rein to, by contract, indenture an employee or dampen everyday competition that benefits Texas and Texans.

Don R. Willett
Justice

OPINION DELIVERED: June 24, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0561

NUECES COUNTY, TEXAS, PETITIONER,

v.

JOE GUADALUPE BALLESTEROS, RESPONDENT

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

JUSTICE WILLETT, dissenting from the denial of the petition for review.

For reasons explained in my concurrence today in *Roccaforte v. Jefferson County,*[1] I respectfully dissent from the Court's denial of Nueces County's petition for review.

My view in *Roccaforte* is that Jefferson County effectively waived Roccaforte's noncompliance with the mandatory post-suit notice requirements of Local Government Code Section 89.0041 by failing to raise it "as soon as possible."[2] As we have stated, "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."[3] In *Roccaforte*, Jefferson County litigated for

[1] __ S.W.3d __, __ (Tex. 2011) (Willett, J., concurring in part).

[2] *Id.* (citing *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 360 (Tex. 2003) ("[I]f a governmental unit is to avoid litigation to which it should not be subjected because of lack of notice, it should raise the issue as soon as possible.")).

[3] *Loutzenhiser*, 140 S.W.3d at 359.

two-plus years before asserting defective notice, raising it only after limitations had expired. In this case, however, Nueces County immediately objected to Ballesteros's noncompliance in both its plea to the jurisdiction and its motion to dismiss.[4] Accordingly, I believe Nueces County was entitled to mandatory dismissal under Section 89.0041(c).[5]

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Don R. Willett
Justice

OPINION DELIVERED: April 29, 2011

[4] 286 S.W.3d 566, 568–69.

[5] Unlike Roccaforte, Ballesteros does not assert in this Court that the no-exceptions dismissal mandate of Section 89.0041(c) is preempted by 42 U.S.C. § 1983.

IN THE SUPREME COURT OF TEXAS

NO. 09-0613

TURTLE HEALTHCARE GROUP, L.L.C.
D/B/A FRED'S PHARMACY, PETITIONERS,

v.

YOLANDA HIGUERA LINAN INDIVIDUALLY AND AS THE NATURAL PARENT OF MARIA YOLANDA LINAN AND GERARDO LINAN, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OF MARIA YOLANDA LINAN, DECEASED, RESPONDENTS

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

PER CURIAM

We issued an opinion in this case on February 25, 2011. We deny the motion for rehearing filed by respondents, the Linans, withdraw our prior opinion and issue this opinion in its place.

At issue in this appeal is whether claims based on the failure of a ventilator can be brought both as claims subject to the Texas Medical Liability Act (TMLA) and claims not subject to the TMLA. We hold that under the record presented, they cannot; all the claims are subject to the TMLA and must be dismissed because no expert report was served.

Turtle Healthcare Group supplied a ventilator to Maria Linan. A respiratory therapist from Turtle made regular visits to ensure the ventilator was operating properly. In July 2005, Maria's

mother and caretaker, Yolanda Linan, contacted Turtle and requested an oxygen tank and two additional external ventilator batteries because of an impending hurricane. Turtle delivered the oxygen tank and one battery. The next day the hurricane arrived and the Linans' power went out around 7:00 a.m. The ventilator continued to function after the electricity went out, but around 9:30 a.m. Maria's family found that the ventilator was not operating and Maria had died.

Yolanda and Maria's brother, Gerardo, individually and as representative of Maria's estate (collectively, the Linans), filed suit against Turtle, alleging that Maria died as a result of the equipment failure. They asserted that Turtle was negligent "in the operation and/or maintenance of the . . . ventilator and/or its components and accessories" and that Turtle was negligent in delivering a defective ventilator, battery, and battery boxes. They specified that Turtle failed to exercise ordinary care by:

> [1.] failing to timely provide functional equipment to its customers;
> [2.] failing to warn of the defect or defects described above;
> [3.] committing errors during the assembly phase including the warnings or parameters of use;
> [4.] failing to install adequate safety warning devices and/or advises [sic];
> [5.] using and installing warning devices which failed in use;
> [6.] failing to make adequate safety tests or checks prior to and/or after sale or leasing of its equipment;
> [7.] failing to exercise reasonable care in repairing or replacing component parts of the subject ventilator, oxygen tank and/or battery;
> [8.] failing to maintain equipment in functional and usable condition.

Turtle filed a motion to dismiss on the grounds that the Linans' claims were healthcare liability claims and the Linans had not filed an expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a), (b) (requiring a trial court to dismiss a health care liability claim if an expert report has not been served within 120 days of filing suit). The Linans asserted that their claims were governed

by a standard of ordinary care and were claims for common law negligence. The trial court determined that the Linans' claims were not health care liability claims and denied Turtle's motion to dismiss. Turtle filed this interlocutory appeal. *See id.* § 51.004 (a)(9).

The court of appeals concluded

> To the extent that the Linans' allegations involve acts or omissions beyond the alleged failure to provide properly charged batteries—such as their claims involving Turtle's provision of the ventilator and its alleged failure to provide warnings and to properly maintain the ventilator—those claims clearly involve acts or omissions that are "inseparable" from the rendition of medical services . . . [and] are barred due to the Linans' failure to serve an expert report.

___ S.W.3d ___. However, the court further held that the Linans' claims alleging Turtle was negligent by failing to provide functioning, charged batteries were not health care liability claims. *Id.* The court noted that it was within the common knowledge of the general public that functioning, charged batteries are required for electronic equipment and expertise in the medical field would contribute nothing to a determination of whether failure to provide such batteries was negligence. *Id.* at ___.

Turtle filed a petition for review; the Linans did not. Turtle asserts that the court of appeals was correct insofar as it held that some of the Linans' claims were health care liability claims, but the court wrongly divided the Linans' "battery claims" from their "non-battery claims." The Linans respond to Turtle's assertions by urging that their claims are based on Turtle's failure to send home-use equipment to a third party for servicing, failure to charge the ventilator batteries, and failure to train its employees on equipment checks. They maintain that such claims do not fall within the definition of a health care liability claim. We agree with Turtle.

Pursuant to the TMLA, a claimant in a health care liability claim must serve an expert report within 120 days after filing a claim. TEX. CIV. PRAC. & REM. CODE § 74.351(a). A health care liability claim is one "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 or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant." *Id.* § 74.001(a)(13). A health care provider for purposes of the TMLA includes "any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care." *Id.* § 74.001(a)(12)(A). The Linans do not challenge Turtle's status as a health care provider.

We recently addressed a similar situation in regard to whether the same underlying facts can give rise to both health care liability claims and ordinary negligence claims. *See Yamada v. Friend*, ___ S.W.3d ___, ___ (Tex. 2010). In *Yamada*, Laura and Luther Friend sued Dr. Yamada after their daughter collapsed at a water park and later died from a heart condition. *Id.* at ___. Dr. Yamada filed an interlocutory appeal after the trial court denied his motion to dismiss for the Friends' failure to file an expert report. *Id.* The court of appeals noted that the Friends' claims were based on Dr. Yamada's failure to properly provide advice and recommendations to the owner of the water park about its safety practices, including the placement and maintenance of automatic external defibrillators. The court held that the Friends' pleadings stated both claims for negligence based on an emergency physicians' standard of care and claims for ordinary negligence. *Id.*

We held that all the Friends' claims must be dismissed. *Id.* We noted that permitting a claimant to maintain both health care liability claims and different types of claims based on the same

underlying factual scenario "'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.* (quoting *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005)). We recognized that it would almost always be possible to parse out particular actions or omissions involved in a health care liability claim and allege that some of those actions or omissions breached ordinary standards of care. But permitting the same underlying facts to give rise to both types of claims would effectively negate the procedures and limitations of the TMLA. *Id.*

In this case the substance of the Linans' claims are that Turtle failed to provide Maria with a properly functioning ventilator. The court of appeals concluded that although the Linans alleged health care liability claims, the allegations that Turtle failed to provide functioning, properly charged batteries did not comprise health care liability claims. ___ S.W.3d at ___. The court stated that the Linans' "battery" claims were based on allegations of negligence "involving activities that are wholly separable from the provision of health care." *See id.* We disagree.

The court of appeals recognized that many of the Linans' allegations would "fall under both the 'battery claim' category and the 'non-battery' claim category." ___ S.W.3d at ___ n.3 (stating that the court would not "attempt to delineate" which of the Linans' claims were battery and which were non-battery). But all the Linans' claims are based on the same underlying facts and the Linans' pleadings are essentially that Maria's death was caused by Turtle's negligence in the "operation and/or maintenance of the . . . ventilator and/or its components and accessories."

Although the Linans do not affirmatively agree with the court of appeals' holding that some of their claims are health care liability claims as did the Friends in *Yamada*, the difference does not require a different outcome. The Linans did not file a petition for review challenging that portion of the court of appeals' judgment dismissing part of their claims because they were health care liability claims. Therefore, that part of the court of appeals' judgment is not before us. *See* TEX. R. APP. P. 53.1 ("A party who seeks to alter the court of appeals' judgment must file a petition for review."); *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 171 (Tex. 2004) (noting that although the respondent challenged a portion of the trial court's judgment, the Court could not reach the issue because the respondent did not petition the Court for review on that point). And as did the unchallenged court of appeals' holding in *Yamada*, the court of appeals' unchallenged holding here requires dismissal of all the Linans' claims.

Accordingly, without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment to the extent it affirmed the trial court's order denying Turtle's motion to dismiss. By response to the Linans' motion for rehearing, Turtle waived its request for attorney's fees and costs. Accordingly, we affirm that part of the court of appeals' judgment that reversed the trial court's order. We reverse that part of the court of appeals' judgment that affirmed the trial court's order and render judgment dismissing all the Linans' claims against Turtle.

OPINION DELIVERED: April 29, 2011

IN THE SUPREME COURT OF TEXAS

444444444444
NO. 09-0652
444444444444

THE STATE OF TEXAS, PETITIONER,

v.

CHRIS AND HELEN PETROPOULOS, RESPONDENTS

4444444444444444444444444444444444444444444444444444
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS
4444444444444444444444444444444444444444444444444444

Argued February 1, 2011

JUSTICE JOHNSON delivered the opinion of the Court.

In this partial-taking condemnation proceeding, the landowners introduced evidence that the property's pre-taking value was over $4 per square foot and then read deposition testimony from the State's appraisal witness that the post-taking value was $2 per square foot. The landowners rested without introducing any evidence that the difference in values was caused by the condemnation. As part of the State's case, its appraisal witness opined that the whole property pre-taking was worth $2 per square foot and the remainder's value was not affected by the partial taking. The trial court directed a verdict that the post-taking value of the remainder was $2 per square foot, submitted the pre-taking value of the whole property to the jury, and calculated its judgment using the difference between the two.

We consider two primary issues. First, whether the trial court erred by only charging the jury to find the pre-taking value of the tract when there was evidence the taking did not cause damage to the remainder. Second, whether there was any evidence the remainder suffered compensable damages. We conclude that the trial court committed charge error and that there was no evidence the taking caused compensable damages to the remainder. We reverse the court of appeals' judgment and remand to the trial court for rendition of judgment in accordance with this opinion.

I. Background

The State of Texas sought to acquire .33 acres out of a 3.5 acre tract fronting U.S. Highway 290 in Travis County as part of its plan to expand Highway 290 into a controlled access highway or a toll road. The State and the landowners, Chris and Helen Petropoulos, could not agree on the amount of compensation so the State initiated condemnation proceedings. *See* TEX. PROP. CODE § 21.012(a). Special commissioners awarded the Petropouloses $116,080 as damages. *See id.* § 21.014. The State objected to the commissioners' award, transforming the matter from an administrative proceeding into a civil suit. *See id.* § 21.018(b); *Denton County v. Brammer*, 361 S.W.2d 198, 200 (Tex. 1962).

At trial the Petropouloses' appraisal expert, Mark Smith, testified that the fair market value of the entire 3.5 acre tract pre-taking was $630,000, or $4.13 per square foot. He did not separately appraise the tract that was taken, and he specifically disclaimed any opinion about the remainder's post-taking value. Without objection by the State, the Petropouloses called the State's designated appraisal expert, Paul Hornsby, by deposition. They read Hornsby's testimony valuing the remainder property post-taking at $276,170, but they chose not to read either his testimony that the value of the

whole property per square foot was the same before and after the taking or his testimony that the partial taking did not result in damages to the remainder. The Petropouloses did not offer any evidence of the post-taking value of the remainder other than Hornsby's deposition testimony, nor did they offer any evidence that the taking caused any difference between the remainder's pre-taking value and its post-taking value.

During its case the State called Hornsby. He testified that the fair market value of the Petropouloses' entire tract pre-taking was $304,920; the part taken was not an independent economic unit and should be valued as a pro rata part of the entire tract; the part taken contained 14,375 square feet and was worth $28,750; and post-taking, the fair market value of the remainder was $276,170. These values were based on Hornsby's underlying opinion that the entire tract was worth $2 per square foot prior to the taking, the remainder was not damaged by the taking, and the remainder was worth $2 per square foot after the taking.

Because both parties presented Hornsby's valuation opinion as their only evidence of the remainder's post-taking value, the Petropouloses moved for a partial directed verdict as to that value and requested the jury be charged only on the question of fair market value of the whole property pre-taking. The court granted both requests and submitted one question to the jury:

> On November 22, 2002, what was the fair market value of the Petropouloses' entire tract of land before the taking, excluding consideration of the proposed project and the pending condemnation.

The Petropouloses did not object to the charge, but the State did. The State argued that the charge did not allow the jury to find the correct measure of damages, which was the amount of just compensation due to the Petropouloses. It argued that the proper measure of damages was either (1)

the value of the part taken plus any damages the taking caused to the remainder, or (2) the difference between the value of the whole property before the taking and the value of the remainder after the taking. In addition to objecting to the charge, the State moved for a partial directed verdict on the grounds that there was no evidence the partial taking caused damages to the remainder and requested the trial court to submit either of two damages questions:

> REQUESTED JURY QUESTION [1]
>
> > From a preponderance of the evidence, what do you find to be the fair market value of the property being acquired, the .33 acres (14,375 square feet), considered as severed land, as of the date of taking, November 22, 2002?
>
> REQUESTED JURY QUESTION [2]
>
> > From a preponderance of the evidence, what do you find to be the damages, if any, to [the Petropouloses]'s property, including improvements thereon, as a result of the acquisition of the 0.33 acres (14,375 square feet) of land as of the date of taking, November 22, 2002?

The trial court denied the State's motion for partial directed verdict, refused to submit the requested jury questions, and overruled the State's objections to the charge.

The jury found the pre-taking value of the property was $579,348. The trial court then calculated the Petropouloses' damages by subtracting the amount that Hornsby testified was the value of the remainder—$276,170—from $579,348. The court rendered judgment for the Petropouloses in the amount of $303,178 less credit for the amount of the commissioners' award, which the State had deposited into the trial court registry and the Petropouloses had withdrawn. The State appealed.

The court of appeals affirmed. ___ S.W.3d ___. It held that the trial court did not commit charge error and the evidence was sufficient to support the damages awarded. *Id.* at ___. We granted the State's petition for review. 54 TEX. SUP. CT. J. 329 (Dec. 17, 2010).

The State presents seven issues that focus on three main points: (1) the Petropouloses' appraisal expert was improperly allowed to testify to the pre-taking value of the whole property; (2) the trial court's charge was erroneous and the damages should have been submitted by broad form questions; and (3) there was no evidence the partial taking resulted in damages to the remainder. The State urges that we should reverse the judgment of the court of appeals and either render judgment for the value of the .33 acres taken or grant a new trial. In response, the Petropouloses maintain that because the pre-taking value of the whole property was the only disputed issue, the trial court was correct in submitting only that question to the jury.

We disagree with the State in part but also agree in part. We disagree that the trial court erred by admitting testimony from the Petropouloses' appraisal expert, but we agree that (1) the court committed charge error and (2) there was no evidence the taking caused remainder damages. We address these issues in turn, beginning with the State's assertion that the trial court abused its discretion by admitting Smith's testimony.

II. Analysis

A. The Petropouloses' Appraisal Expert

The State first argues that Smith's testimony was irrelevant because he only testified to the pre-taking value of the whole property and the proper method of determining damages required evidence of both the value of the part taken and the damage to the remainder. However, the State

does not dispute that at least part of an acceptable method of calculating partial-taking damages requires determining the market value of the entire tract before the taking. *See Westgate, Ltd. v. State*, 843 S.W.2d 448, 457 (Tex. 1992). It follows that Smith's testimony as to the property's pre-taking value was relevant, and the trial court did not abuse its discretion in admitting the testimony. *See* TEX. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *E.I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995).

The State also challenges the reliability of Smith's opinion. The State argues there was no evidence Smith's appraisal technique was generally accepted. We disagree. Smith used "the comparable sales approach" to determine the pre-taking value of the whole. We have recognized that this is a traditional method for determining land value. *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001).

Finally, the State argues that because Smith based his value on the specific use of a car wash and lube facility instead of considering all reasonable uses, his testimony was unreliable under *City of Austin v. Cannizzo*, 267 S.W.2d 808, 815 (Tex. 1954), which states that it is proper to admit evidence of "the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future." According to the State, Smith's testimony was speculative because the Petropouloses had not been approached by buyers seeking to acquire the land for a car wash and lube facility. But in his testimony, Smith described the practice in the appraisal profession of conducting a feasibility analysis to determine an appropriate

highest and best use. He also testified that he adhered to that practice and considered four factors: what is legally permissible; what is physically possible; what is financially feasible; and what is the most productive use of the property. These are the same factors upon which Hornsby, the State's expert, based his highest and best use testimony. Smith then discussed his analysis—including assessing properties comparable to the Petropouloses' property—and determined a value estimate for the property under its various possible uses. As a result of his feasibility analysis, Smith determined the fair market value of the Petropouloses' property based on what he considered its highest and best use.

A trial court has broad discretion to determine the admissibility of expert testimony. *See, e.g.*, *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001). Under the record before us, we conclude that the trial court did not abuse its discretion in admitting Smith's testimony.[1]

B. The Jury Charge

In *Westgate* we reaffirmed the longstanding rule that the measure of compensation in a partial-takings case is "the market value of the part taken plus damage to the remainder caused by

[1] The State also contends that the trial court abused its discretion because the Petropouloses did not offer evidence to support the relevancy and reliability of Smith's testimony at the pretrial hearing on the State's motion to exclude. But it is within a trial court's discretion whether to even conduct a pretrial evidentiary hearing when an expert's testimony has been challenged. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152-53 (1999); *see also Regan v. Schlumberger Tech. Corp.*, No. 01-00-00026-CV, 2001 WL 1344077, at *2 (Tex. App.—Hous. [1st Dist.] 2001, pet. denied) (not designated for publication). And in making a preliminary determination on the admissibility of the expert's testimony at such a hearing, the trial court is "not bound by the rules of evidence except those with respect to privileges." *See* TEX. R. EVID. 104(a); *see also Glenn v. C & G Elec., Inc.*, 977 S.W.2d 686, 688 (Tex. App.—Fort Worth 1998, pet. denied). Thus, because the trial court was not required to hold a pretrial hearing to begin with, and the rules of evidence did not apply to the hearing when it was conducted, the trial court did not abuse its discretion by refusing to exclude Smith's testimony on the basis urged by the State.

the condemnation." 843 S.W.2d at 456.[2] We outlined two acceptable methods for calculating damages in a partial takings case. The first method measures damages by the fair market value of the part taken plus damages to the remainder caused by the condemnation. *Id.* (citing *Buffalo Bayou, Brazos & Colo. Ry. Co. v. Ferris*, 26 Tex. 588, 603-04 (1863)). The second method measures damages by the difference between the market value of the entire tract before the taking and the market value of the remainder after the taking. *See id.* (citing *Uselton v. State*, 499 S.W.2d 92 (Tex. 1973)). The second method is preferable when the part taken does not constitute a separate economic unit, such as when the tract taken is small or irregularly shaped. *Id.* at 456-57.

We have previously addressed how partial-takings cases should be submitted following the amendment of Texas Rule of Civil Procedure 277 to mandate use of broad form jury questions whenever feasible. In *Callejo v. Brazos Elec. Power Coop., Inc.*, 755 S.W.2d 73 (Tex. 1988), the trial court charged the jury to separately find the pre- and post-taking values of the land. *Id.* at 74. The trial court then disregarded the finding on post-taking value and rendered judgment based on the finding of pre-taking value and the condemning authority's expert's opinion of the post-taking value. *Id.* We agreed that there was no evidence to support the finding of the jury as to post-taking value and affirmed the judgment. *Id.* at 75-76. We noted, however, that the case was tried before Rule 277 was amended. *Id.* at 76. We specifically stated that pursuant to amended Rule 277, future condemnation cases should be submitted "broadly in terms of the difference in value, rather than asking separate questions on pre- and post-taking values." *Id.*

[2] The landowner is entitled to recover at least the fair market value of the property taken even if the taking causes the remainder's value to increase. *Westgate*, 843 S.W.2d at 456.

In *Westgate*, the jury was charged to find the pre- and post-taking values of the tract, rather than being broadly charged to find the difference between the two. 843 S.W.2d at 451. The court of appeals held that the trial court erred by not submitting a broad-form charge to the jury as mandated by Rule 277 and *Callejo*. *State v. Westgate*, 798 S.W.2d 903, 907-08 (Tex. App.—Austin 1990), *aff'd*, 843 S.W.2d 448 (Tex. 1992). In affirming, we specifically stated that the court of appeals properly disposed of the charge issue. *Westgate*, 843 S.W.2d at 456. We also generally discussed the manner in which partial condemnation damages should be submitted to the jury. *Id.* As relevant to the method used by the trial court here, we noted that the broad-form submission should be "the damages to the landowner's property, accompanied by an instruction that such damages should be determined by considering the difference between a) the value of the landowner's entire tract before the taking, and b) the market value of the remainder after the taking, giving consideration to the uses to which the condemned part is to be subjected." *Id.* at 457. But our discussion was predicated on the overarching premise that in partial-takings cases the landowner's just compensation is an amount determined by the value of the property taken plus damage to the remainder *caused* by the condemnation. *Id.* at 456. As the Petropouloses note, we addressed a jury question submitted by the trial court in *Uselton*:

> The trial court in *Uselton* also asked the following additional question:
>
> > Do you find from a preponderance of the evidence that the market value of the remainder of the defendants' tract of land not taken was decreased in market value as a result of the condemnation by the plaintiffs, giving consideration to the uses to which the part taken is to be subjected? Answer "yes" or "no." [Answer: Yes]
>
> We have never required this type of threshold question inquiring whether the landowner suffered damages to the remainder, and such a question is not necessary.

Id. at 464 n.7. Although we stated that the threshold question submitted in *Uselton*, which contained a causation element, is not necessary, the causation element was not the focus of our statement. And to the extent our statement could be read to imply that a showing of causation between the taking and damages to the remainder is not required, we clarify it today. When there is a question about whether the partial taking caused damages to the remainder the parties are entitled to have the jury decide the issue. In this case, the trial court opted to determine damages according to the second method we discussed in *Westgate* by subtracting the post-taking value of the remainder from the pre-taking value of the whole tract. *See Westgate*, 843 S.W.2d at 457. But that methodology effectively removed an essential part of the damages question from the jury's consideration: whether the partial taking caused the remainder's value to change. Where the parties disagree about the value of the part taken as well as whether the partial taking *caused* the remainder's post-taking value to differ from its pre-taking value, the trial court should charge the jury using broad-form questions and incorporate the causation issue.

In this case the State properly and timely objected to the jury charge. The State went further and also requested questions that would have allowed the jury to find the Petropouloses' damages according to the manner we outlined in *Westgate*. The State's requested jury question 1 effectively submitted damages according to the first method we discussed because, as we determine below, there was no evidence the taking caused any compensable damages to the remainder. The State's requested jury question 2 conformed to the second method we discussed in *Westgate*. It would have

required the jury to determine the amount of damages *resulting from* the taking.[3] We conclude that the trial court committed charge error by submitting only the pre-taking value of the property to the jury.

We next address the State's argument that even if the jury had been properly charged, there was no evidence the taking caused compensable remainder damages and that we should render judgment instead of remanding the cause for a new trial.

C. Remainder Damages

As support for its conclusion that there was some evidence of damage to the remainder, the court of appeals referenced Smith's testimony that conversion of Highway 290 to a toll road would reduce the financial feasibility of some types of development on the remainder. *See Petropoulos*, ___ S.W.3d ___. But Smith only testified that the taking would affect the soundness of a business decision to build a car wash and lube facility on the property post-taking. Specifically, he stated that it would be physically and legally possible to build a car wash and lube facility on the tract both before and after the taking, but "impulse retail" on a mid-block location on a toll road was less financially feasible because:

> [an upgraded corner site] increases the exposure and accessibility of getting in and out of that site, it, enhances the ability to see the property, and it increases – you know, the visibility of it to where customers can actually see what's there and what business they may frequent.

[3] We recognize that the jury question might have made it difficult for the State to prosecute an appeal challenging the sufficiency of the evidence as to damages. *See Harris County v. Smith*, 96 S.W.3d 230, 233 (Tex. 2002). Whether the State could have, under this record, validly objected to the jury being charged with such a question had the Petropouloses requested it is an issue not presented, and we offer no opinion on it.

We have previously held that altered exposure to traffic and altered accessibility to a roadway are not compensable damages. *State v. Schmidt*, 867 S.W.2d 769, 777 (Tex. 1993) (holding that a landowner could be compensated if access to their property is completely denied, but not for "loss of value due to diversion of traffic or circuity of travel"). Further, in *State v. Dawmar Partners, Ltd.*, we recently considered damages for a partial taking as part of a highway improvement project. 267 S.W.3d 875, 877 (Tex. 2008) (per curiam). In *Dawmar Partners* the principal issue was whether the landowners were entitled to remainder damages caused by permanent denial of direct access to the highway if the restrictions on access changed the highest and best use of the property from commercial to residential. *Id.* We held that the landowners were not entitled to compensation for diminished value of the remainder because they had not suffered a material and substantial impairment of access, regardless of the fact that the highest and best use had drastically changed because of loss of direct access to the highway. *Id.* at 878.

Here, the Petropouloses did not offer any evidence that the taking caused a material and substantial impairment of access to their property. Although Smith testified that the Property would have less exposure to traffic after conversion of the highway to a toll road, the Petropouloses' remainder property would still have frontage on and direct access to the highway. There was no evidence that any other access to the property would be affected by the highway conversion. Evidence that conversion of U.S. 290 to a toll road would alter the nature of the property's highest and best use is not, without more, evidence of compensable damages for a partial condemnation and taking. *See id.*; *Schmidt*, 867 S.W.2d at 777. Nor is diminished traffic and diminished exposure to traffic. *See Schmidt*, 867 S.W.2d at 773-74; *Archenhold Auto. Supply Co. v. City of Waco*, 396

S.W.2d 111, 114 (Tex. 1965); *see also State v. Heal*, 917 S.W.2d 6, 11 (Tex. 1996) (holding that absent a material and substantial impairment of access, the landowners were not entitled to compensation "even if the remainder of their property has lost some degree of value").

Moreover, Hornsby testified that the taking did not cause any change in the value of the remainder property, and Smith expressly limited his valuation opinion to only the pre-taking value of the whole property. The parties agreed that the tract's allowable impervious cover area—the area on which buildings, parking lots, etc. could be constructed—was increased by the taking.

We conclude that there was no evidence of compensable remainder damages.

D. Disposition

Even though there is no evidence of compensable damages to the Petropouloses' remainder property, they are still entitled to compensation for the value of the property taken. *Westgate*, 843 S.W.2d at 456. The State argues that because there was no evidence of remainder damages, judgment should be rendered for the value of the acreage taken. In the alternative, the State seeks remand for a new trial.

Regarding the State's rendition argument, there was evidence from Hornsby that the property was worth $2 per square foot pre-taking. Smith's opinion was that the whole tract was worth $4.13 per square foot pre-taking. Smith did not appraise the part taken as a separate tract and had no opinion about whether it should be valued as a separate tract or a pro rata part of the whole 3.5 acres. Hornsby, however, testified that because of the configuration of the strip taken and its location, the .33 acres tract did not have value as a separate economic unit and should be valued as a pro rata part of the 3.5 acres.

The jury found that the pre-taking value was $579,348, which is $3.80 per square foot, and the value of the tract taken can be calculated based on that determination because the evidence was undisputed that the .33 acres taken contained 14,375 square feet. Further, Hornsby's opinion was that the tract should be valued as a pro rata share of the entire tract and there is no evidence that it should be valued otherwise. Based on the jury finding and the undisputed evidence, then, the Petropouloses are entitled to damages of $3.80 per square foot for 14,375 square feet—a total of $54,625.

Neither party contested the part of the trial court's judgment allowing the State credit for the amount of the commissioners' award that it deposited and the Petropolouses withdrew. Accordingly, the State is entitled to credit for that amount.

III. Conclusion

The trial court erred by charging the jury as it did. Further, there was no evidence the partial taking caused damages to the remainder property, and based on the jury findings the value of the tract taken can be determined. Accordingly, the judgment of the court of appeals is reversed and the cause is remanded to the trial court for rendition of judgment in accordance with this opinion.

Phil Johnson
Justice

OPINION DELIVERED: June 10, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0665

TERRY LEONARD, P.A., AND APRIL DAWN HAIN, M.D., PETITIONERS,

v.

ANDRE GLENN, RESPONDENT

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

PER CURIAM

Respondent Andre Glenn sued petitioners Terry Leonard, P.A., and her supervisor, April Dawn Hain, M.D., both employees of Bexar County Hospital District d/b/a University Health System on health care liability claims after Leonard diagnosed Glenn with gout and prescribed Indomethacin, which led to Glenn's kidney failure. Leonard and Hain moved to dismiss the suit under section 101.106(f) of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.106(f), alleging that the suit was based on conduct within the general scope of their employment could have been brought against UHS. Glenn did not file a motion to amend his petition to name UHS as a defendant, but instead disputed whether he could have brought claims against UHS.

The trial court denied the defendants' motions to dismiss under section 101.106(f) , as well as the defendants' objections to the plaintiff's expert report and motion to dismiss under TEX. CIV.

PRAC. & REM. CODE § 74.351, and the defendants brought an interlocutory appeal. The court of appeals affirmed on both issues. 293 S.W.3d 669, 684 (Tex. App.–San Antonio 2009).

While this case has been pending on appeal, we have decided *Franka v. Velasquez*, ___ S.W.3d ___ (Tex. 2011), holding among other things that, for purposes of TEX. CIV. PRAC. & REM. CODE § 101.106(f), a tort action is brought "under" the Texas Tort Claims Act, even if the government has not waived its immunity for such actions. ___ S.W.3d at ___. In light of *Franka*, we grant Leonard's and Hain's petition for review and without hearing oral argument, reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings. TEX. R. APP. P. 59.1.

Opinion delivered: January 21, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0683

CHRISTI BAY TEMPLE, PETITIONER,

v.

GUIDEONE SPECIALTY MUTUAL INSURANCE CO., ET AL., RESPONDENTS

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

PER CURIAM

The issue on appeal is whether a church lacked capacity to sue its insurance carrier for breach of contract. The defendant insurance carrier moved to abate and later to dismiss the action, arguing that the church lacked capacity because it was a non-profit corporation which had lost its charter. The court of appeals agreed, affirming the trial court's judgment dismissing the underlying suit. ___ S.W.3d ___. The church maintains, however, that it has never operated as a non-profit corporation but rather is an unincorporated religious association. Because there is no evidence that the church ever functioned as a corporation or otherwise lacked capacity to sue its insurance carrier for breach of contract, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

Christi Bay Temple of Corpus Christi, Texas, is a member church of the Pentecostal Church of God. Operating as an unincorporated religious association, the trustees of the church acquired

title to property for its ministry in 1976. This property sustained water damage in 2001. GuideOne Specialty Mutual Insurance Company insured the property at the time of the loss. Although GuideOne accepted coverage, the church was ultimately dissatisfied with the adjustment of its claims and sued for additional damages.

GuideOne generally denied that it owed the church any more money for its loss. Two and a half years later and shortly before trial was to commence, GuideOne amended its answer to include a verified plea in abatement challenging the church's capacity to sue. In this plea, GuideOne averred that the church was, in fact, a non-profit corporation that had forfeited its charter years earlier and thus lacked capacity to sue or, for that matter, even contract for insurance.

The trial court apparently agreed, granting the plea in abatement and several months later dismissing the church's lawsuit for want of prosecution after the church failed to cure the problem. The court of appeals subsequently affirmed finding no abuse of discretion. ___ S.W.3d at ____.

The church complains that the lower courts erred in abating, and subsequently dismissing, its action against GuideOne because that lawsuit belonged to it rather than to a similarly-named, non-profit corporation. This similarly-named corporation was chartered in 1980 and promptly forfeited its charter eighteen months later when it failed to file its franchise tax report. The church argues that this corporation has no connection to the insured property. The church acquired the property four years before the creation of the similarly-named corporation, and GuideOne issued the policy almost twenty years after that corporation ceased to exist. The church submits that it brought this suit as an unincorporated religious association because that is how it has always operated. An

unincorporated association organized for nonbusiness purposes generally has the legal capacity to sue or be sued in its assumed name. TEX. R. CIV. P. 28.

GuideOne argues, however, that the church ceased to exist as an association in 1980 when the non-profit corporation, bearing the same name and a similar affiliation with the Pentecostal Church of God, was created. GuideOne submits that upon becoming a corporation the church lost the capacity to litigate as an unincorporated association. Only a party that actually or legally exists may bring a lawsuit. *See Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist*., 925 S.W.2d 659, 661 (Tex. 1996) (noting that a party who lacks the legal authority to act lacks capacity); *see also Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) (describing capacity as a procedural issue dealing with the personal qualifications of a party to litigate).

As the party challenging capacity, GuideOne bore the burden of proof. *Flowers v. Steelcraft Corp.*, 406 S.W.2d 199, 199 (Tex. 1966). GuideOne's proof here rests entirely on the articles of incorporation that created the non-profit corporation in 1980 with a similar name to and same religious affiliation as the church. Beyond that, GuideOne presumes that the individuals who filed these articles had some connection to the church and intended for the church to assume this corporate form. There is no specific proof of this, however, nor is there any other evidence to connect this corporation to the present suit or any other church activity.

The church maintains that it has always operated as an unincorporated religious association, and the record does not suggest otherwise. There is no evidence that the church transferred any property or assets to the non-profit or conducted any activity or ministry as a non-profit corporation. The record reflects only that the church and corporation have similar names. This fact alone,

however, fails to raise even a suspicion that the church lacked capacity to prosecute this case. *See Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006) (observing that surmise and suspicion are not evidence).

Because there is no evidence that the church lacked capacity, the courts below erred in dismissing its claims for want of prosecution. Accordingly, we grant the petition for review, and, without hearing oral argument, reverse the court of appeals' judgment and remand the cause to the trial court. TEX. R. APP. P. 59.1.

Opinion Delivered: December 3, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0744

MID-CONTINENT CASUALTY COMPANY, PETITIONER,

v.

GLOBAL ENERCOM MANAGEMENT, INC., RESPONDENT,

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

PER CURIAM

In this case, we must determine whether two exclusions in insurance policies—"auto use" and "subsequent-to-execution"—preclude coverage for a subcontractor's workers who fell and died after being hoisted up on a rope through a pulley system by a pickup truck. The subcontracts for which the insurance policies allegedly provided coverage were signed after the work had begun. The trial court and court of appeals held that neither exclusion applied and granted summary judgment to the policyholder, declaring coverage under both policies. 293 S.W.3d 322, 325, 328 (Tex. App.—Houston [14th Dist.] 2009, pet. granted). We affirm in part, reverse in part, and render judgment.

The relevant facts are not in dispute. Global Enercom Management, Inc. is a Delaware corporation with its principal place of business in Houston. It constructs and maintains cellular phone towers. Global subcontracted with All States Construction Company to perform repair work

on a cell tower located in Arkansas. A provision of Global's subcontract with All States required All States to indemnify Global for "all acts and omissions of its employees, on the site where the Work is being performed and for all acts and omissions of its subcontractors, agents and vendors . . . ." All States signed and delivered the subcontractor agreement to Global and began work on the project, but Global did not immediately sign the contract.

Mid-Continent Casualty Company is All States's insurer, and it issued both a commercial general liability policy (CGL) and a commercial auto policy (CAP) to All States. The CGL policy has a limit of $1,000,000 per occurrence, and the CAP has a limit of $100,000 per occurrence. Each policy also provides coverage extending to additional "insured contracts" when All States enters into contracts "pertaining to [its] business" in which All States "assume[s] the tort liability of another to pay for 'bodily injury' or 'property damage' to a third party or organization," so long as the liability occurred "subsequent to the execution of the contract or agreement."

All States employees began repairing the cell tower in December 2001, continuing into January 2002. As part of the repairs, the employees set up a rope-and-pulley system on the tower. One end of the rope was anchored on a spool and was run through a pulley attached to the "towing point," or eye hooks, on the front bumper of a 2000 Ford F-250 Super Duty truck. The truck was parked some distance away from the tower on the opposite side of an outbuilding. The rope also ran through pulleys installed on the top and bottom of the 280-foot cell tower and was finally anchored to a headache ball on the other end of the rope. Three workers were instructed by the foreman to climb the tower to take measurements. They tried to reach the top of the tower by attaching themselves to the headache ball at the end of the rope and signaling the foreman to back the truck

away from the tower to pull the rope through the pulleys and raise the headache ball. The foreman driving the truck did not see the workers until they had been raised approximately fifteen to twenty feet in the air, over the building obstructing his view. The foreman gave a hand signal, communicating "What's going on?" The workers, attached to the headache ball, gave another "up" signal, indicating to the foreman to continue driving the truck. Although the foreman knew this was not common practice and potentially unsafe, he nevertheless continued to drive the truck in reverse, away from the tower, lifting the three workers to a height of eighty feet. The rope broke, and the workers fell to their deaths. The day after the incident, Global signed the subcontract.

The heirs of the deceased workers brought suit against Global in federal court in Mississippi. Global sought indemnification from Mid-Continent as an additional insured under All States's CGL and CAP policies. Mid-Continent defended but ultimately refused to indemnify Global, and Global then filed this case in Texas, seeking, among other things,[1] a declaration of a right to defense and indemnification from Mid-Continent. Mid-Continent filed a counterclaim seeking declarations that it owed no duty to indemnify or defend Global, that Global was not an additional insured under any policies issued by Mid-Continent to All States, and that it did not commit any statutory violations.

The parties each filed motions for summary judgment. Mid-Continent argued two separate bases for denial of coverage. First, Mid-Continent claims that the "auto-use" exclusion in the CGL policy precludes coverage. The exclusion states that the policy does not apply to:

[1] Global eventually dismissed all claims against Mid-Continent other than its declaratory judgment claims.

> "[b]odily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured.

The policy defines the term "auto" as "a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment."

Second, Mid-Continent denied coverage under the CGL and CAP policies pursuant to the "subsequent-to-execution" clauses in each. Those clauses provide that a claim under an "insured contract" is only covered under the policies if "the 'bodily injury' or 'property damage' occurs subsequent to the execution of the [insured] contract or agreement."

The trial court granted Global's motion for summary judgment and denied Mid-Continent's. Mid-Continent appealed.[2] The court of appeals affirmed, holding that neither exclusion applied. 293 S.W.3d at 328. One justice dissented in part, arguing that the "auto-use" exclusion should bar coverage under the CGL policy, but he agreed with the majority that the "subsequent-to-execution" exceptions did not bar recovery under the policies. *Id.* at 329–32 (Seymore, J., dissenting in part and concurring in part). Mid-Continent petitioned this Court for review.

When both parties move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review the summary judgment evidence presented by both sides, determine all questions presented, and render the judgment the trial court should have rendered. *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex.

[2] Prior to the trial court's decision, Global non-suited its direct claims against All States and its owner, Irving Barnes. After the trial court granted Global's summary judgment motion, Global dismissed its claim for attorneys' fees against Mid-Continent under the Texas Civil Practice and Remedies Code. Thus, the summary judgment entered in Global's favor was final and appealable.

2004) (citation omitted). We analyze disputes over the interpretation of insurance contracts under the well-established principles of contract construction, attempting to determine the parties' intent through the written language of the policy. *E.g.*, *State Farm Lloyds v. Page*, ___ S.W.3d ___ (Tex. 2010) (citing *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 420, 433 (Tex. 1995)). If a contract for insurance has a clear and definite meaning, then it is not ambiguous as a matter of law, even if the parties interpret a policy differently. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, ___ S.W.3d ___ (Tex. 2010) (citations omitted).

We first address whether the "auto-use" exclusion bars coverage for the injury under the CGL policy. In the case before us, Mid-Continent alleges that using the truck with an attached pulley to lift the workers "arises out of" the use of an "auto" and excludes coverage. The parties do not dispute that the truck was hoisting the headache ball with the workers attached when the rope broke. But the parties dispute what caused the rope to break, and, more relevant here, whether the "use" of the truck was sufficient to trigger the "auto-use" exclusion and preclude coverage under the CGL policy.

The leading case from this Court regarding "auto-use" exceptions or inclusions to coverage is *Mid-Century Insurance Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999). In *Lindsey*, a boy attempted to access a locked pickup truck through its back window, but in the process accidentally touched a shotgun mounted over the window, causing it to discharge and injure a person sitting in an adjacent vehicle. *Id.* at 154. The injured party settled with the owners of the first vehicle for an amount less than his total injuries and then sought underinsured motorist coverage from the insurer of the vehicle in which he was sitting. *Id.* That insurance company denied coverage, arguing, among

other things, that the vehicle owner's policy did not provide coverage because the accident did not "arise out of" the "use" of a motor vehicle. *Id.* at 155.

The Court used the factors announced in two insurance treatises[3] to focus the analysis in determining whether an automobile's "use" clause applied to a particular claim.

> For an injury to fall within the "use" coverage of an automobile policy (1) the accident must have arisen out of the inherent nature of the automobile, as such, (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated, (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury.

Lindsey, 997 S.W.2d at 157.[4] The Court held that the factors were satisfied because the child was attempting to gain entry into the truck through the back window and the child did not stray from that purpose by playing with the gun or trying to shoot it. *Id.* at 158. The "injury producing act and its purposes are an integral part of the use of the vehicle as such," and therefore the injury caused by the discharging gun arose out of the use of the vehicle. *Id.* at 161.

The court of appeals in this case held that *Lindsey* was limited to insurance coverage claims involving the discharge of firearms or was at least distinguishable on its facts. 293 S.W.3d at 327. It instead held that the present case was controlled by *Brown v. Houston Independent School District*, 123 S.W.3d 618 (Tex. App.—Houston [14th Dist.] 2003, pet. denied), and *National Union Fire*

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[3] *See* 6B JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4317, at 367–69 (Buckley ed. 1979); 8A COUCH ON INSURANCE 3d § 119:37, at 119-56 (2005).

[4] The *Lindsey* Court noted that the Appleman/Couch test was not an "absolute test," and that the factors were not necessarily determinative in analyzing whether a motor vehicle was "used" for insurance coverage purposes. *Lindsey*, 997 S.W.2d at 157–58. In this case, we likewise do not adopt the Appleman/Couch test as an absolute test, but rather continue to use it as a conceptual framework to analyze the exclusion at issue.

Insurance Company of Pittsburgh, PA v. Merchants Fast Motor Lines, Inc., 939 S.W.2d 139 (Tex. 1997).

The court of appeals erred in disregarding *Lindsey.* Although the Court in *Lindsey* discussed the nuances of different claims involving the discharge of firearms in or near motor vehicles, nothing in the language of the opinion, or its subsequent application by this Court, suggests that *Lindsey*'s holding or reasoning is limited to gun rack or firearms cases. Additionally, *Lindsey* has been compared to or relied on by this Court in other types of auto-coverage cases that do not involve firearms. *E.g.*, *U.S. Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603, 606 (Tex. 2008) (concerning a "Good Samaritan" who was hit by a passing car and sustained injuries after he exited his employer's insured vehicle to assist a stranded motorist); *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004) (concerning an insurer's duty to defend where an insured doctors' employee allegedly administered contaminated anesthetics); *see also Lincoln Gen. Ins. Co. v. Aisha's Learning Ctr.*, 468 F.3d 857, 859–60 (5th Cir. 2006) (declaring that *Lindsey*'s test for "use" is to be interpreted broadly and holding that an auto exclusion provision in a CGL policy applied when a child was left in a daycare van during extreme heat).

Using the Appleman/Couch factors elucidated in *Lindsey* as a framework, we conclude that the exclusion applies to this case as a matter of law. First, it is in the inherent nature of a 2000 Ford F-250 Super Duty pickup truck on a cell tower job site that it will be used to haul and tow materials. The truck was leased for the specific purpose of completing work under the insured contract, and it was equipped with eye hooks on the front bumper, to which the pulley was attached for that type of use. Using an F-250 truck in this way "was not an unexpected or unnatural use of the vehicle," given

the vehicle's location on the job site and its specifications for this type of work. *Lindsey*, 997 S.W.2d at 158. Second, the accident was within the "natural territorial limits" of the truck. In *Lindsey*, this factor was met even though the injury occurred in an adjacent vehicle. Significantly in this case, the CGL policy defines "auto" to include "attached machinery and equipment." Even though the workers were on the other side of a building and not inside the vehicle, the workers were still attached to the pulley system, which was part of the vehicle, which was in use at the time of the accident.

The third factor is a causation analysis. The parties recognize that some formulation of "but-for" or "producing cause" causation applies, but Global argues that the truck was not a "substantial factor" causing the injury. *See, e.g.*, *Akin, Gump, Strauss, Hauer & Field, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009) (defining the elements of cause-in-fact as 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" (citation omitted)). In defining "use of an auto" in insurance policies, "Texas courts define 'use' broadly." *Lincoln Gen. Ins. Co.*, 468 F.3d at 859 (quoting, among other cases, *Lindsey*, 997 S.W.2d at 156; *State Farm Mut. Auto Ins. Co v. Pan Am. Ins. Co.*, 437 S.W.2d 542, 545 (Tex. 1969); *Utica Nat'l Ins. Co.*, 141 S.W.3d at 203; *LeLeaux v. Hamshire-Fannett Ind. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992)). In *Lindsey*, the Court acknowledged that the third factor may be difficult to define because it is not always clear how the vehicle contributed to an accident. *Id*. at 157. This Court later clarified that "'arise out of' means that there is simply a 'causal connection or relation,' which is interpreted to mean that there is but for causation, though not necessarily direct or

proximate causation." *Utica Nat'l Ins. Co.*, 141 S.W.3d at 203 (citing *Lindsey*, 997 S.W.2d at 156). "Arise out of" may indicate more direct causation if the insurance policy dictates, but no such differentiating language exists in this policy. *Cf. id.* (holding that "arise out of" required more direct causation because the insurance policy at issue differentiated between accidents that "arise out of" one cause and accidents that are "due to" another cause).

There is a greater causal relationship in this case than existed in *Lindsey*. Global asserts that it was the defective rope, not the truck, that caused the injuries, but the rope would not have broken if the truck was not used to hoist the headache ball. The court of appeals held that the pickup truck simply "provided the power for the pulley system," but here, the workers could not have been raised on the rope through the pulley system without the use of mechanical assistance. 293 S.W.3d at 327. This is not the case where "the [negligent actor] could be standing still and accomplish the same result." *Lindsey*, 997 S.W.2d at 158. The accident did not merely happen because the rope broke; the accident did not merely happen in or near the truck; the workers could not have accomplished the same result without the truck; and one of the expected purposes of this particular truck was to perform towing and lifting activities. The "auto-use" exclusion in All States's CGL policy precludes coverage for the accident under that policy, and the trial court and court of appeals erred in holding otherwise.

Furthermore, this case is not controlled by *Brown* and *National Union.* *Brown* involved an officer who pulled over a woman in his patrol car and sexually assaulted the woman in her own vehicle. 123 S.W.3d at 619. The only relevance of the vehicle was that it was the location of the sexual assault. This act of violence did not arise out of the inherent nature of an automobile, nor did

it produce the injury. In *National Union,* the only facts in the pleadings were that the driver of a vehicle "negligently discharged a firearm and caused a bullet to strike" a passenger in a vehicle traveling nearby. 939 S.W.2d at 141. There were no allegations of a causal connection whatsoever between the automobile and the shooting. *Id.* at 142. The truck was merely the situs of the alleged negligence, and the mere fact that the allegedly negligent party was driving was insufficient to qualify as an "accident resulting from the . . . use of a covered auto." *Id.*

The second exclusion Mid-Continent cites to deny coverage to Global is the "subsequent-to-execution" exclusion found in both the CGL and CAP policies. These clauses prohibit coverage for a claim under an "insured contract" if the incident "occurs subsequent to the execution of the [insured] contract or agreement." "Execution" is not defined either in the insurance policies or in the subcontract. Mid-Continent agrees that the subcontract between All States and Global would be an "insured contract" if it were "executed" prior to the incident and concedes that the contract signed by All States and remitted back to Global is probably valid and enforceable. Yet Mid-Continent claims that the contract did not meet the definition of "insured contract" as defined by the policies because Global did not sign the subcontract with All States prior to the accident.

Mid-Continent alleges that result is dictated if the Court gives the term "execute" its "ordinary and accepted meaning." But the word "execute" has several definitions and is not constrained by Mid-Continent's argument that "to execute" may only mean "to sign." Black's Law Dictionary defines "execute" as "[t]o perform or complete (a contract or duty) . . . [t]o change (as a legal interest) from one form to another . . . [or] [t]o make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form . . . ." BLACK'S LAW DICTIONARY

(8th ed. 2004). Further, Texas law recognizes that a contract need not be signed to be "executed" unless the parties explicitly require signatures as a condition of mutual assent.

> If a written draft of an agreement is prepared, submitted to both parties, and each of them expresses his *unconditional* assent thereto, there is a written contract . . . . [I]f there is a writing, there need be no signatures unless the parties have made them necessary at the time they express their assent and as a condition modifying that assent. . . . An unsigned agreement all the terms of which are embodied in a writing, *unconditionally* assented to by both parties, is a written contract. . . .

Simmons & Simmons Constr. Co., Inc. v. Rea, 286 S.W.2d 415, 418 (Tex. 1956) (quoting 1 CORBIN ON CONTRACTS §§ 31–32); *see also Travelers Ins. Co. v. Chicago Bridge & Iron Co.,* 442 S.W.2d 888, 895 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e) ("The term 'execute' means 'to finish' or 'make complete.' The execution of a contract includes the performance of all acts necessary to render it complete as an instrument."); *cf. Scaife v. Associated Air Ctr., Inc.*, 100 F.3d 406, 410–11 (5th Cir. 1996) (applying Texas law and holding no contract was formed when the contract was never delivered, neither party signed the agreement, and the contractor never began work pursuant to the contract).

Global offered the contract to All States, and All States accepted not only by signing and faxing the agreement back to Global, but also by beginning performance on the contract work. *United Concrete Pipe Corp. v. Spin-Line Co.*, 430 S.W.2d 360, 364 (Tex. 1968) ("[P]erformance of that act which the offeree was requested to promise to perform may constitute a valid acceptance."). Further, there was mutual assent to All States's work by Global. *Mann Franfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 850 (Tex. 2009) (noting that mutual assent can be inferred from the circumstances). All States and Global agree that the insured contract was

effective, and the companies were operating under that agreement when the accident occurred. In fact, a representative of Global was at the job site while All States's employees installed the pulley system.

Although not signed by Global until after the accident, the subcontract with All States was nonetheless "executed" before the accident. There is no language in the policies requiring both parties to sign the insured contract, and there was no evidence raising a fact issue of the parties' intent to require that all parties to the subcontract sign it as a condition precedent to the subcontract's validity. The evidence shows just the opposite. Therefore, the "subsequent-to-execution" exclusions in both CGL and CAP policies do not bar coverage, and that portion of the court of appeals' opinion is affirmed.

We hold that the court of appeals correctly determined that the insured contract was executed, and that the "subsequent-to-execution" exclusions in the CAP and CGL policies were not triggered as a matter of law. We therefore affirm the judgment of the court of appeals and the trial court's grant of summary judgment to Global on this issue. However, the court of appeals erred in holding that the "auto-use" exclusion in All States's CGL policy did not apply. Accordingly, we reverse the judgment of the court of appeals and render partial summary judgment in favor of Mid-Continent on this issue. Without hearing oral argument, we affirm in part and reverse in part the judgment of the court of appeals and render partial summary judgment in favor of Mid-Continent, and partial summary judgment in favor of Global. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: October 1, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0753

JAMES DERWOOD ILIFF, PETITIONER,

v.

JERILYN TRIJE ILIFF, RESPONDENT

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

Argued October 13, 2010

JUSTICE WAINWRIGHT delivered the opinion of the Court.

Under the Texas Family Code, may a trial court calculate child support based on earning potential, rather than actual earnings, when the obligor is intentionally unemployed or underemployed, but there is no proof that the obligor's unemployment or underemployment is for the purpose of avoiding child support? Because the language of Texas Family Code section 154.066 does not require such proof, we hold that intent to avoid child support need not be proven for the trial court to apply the child support guidelines to earning potential instead of actual earnings. However, a trial court may properly consider an obligor's intent to avoid child support as a factor, along with

other relevant facts, in an intentional unemployment or underemployment analysis. We affirm the judgment of the trial court and the court of appeals.[1]

I. Factual and Procedural Background

Jerilyn Trije Iliff and James Derwood Iliff married April 7, 1990 and had three children. During their marriage James was the primary earner, working in the chemical industry as a chemical specialist and account manager. Although there was some dispute during the divorce proceedings over the amount of his salary, Jerilyn testified James usually made $90,000 to $100,000 a year, and James's W-2 for the year prior to the divorce showed earnings of $102,000. James quit his job in January 2006. After leaving his employment in the chemical industry, James had no steady gainful employment during the divorce proceedings. Despite the fact that James has Bachelor of Science and Master of Business Administration degrees and admits that he is not disabled and is fit to work, James's only work since quitting his job consisted of operating a tractor and sporadic business management consulting for an estimated total earnings of $3,600 to $4,800 over a two-year period.

Jerilyn filed for divorce on June 28, 2006 in Hays County, six months after James resigned. The trial court entered the final divorce decree on May 5, 2008. The trial court appointed Jerilyn sole managing conservator of the children. James was appointed possessory conservator and was ordered to pay child support. Because the trial court determined that James was intentionally unemployed or underemployed, the trial court exercised its discretion and applied the child support guidelines to James's earning potential, as opposed to his actual earnings. *See* TEX. FAM. CODE

[1] The Attorney General of Texas submitted an amicus curiae brief in support of Jerilyn Iliff.

§ 154.066 (allowing the trial court to set child support based on earning potential where an obligor is intentionally underemployed). The trial court's findings of fact and conclusions of law state:

> James Derwood Iliff's own testimony at trial showed that he made in excess of $100,000 in earnings in 2005, the year immediately prior to the filing of divorce. James Derwood Iliff testified at trial that he had left his employment voluntarily in December of 2005. He further testified that he was not disabled or unable to work and had plans to start his own business.

Determining that James's monthly gross earning potential was no less than $5,000, the trial court calculated James's net resources to be $3,662.09 a month and ordered James to pay $1,295.19 per month in child support for his three minor children.

At the court of appeals, James argued that the trial court abused its discretion by awarding child support in excess of the statutory guidelines because there was no evidence that James was intentionally unemployed or underemployed for the purpose of avoiding child support. *Iliff v. Iliff*, ___ S.W.3d ___ (Tex. App.—Austin 2009, pet. granted). The court held that the trial court did not abuse its discretion, rejecting James's argument that the trial court was required to find that his unemployment or underemployment was for "the primary purpose of avoiding child support." *Id*. While acknowledging that other Texas courts of appeals impose a requirement that intentional unemployment or underemployment be for the primary purpose of avoiding child support, the court reasoned that the language of section 154.066 does not require a court to consider avoidance of child support. *Id.* (citing *Hollifield v. Hollifield*, 925 S.W.2d 153, 156 (Tex. App.—Austin 1996, no writ)). We granted Jerilyn's petition to resolve the split among the courts of appeals. *Compare Hollifield*, 925 S.W.2d at 156 ("Section 154.066 does not require the court to consider whether the obligor's 'voluntary unemployment' was for the primary purpose of avoiding child support."), *with*

DuBois v. DuBois, 956 S.W.2d 607, 610 (Tex. App.—Tyler 1997, no pet.) ("[T]here must be evidence that the parent reduced his income for the purpose of decreasing his child support payments.").

II. Standard of Review

A trial court has discretion to set child support within the parameters provided by the Texas Family Code. *Rodriguez v. Rodriguez*, 860 S.W.2d 414, 415 (Tex. 1993); *see also* TEX. FAM. CODE §§ 154.121–.123. "A court's order of child support will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion." *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam) (citation omitted); *see also Rodriguez*, 860 S.W.2d at 415. A trial court abuses its discretion when it acts arbitrarily or unreasonably, without reference to guiding rules or principles. *Worford*, 801 S.W.2d at 109; *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). A trial court also abuses its discretion by failing to analyze or apply the law correctly. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

III. Law and Analysis

Texas Family Code section 154.066 provides that "[i]f the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor." TEX. FAM. CODE § 154.066. The question this case presents is: In order to set child support based upon earning potential of the obligor under section 154.066, must the trial court determine that the obligor's unemployment or underemployment is for the purpose of reducing child support?

A. Disagreement Among the Courts of Appeals

Twelve of the fourteen Texas courts of appeals have answered this question in the affirmative, interpreting Texas Family Code section 154.066 to require proof that the obligor is intentionally unemployed or underemployed for the purpose of avoiding child support. *See, e.g., DuBois*, 956 S.W.2d at 610. Prior to the Tyler Court of Appeals holding in *DuBois*, there was no uniform interpretation of "intentional unemployment or underemployment." *Compare Baucom v. Crews*, 819 S.W.2d 628, 633 (Tex. App.—Waco 1991, no writ) (setting child support based on earning potential simply because the obligor "voluntarily became underemployed by choosing to resign from the employment he had"), *with Woodall v. Woodall*, 837 S.W.2d 856, 858 (Tex. App.—Houston [14th Dist.] 1992, no writ) (requiring evidence that the obligor's "income reduction was designed to obtain a decrease in his child support obligation"). After 1997, the vast majority of the Texas courts of appeals adopted the *DuBois* rule and began to consistently recite its "intent to avoid child support" standard.[2]

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[2] *See, e.g., In re B.R.*, 327 S.W.3d 208, 213 (Tex. App.—San Antonio 2010, no pet.); *Romero v. Zapien*, No. 13-07-00758-CV, 2010 WL 2543897, at *6 (Tex. App.—Corpus Christi-Edinburg June 24, 2010, pet. denied); *Fondren v. Fondren*, No. 09-08-00187-CV, 2009 WL 2045252, at *5 (Tex. App.—Beaumont July 16, 2009, no pet.); *In re A.B.A.T.W.*, 266 S.W.3d 580, 585 (Tex. App.—Dallas 2008, no pet.); *McLane v. McLane*, 263 S.W.3d 358, 362 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Schaban-Maurer v. Maurer-Schaban*, 238 S.W.3d 815, 826 (Tex. App.—Fort Worth 2007, no pet.); *Beach v. Beach*, No. 05-05-01316-CV, 2007 WL 1765250, at *4 (Tex. App.—Dallas June 20, 2007, no pet.); *In re Marriage of Anderson*, No. 10-06-00361-CV, 2007 WL 3409294, at *3 (Tex. App.—Waco Nov. 14, 2007, no pet.); *In re S.C.S.*, 201 S.W.3d 882, 889 (Tex. App.—Eastland 2006, no pet.); *Garner v. Garner*, 200 S.W.3d 303, 306–07 (Tex. App.—Dallas 2006, no pet.); *Logan v. Logan*, No. 2-05-068-CV, 2006 WL 2167164, at *6 (Tex. App.—Fort Worth Aug. 3, 2006, pet. denied); *Colvin v. Colvin*, No.13-03-00034-CV, 2006 WL 1431218, at *5 (Tex. App.—Corpus Christi-Edinburg May 25, 2006, pet. denied); *Gaxiola v. Garcia*, 169 S.W.3d 426, 432 (Tex. App.—El Paso 2005, no pet.); *In re A.J.J.*, No. 2-04-265-CV, 2005 WL 914493, at *3 (Tex. App.—Fort Worth April 21, 2005, no pet.); *In re J.C.S.*, No. 06-04-00085-CV, 2005 WL 927173, at *5 (Tex. App.—Texarkana April 18, 2005, no pet.); *In re E.A.S.*, 123 S.W.3d 565, 570 (Tex. App.—El Paso 2003, pet. denied); *In re Z.B.P.*, 109 S.W.3d 772, 783 (Tex. App.—Fort Worth 2003, no pet.); *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex. App.—Corpus Christi-Edinburg 2002, no pet.); *Galarza v. Galarza*, No. 13-99-797-CV, 2000 WL 35729667, at *2 (Tex. App.—Corpus Christi-Edinburg Nov. 30, 2000, no pet.); *In re P.J.H.*, 25 S.W.3d 402, 405–06 (Tex. App.—Fort Worth 2000, no pet.); *Snell*

Although many of the courts of appeals cases recite the *DuBois* standard, they loosely apply it, providing little or no analysis of how the particular facts of the case indicate a parent's intent to avoid child support. For example, in *Schaben-Maurer v. Maurer-Schaban*, a husband was unemployed for six years before his wife filed for divorce, because, as the wife testified, "[the husband] simply liked sleeping late into the day, watching television, playing on the computer all night, and not having to go to a job." 238 S.W.3d 815, 827 (Tex. App.—Fort Worth 2007, no pet.). The court of appeals did not examine any evidence that the husband was unemployed for the purpose of avoiding child support, but relied on evidence that the husband did not want to hold down a job. *Id.* After citing the *DuBois* standard, the court of appeals held that the husband was intentionally underemployed. *Id.* at 827–28. But the deficiency in this conclusion is the failure to actually apply *DuBois*—a parent cannot be unemployed for the purposes of avoiding child support when the parent became voluntarily unemployed six years before the divorce. Straying from strict adherence to a purpose requirement, many courts of appeals infer intent to avoid child support from "such circumstances as the parent's education, economic adversities, business reversals, business background, and earning potential." *See, e.g., Garner v. Garner*, 200 S.W.3d 303, 307 (Tex. App.—Dallas 2006, no pet.) (citing *In re P.J.H.*, 25 S.W.3d at 406). Innocuous facts such as a graduate degree or past jobs are not particularly indicative of a parent's motive or intent to avoid child support obligations.

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v. Snell, No. 11-98-00126-CV, 1999 WL 33747973, at *2 (Tex. App.—Eastland Nov. 4, 1999, no pet.).

To interpret "intentional unemployment or underemployment," we first turn to the text of the statute.

B. Statutory Construction

In construing a statute, the court's purpose is to give effect to the Legislature's expressed intent. "Our role . . . is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent." *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003). Where statutory language is unambiguous and only yields one reasonable interpretation, "we will interpret the statute according to its plain meaning." *Id*; *see also City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008) ("[W]e 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." (internal citations omitted)).

Section 154.066 gives a trial court discretion to set child support based on the obligor's earning capacity where "the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment." TEX. FAM. CODE § 154.066.[3] Looking to the grammatical structure of the statute, the adjective "intentional" proceeds

[3] The Legislature originally enacted this statute in 1989 and amended it as currently worded in 1995. The prior version, section 14.053(f), had slightly different language but is substantively indistinguishable: "If the actual income of the obligor is significantly less than what the obligor could earn *because the obligor is intentionally unemployed or underemployed*, the court may apply these guidelines to the earning potential of the obligor." Act of May 12, 1989, 71st Leg., R.S., ch. 617, § 6, 1989 Tex. Gen. Laws 2030, 2037, *amended by* Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 160 (current version at TEX. FAM. CODE § 154.066) (emphasis added). James argues that because several cases before the statute's recodification required proof of an intent to avoid child support, the Legislature impliedly approved this interpretation when it re-enacted the statute without substantive change. This argument fails because there was no consistent application of the purpose requirement among the courts of appeals. Just as many, if not more, cases during that time period did not require additional proof of intent to avoid child support. *See, e.g., Roosth*

the phrase "unemployment or underemployment" and thus modifies that phrase. *See McIntyre*, 109 S.W.3d at 746 (quoting, among others, *Long v. United States*, 199 F.2d 717, 719 (4th Cir. 1952)) (reasoning that an adverb preceding two verbs connected with the disjunctive conjunction "or" applies to both verbs); *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005) ("[T]he first adjective in a series of nouns or phrases modifies each noun or phrase in the following series unless another adjective appears."). "Intentional" cannot be said to modify "reduction of child support obligations," a phrase not contained in the section. The Legislature did not include in the statute any mention of "purpose," "design," or even "intent" to avoid or reduce child support.

There must be a finding that the obligor is intentionally unemployed or underemployed, meaning an obligor consciously chooses to remain unemployed or underemployed. But there is nothing in the statute requiring further proof of the motive or purpose behind the unemployment or underemployment.[4] "We have no right to engraft upon the statute any conditions or provisions not placed there by the legislature." *Duncan, Wyatt & Co. v. Taylor*, 63 Tex. 645, 649 (1885). Because

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v. Roosth, 889 S.W.2d 445, 454 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Kish v. Kole*, 874 S.W.2d 835, 838 (Tex. App.—Beaumont 1994, no writ); *Baucom v. Crews*, 819 S.W.2d 628, 633–34 (Tex. App.—Waco 1991, no writ). Moreover, the doctrine of legislative acceptance is inapplicable when courts are presented with an unambiguous statute. *See Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 282 (Tex. 1999).

[4] At oral argument, James for the first time asked this Court to adopt a new standard, not found within the text of the statute or any case law: "intent to make less money." Because a person who is "intentionally unemployed or underemployed" can always be said to be acting with an "intent to make less money," the two are virtually synonymous. James also raised for the first time at oral argument his position that the Legislature's substitution of the term "intentional" for "voluntary" when enacting the 1989 version of section 154.066 requires courts to consider the motive behind the unemployment or underemployment. *See* TEX. SUP. CT. CHILD SUPPORT GUIDELINES, R. 3(e), *superceded by* Act of May 12, 1989 71st Leg., R.S., ch. 617, § 6, 1989 Tex. Gen. Laws 2030, 2037. However, regardless of the use of "intentional" or "voluntary" as an adjective, there is no extra proof requirement in the statute that the unemployment or underemployment be for the purpose of avoiding child support. James's analogies to the definition of intentional murder in criminal law are inapposite. We also note that Black's Law Dictionary defines "voluntary" in terms of "intent." BLACK'S LAW DICTIONARY 1569 (9th ed. 2009) (defining "voluntary" as "[d]one by design or intention"). We reject James's proposed interpretations to the extent there is any meaningful distinction.

section 154.066 is unambiguous, we decline to read into the statute an extra proof requirement that the Legislature did not express. *See 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." (citation omitted)).

C. Application of Texas Family Code Section 154.066

The trial court has the discretion to apply the support guidelines to the earning potential of an obligor if it determines an obligor is intentionally unemployed or underemployed.[5] Section 154.066 simply states that a trial court *may* apply the child support guidelines to the earning potential of the obligor in an intentional unemployment or underemployment situation. *See* TEX. GOV'T CODE § 311.016(1) ("'May' creates discretionary authority or grants permission or power."); *Dallas Cnty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 874 (Tex. 2005) (noting that the word "may" should be given its permissive meaning). While the permissive word "may" imports the exercise of discretion, "the court is not vested with unlimited discretion, and is required to exercise a sound and legal discretion within the limits created by the circumstances of a particular case." *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956). Moreover, in child support decisions, the "paramount guiding principle" of the trial court should always be the best interest of the child. *See Rodriguez*, 860 S.W.2d at 417 n.3.

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[5] According to the statutory scheme of the Texas Family Code, the same intentional unemployment/underemployment analysis under section 154.066 may be applied in both original child support orders and modifications of existing child support orders. *See* TEX. FAM. CODE § 156.402 (allowing the court to consider "the child support guidelines . . . under Chapter 154 to determine whether there has been a material or substantial change of circumstances under this chapter that warrants a modification of an existing child support order if the modification is in the best interest of the child").

Although a trial court properly considers whether an obligor parent is unemployed or underemployed for the purpose of avoiding child support, the inquiry under section 154.066 should not be so narrowly circumscribed. While the trial court may consider whether the obligor is attempting to avoid child support by becoming or remaining unemployed or underemployed as a factor in its child support determination, such proof is not required for a court to be able to set child support based on earning potential. However, in certain cases, such evidence may be especially relevant or even dispositive of the matter.

The law has long recognized parents have a legal duty to support their children during their minority. *In re Henry*, 154 S.W.3d 594, 596 (Tex. 2005) (per curiam); *Ex Parte Hall*, 854 S.W.2d 656, 658 (Tex. 1993); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 138 (Tex. 1977); *see also Yarborough v. Yarborough*, 290 U.S. 202, 221 (1933) ("[I]n order that children may not become public charges the duty of maintenance is one imposed primarily upon the parents, according to the needs of the child and their ability to meet those needs."). A parent who is qualified to obtain gainful employment cannot evade his or her child support obligation by voluntarily remaining unemployed or underemployed. *See Eggemeyer v. Eggemeyer*, 535 S.W.2d 425, 427–28 (Tex. Civ. App.—Austin 1976), *aff'd*, 554 S.W.2d 137 (Tex. 1977). Concurrently, the court must consider "a parent's right to pursue his or her own happiness," *In re E.A.S.*, 123 S.W.3d 565, 570 (Tex. App.—El Paso 2003, pet. denied), with a parent's duty to support and provide for his or her child. The court must engage in a case-by-case determination to decide whether child support should be set based on earning potential as opposed to actual earnings. Once the obligor has offered proof of his or her current wages, the obligee bears the burden of demonstrating that the obligor is

intentionally unemployed or underemployed.[6] The burden then shifts to the obligor, if necessary, to offer evidence in rebuttal.

Trial courts should be cautious of setting child support based on earning potential in every case where an obligor makes less money than he or she has in the past. James argues that application of section 154.066 will lead to absurd consequences by preventing parents from ever selecting a job which provides a lower income. However, the Legislature addressed this concern, in part, by limiting the application of the statute only to situations where the obligor makes "significantly less" money because of intentional unemployment or underemployment. TEX. FAM. CODE § 154.066. We are wary of the proposition presented by the Attorney General that, other things being equal, receiving more child support will always be in the best interest of the child. Although some financial resources are indispensable to raising and providing for a child, the financial analysis will often not be the end of the court's consideration.[7] A court properly considers the obligor's proffered rebuttal evidence of the reasons for an obligor's intentional unemployment or underemployment. This includes such laudable intentions by obligors who alter their employment situations to spend more time with their children, to live closer to their children in order to attend their events and be more involved in their lives, or to provide their children with better health benefits. Other objectives are also factors, such as whether an obligor alters his or her employment situation to start a new

[6] Some of the courts of appeals have applied a similar burden analysis under section 154.066. *See, e.g., McLane v. McLane*, 263 S.W.3d 358, 363 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *In re E.A.S.*, 123 S.W.3d 565, 570 (Tex. App.—El Paso 2003, pet. denied); *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex. App.—Corpus Christi-Edinburg 2002, no pet.); *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex. App.—Tyler 1997, no pet.).

[7] Moreover, monthly child support awards are not without limits—the child support guidelines only apply to the first $7,500 of an obligor's net monthly resources. TEX. FAM. CODE § 154.125.

business, to gain further education, to become a public servant, or to address health needs. An active but unfruitful pursuit of employment may also be relevant to the court's child support determination, as well as economic conditions that legitimately preclude full employment. But, we are mindful that such explanations are not always sincere, and the judge as fact finder has latitude to consider the testimony and evidence to make the necessary determinations. *See Murff v. Murff*, 615 S.W.2d 696, 700 (Tex. 1981). Such discretion must be exercised within the limits set by the Texas Family Code, particularly Chapter 154 including the child support guidelines, and should always focus on the best interest of the child. To facilitate appellate review and to encourage consistency in the exercise of this discretion across the state, the trial court must make a finding of intentional unemployment or underemployment and its decision to base child support on earnings potential rather than actual earnings must be supported by the record.

D. Application of Section 154.066 to the Trial Court's Child Support Determination

During the Iliffs' divorce trial, the court heard testimony that James voluntarily quit a job making $102,000 a year. After leaving his job, James moved in with his mother who testified that James did not help out with any household expenses or the upkeep of the house but instead spent most of his time reading and watching television. James's sister testified that James was not incapacitated or incompetent, he had no gainful employment since 2006, and he was usually watching television when she visited him. Despite having a B.S., an M.B.A., and almost twenty years' experience in the chemical industry, the only employment James had over the two-year period during his divorce included operation of a tractor and some consulting work for an estimated $200 a month. Although Jerilyn testified to possible alcohol abuse and psychological issues, James

refused to comply with the recommended treatment after a court ordered neurological evaluation and further refused to undergo a court ordered psychological evaluation. James admitted to being able to work, however there was little evidence that James had actively sought other comparable employment after his tractor business foundered. On this record, the trial court issued a finding that James was intentionally underemployed and set James's child support payments based on an earning potential of $5,000 a month, or $60,000 a year, $42,000 less than James's salary from the job he voluntarily left. *See Montgomery Indep. Sch. Dist. v . Davis*, 34 S.W.3d 559, 567 (Tex. 2000) (noting that the trial court, as fact finder, "is the sole judge of the witnesses' credibility and the weight to be given their testimony, and is free to resolve any inconsistencies" (citation omitted)). Applying the standard elucidated above, we hold the trial court did not abuse its discretion in its child support determination.

IV. Conclusion

Texas Family Code section 154.066 contains no requirement of proof that an obligor be intentionally unemployed or underemployed for the purposes of avoiding child support. Where a trial court determines that an obligor is intentionally unemployed or underemployed, it is in the court's discretion to set child support based on earning potential. The trial court did not abuse its discretion in setting James's child support based on his earning potential. We affirm the judgment of the court of appeals and disapprove of courts of appeals opinions to the extent they require proof of intent to avoid child support.[8]

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[8] *See, e.g., In re B.R.*, 327 S.W.3d 208, 213 (Tex. App.—San Antonio 2010, no pet.); *Romero v. Zapien*, No. 13-07-00758-CV, 2010 WL 2543897, at *6 (Tex. App.—Corpus Christi-Edinburg June 24, 2010, pet. denied); *Fondren v. Fondren*, No. 09-08-00187-CV, 2009 WL 2045252, at *5 (Tex. App.—Beaumont July 16, 2009, no pet.); *In re*

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Dale Wainwright
Justice

OPINION DELIVERED: April 15, 2011

A.B.A.T.W., 266 S.W.3d 580, 585 (Tex. App.—Dallas 2008, no pet.); *McLane v. McLane*, 263 S.W.3d 358, 362 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Schaban-Maurer v. Maurer-Schaban*, 238 S.W.3d 815, 826 (Tex. App.—Fort Worth 2007, no pet.); *Beach v. Beach*, No. 05-05-01316-CV, 2007 WL 1765250, at *4 (Tex. App.—Dallas June 20, 2007, no pet.); *In re Marriage of Anderson*, No. 10-06-00361-CV, 2007 WL 3409294, at *3 (Tex. App.—Waco Nov. 14, 2007, no pet.); *In re S.C.S.*, 201 S.W.3d 882, 889 (Tex. App.—Eastland 2006, no pet.); *Garner v. Garner*, 200 S.W.3d 303, 306–07 (Tex. App.—Dallas 2006, no pet.); *Logan v. Logan*, No. 2-05-068-CV, 2006 WL 2167164, at *6 (Tex. App.—Fort Worth Aug. 3, 2006, pet. denied); *Colvin v. Colvin*, No.13-03-00034-CV, 2006 WL 1431218, at *5 (Tex. App.—Corpus Christi-Edinburg May 25, 2006, pet. denied); *Gaxiola v. Garcia*, 169 S.W.3d 426, 432 (Tex. App.—El Paso 2005, no pet.); *In re A.J.J.*, No. 2-04-265-CV, 2005 WL 914493, at *3 (Tex. App.—Fort Worth April 21, 2005, no pet.); *In re J.C.S.*, No. 06-04-00085-CV, 2005 WL 927173, at *5 (Tex. App.—Texarkana April 18, 2005, no pet.); *In re E.A.S.*, 123 S.W.3d 565, 570 (Tex. App.—El Paso 2003, pet. denied); *In re Z.B.P.*, 109 S.W.3d 772, 783 (Tex. App.—Fort Worth 2003, no pet.); *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex. App.—Corpus Christi-Edinburg 2002, no pet.); *Galarza v. Galarza*, No. 13-99-797-CV, 2000 WL 35729667, at *2 (Tex. App.—Corpus Christi-Edinburg Nov. 30, 2000, no pet.); *In re P.J.H.*, 25 S.W.3d 402, 405–06 (Tex. App.—Fort Worth 2000, no pet.); *Snell v. Snell*, No. 11-98-00126-CV, 1999 WL 33747973, at *2 (Tex. App.—Eastland Nov. 4, 1999, no pet.); *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex. App.—Tyler 1997, no pet.); *Woodall v. Woodall*, 837 S.W.2d 856, 858 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Casterline v. Burden*, 560 S.W.2d 499, 501 (Tex. Civ. App.—Dallas 1977, no writ); *Anderson v. Anderson*, 503 S.W.2d 124, 126 (Tex. Civ. App.—Corpus Christi 1973, no writ); *McSween v. McSween*, 472 S.W.2d 307, 310 (Tex. Civ. App.—San Antonio 1971, no writ).

IN THE SUPREME COURT OF TEXAS

NO. 09-0770

THE CITY OF HOUSTON, PETITIONER,

v.

STEVE WILLIAMS, ET AL., RESPONDENTS

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

Argued October 13, 2010

JUSTICE GUZMAN delivered the opinion of the Court.

Section 271.152 of the Local Government Code, under certain circumstances, waives governmental immunity for suits alleging breach of a written contract. For a second time on interlocutory appeal, we review the City of Houston's plea to the jurisdiction in a suit by 540 former Houston Firefighters.[1] The Firefighters allege wrongful underpayment of lump sums due upon termination of their employment, but the City claims the Firefighters' suit is barred by governmental immunity. At issue is whether the City's immunity from suit is waived by section 271.152. The Firefighters point to three distinct writings they assert constitute qualifying written contracts under that section: (1) certain City of Houston Ordinances, (2) Chapter 143 of the Local Government Code,

[1] Houston firefighter Steve Williams is no longer a party to this suit, but the parties agreed to keep his name in the style for clarity and consistency.

and (3) two Meet and Confer Agreements (MCAs) and a Collective Bargaining Agreement (CBA) (collectively, the Agreements) negotiated by the Houston Professional Fire Fighters Association (the Union) on behalf of the Firefighters with the City.

We hold the Ordinances and Agreements constitute written contracts within the scope of section 271.152. But we conclude that Chapter 143, standing alone, does not establish a contract between the City and the Firefighters, and as such does not fall within the scope of section 271.152's waiver of immunity. Accordingly, we affirm the court of appeals' judgment in part, reverse in part, and remand the case to the trial court for further proceedings consistent with this opinion.

I. Background

The Firefighters assert two claims against the City, both based on alleged underpayment of lump sums owed to them when their employment with the City terminated. The first is the "debit dock" claim, alleging that previously paid overtime amounts were improperly deducted from the termination payment. The second is the "termination pay" claim, alleging the improper exclusion of premium pay from calculation of the termination payment. Both claims are ably described in the original court of appeals opinion, and we do not restate the details here. *See City of Houston v. Williams*, 183 S.W.3d 409, 417–18 (Tex. App.—Houston [14th Dist.] 2005), *rev'd*, 216 S.W.3d 827 (Tex. 2007).

This case first came before us after the trial court granted a partial judgment in 2004, denying the City's plea to the jurisdiction and upholding the Firefighters' claims. The court of appeals affirmed that ruling, holding that governmental immunity had been waived because (1) the Firefighters were seeking a declaratory judgment, and (2) the "sue and be sued" language in the

City's Charter, and the "plead and be impleaded" language of Local Government Code section 51.075, effectuated a waiver of governmental immunity. *See id.* at 426. On petition to this Court, we reversed on both grounds. As to the first, we held that because the only conceivable remedy for the Firefighters was money damages, the Firefighters "'cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages . . . as a declaratory-judgment claim.'" *City of Houston v. Williams* (*Williams I*), 216 S.W.3d 827, 829 (Tex. 2007) (quoting *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002)). As to the second ground, we held, applying our then-recent ruling in *Tooke v. City of Mexia*, that immunity was not waived by the Charter and statutory language empowering the City to "sue and be sued"[2] or "plead and be impleaded." *Id.* at 828–29 (citing *Tooke v. City of Mexia*, 197 S.W.3d 325, 346–47 (Tex. 2006)).

However, in the interim between the trial court's partial judgment and our initial review of this case, the Legislature retroactively waived governmental immunity for certain contract claims by enacting Subchapter I, Local Government Code Chapter 271, particularly section 271.152. *See* Act of May 23, 2005, 79th Leg., R.S., ch. 604, §§ 1–3, 2005 Tex. Gen. Laws 1548, 1548–49 (codified at TEX. LOC. GOV'T CODE §§ 271.151–.160); *Tooke*, 197 S.W.3d at 344–45. As a result, numerous pending suits against governmental units that had rested on "sue and be sued" assertions of waiver were reversed and remanded to the trial courts for consideration of whether immunity was

[2] For convenience, we hereinafter use "sue or be sued" to refer to the entire class of statutory provisions that do not alone waive governmental immunity. *See Tooke*, 197 S.W.3d at 328. Other examples include "prosecute and defend," "defend or be defended," "answer and be answered," and "complain and (or) defend." *Id.* For a partial, but extensive, list of such statutes, *see id.* app.

waived under section 271.152. *See, e.g.*, *City of Midland v. Goerlitz*, 201 S.W.3d 689, 690 (Tex. 2006) (per curiam); *City of Houston v. Jones*, 197 S.W.3d 391, 392 (Tex. 2006) (per curiam); *City of Houston v. Clear Channel Outdoor, Inc.*, 197 S.W.3d 386, 386–87 (Tex. 2006) (per curiam). This case was one such suit. *Williams I*, 216 S.W.3d at 828–29.

Accordingly, on remand to the trial court, the Firefighters argued that certain City of Houston Ordinances constituted a written contract for which immunity was waived under section 271.152. Both the trial court and court of appeals agreed, determining again that the City's immunity had been waived. 290 S.W.3d 260, 262. The Firefighters also argued that Local Government Code Chapter 143, the two MCAs from 1995 and 1997, and the 2005 CBA, all likewise constituted written contracts within the scope of section 271.152's waiver of immunity. The court of appeals disagreed as to these points, holding Chapter 143 was not executed on behalf of the City, and the Firefighters as individuals lacked standing to enforce the Agreements. 290 S.W.3d at 265–67, 271. We now review those determinations.

II. Jurisdiction

Interlocutory appeals such as this are generally final in the court of appeals. TEX. GOV'T CODE § 22.225(b)(3). However, there are exceptions, and, as relevant here, we may review an interlocutory appeal when the intermediate court's decision conflicts with a prior decision of another court of appeals, or of this Court. *Id.* §§ 22.001(a)(2), 22.225(c). The standard governing whether two decisions conflict for purposes of interlocutory jurisdiction was broadened by the Legislature

in 2003.[3] *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 656 n.3 (Tex. 2007). Before 2003, two decisions conflicted "when the two are so similar that the decision in one is necessarily conclusive of the decision in the other." *Id.* at 656. The current, broader standard grants this Court conflicts jurisdiction when there is "inconsistency in [courts of appeals'] respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." TEX. GOV'T CODE § 22.225(e).

The parties dispute which standard should apply to this case,[4] but we need not decide which governs, because jurisdiction would lie under either standard. The court of appeals in this case held certain City of Houston ordinances "constitute a contract." 290 S.W.3d at 270. In direct conflict with that holding, the First Court of Appeals has held that "ordinances alone . . . cannot form a contract . . . . The record must evidence a contract in writing between the plaintiffs and the city into which the ordinances can be read." *Overton v. City of Houston*, 564 S.W.2d 400, 403–04 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.). Here, the two decisions would be conclusive of each other, thus conferring jurisdiction under the old standard, and the inconsistency between the two should be clarified in order to prevent uncertainty and unfairness, thus establishing jurisdiction under the current rule.

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[3] *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.02, sec. 22.225(e), 2003 Tex. Gen. Laws 847, 848–49 (codified at TEX. GOV'T CODE § 22.225(e)).

[4] The Firefighters argue that because the original suit was filed before 2003, the narrower, pre-2003 standard applies. Because our earlier decision denying jurisdiction and remanding the case to the trial court took place after 2003, the City argues the prior action was a nullity and the current standard applies.

Thus, we conclude this Court has jurisdiction over this interlocutory appeal under Government Code sections 22.001(a)(2) and 22.225(c).

III. Discussion

A. Standard of Review

Immunity from suit deprives a trial court of jurisdiction. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638–39 (Tex. 1999) (per curiam). Accordingly, a governmental entity properly asserts immunity in a plea to the jurisdiction. *Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). Whether a trial court possesses jurisdiction is a question of law we review de novo. *IT-Davy*, 74 S.W.3d at 855. Hence, we review de novo the central issue in this case: whether the City's governmental immunity deprives the trial court of jurisdiction.

B. Governmental Immunity

When performing governmental functions, political subdivisions derive governmental immunity from the state's sovereign immunity.[5] *See City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007). Under the common-law doctrine of sovereign immunity, the sovereign cannot be sued without its consent. *Tooke*, 197 S.W.3d at 331. Although this rule was originally justified by the fiction that "the king can do no wrong," *id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 254 (1768)), in modern times its "purpose is pragmatic: to shield the public from the costs and consequences of improvident actions of their governments," *id.* at 332.

[5] Governmental immunity is distinct from sovereign immunity, and refers to the protection afforded to political subdivisions such as counties, cities, school districts, and others. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).

Sovereign immunity has two components: immunity from suit, and immunity from liability.[6] *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). First, the state retains immunity from suit unless it has been expressly waived by the Legislature. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997) (superseded by statute on other grounds). Like sovereign immunity, governmental immunity can be waived, but we defer to the Legislature to do so by statute. *City of Galveston*, 217 S.W.3d at 469. The Legislature has mandated that a statute shall not be construed as waiving immunity absent "clear and unambiguous language." TEX. GOV'T CODE § 311.034; *Tooke*, 197 S.W.3d at 328–29.

Second, immunity from liability shields the state from money judgments even when the Legislature has given consent to sue. *Little-Tex*, 39 S.W.3d at 594. Nevertheless, immunity from liability is waived when the state contracts with a private party. *Id.* Because immunity from liability constitutes an affirmative defense, not a jurisdictional bar, only immunity from suit is properly before us today. *See Miranda*, 133 S.W.3d at 224.

C. Local Government Code Section 271.152's Waiver of Governmental Immunity

Local Government Code section 271.152 waives qualifying local governmental entities' immunity from suit for certain breach of contract claims, providing:

> 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, subject to the terms and conditions of this subchapter.

[6] For a useful exposition on the two components of sovereign immunity in Texas, *see generally* James L. Hartsfield, Jr., *Governmental Immunity from Suit and Liability in Texas*, 27 TEX. L. REV. 337 (1949).

TEX. LOC. GOV'T CODE § 271.152. According to its plain terms, the statute by clear and unambiguous language waives a governmental entity's immunity from suit for breach of written contract. *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivs. Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006).

For section 271.152's waiver of immunity to apply, three elements must be established: (1) the party against whom the waiver is asserted must be a "local governmental entity" as defined by section 271.151(3), (2) the entity must be authorized by statute or the Constitution to enter into contracts, and (3) the entity must in fact have entered into a contract that is "subject to this subchapter," as defined by section 271.151(2). TEX. LOC. GOV'T CODE §§ 271.151–.152. A "contract subject to this subchapter" is defined as "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." *Id.* § 271.151(2).

The first and second elements are present as to each of the Firefighters' claims. Regarding the first, the waiver of immunity in section 271.152 applies to "local governmental entities," which include municipalities, public school and junior college districts, and various special-purpose districts and authorities. *Id.* § 271.151(3). The City is incorporated as a home-rule city—a type of municipality—*see id.* §§ 1.005, 5.004; Act of Mar. 18, 1905, 29th Leg., R.S., ch. 17, 1905 Tex. Spec. Laws 131 (granting Houston's present Charter), and thus is a "local governmental entity" for whom immunity is waived for certain contract suits under section 271.152. Concerning the second element, because the City is a chartered home-rule city, it meets section 271.152's requirement that it be "authorized by statute or the constitution to enter into a contract." *See Proctor v. Andrews*, 972

S.W.2d 729, 733 (Tex. 1998) (noting that home-rule cities possess all powers of the state not inconsistent with "the Constitution, the general laws, or the city's charter," except where limited by statute). Indeed, the City's Charter specifically authorizes it to "contract and be contracted with." HOUSTON, TEX., CHARTER art. II, § 1.

The third element presents a more difficult inquiry; that is, whether the City has entered into a "contract subject to this subchapter." Section 271.151(2) effectively states five elements a contract must meet in order for it to be a contract subject to section 271.152's waiver of immunity: (1) the contract must be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to the local governmental entity, and (5) be executed on behalf of the local governmental entity. TEX. LOC. GOV'T CODE § 271.151(2). To answer that inquiry, we turn to the three separate writings the Firefighters contend are contracts under sections 271.151(2) and 271.152: (1) certain City Ordinances, (2) Local Government Code Chapter 143, and (3) the Agreements.

D. Certain City Ordinances as Contract for Purposes of Local Government Code Section 271.152's Waiver of Governmental Immunity

The Firefighters assert that, when read together, certain sections of Chapter 34 of the Houston Code of Ordinances constitute a unilateral employment contract between the City and the Firefighters.[7] The City disagrees, arguing that the Legislature did not intend for section 271.152's waiver of immunity for certain breach of contract claims to apply to municipal ordinances. Our inquiry thus centers on whether these Ordinances, in aggregate, constitute a unilateral employment contract between the City and the Firefighters so as to waive the City's immunity from suit under

[7] The relevant Ordinances appear in full in the Appendix to this opinion.

Local Government Code section 271.152. To resolve this dispute, we first examine the law of unilateral contracts before applying the requirements of section 271.151(2) to the Ordinances.

1. Law of Unilateral Contracts

Unlike a bilateral contract, in which both parties make mutual promises, *Hutchings v. Slemons*, 174 S.W.2d 487, 489 (Tex. 1943), a unilateral contract is created when a promisor promises a benefit if a promisee performs, *Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 303 (Tex. 2009). The requirement of mutuality is not met by an exchange of promises; rather, the valuable consideration contemplated in "exchange for the promise is something other than a promise," i.e., performance. RESTATEMENT OF CONTRACTS § 12 cmt. a (1932). A unilateral contract becomes enforceable when the promisee performs. *Vanegas*, 302 S.W.3d at 303. We have explained that "'[a] unilateral contract occurs when there is only one promisor and the other accepts . . . by actual performance,'" rather than by the usual mutual promises. *Id.* at 302 (quoting 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1.17 (4th ed. 2007)).

Although the concept of a unilateral contract has been questioned by some authorities, *see, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 1, rptrs. note on cmt. f (1981), the concept enjoys continued recognition among many scholars of contract law, *see, e.g.*, 1 WILLISTON ON CONTRACTS § 1.17, and has recently been reaffirmed as part of the common law of Texas by this Court, *see Vanegas*, 302 S.W.3d at 302. In *Vanegas*, we held that when an employer offered to share five percent of the proceeds of a sale or merger of the company with certain employees if they remained employed until the sale or merger, a unilateral contract was formed when the employees remained employed for the requested time. *Id.* at 303. We noted that "'unilateral 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.'" *Id.* (quoting 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 6.2 (1995)). Thus, a unilateral employment contract is created when an employer promises an employee certain benefits in exchange for the employee's performance, and the employee performs.

2. General Standing Ordinances as Unilateral Contracts

Relying on *Overton v. City of Houston*, the City contends that general standing ordinances, however detailed, can never constitute a unilateral employment contract.[8] *See* 564 S.W.2d at 403–04. In *Overton*, employees relied on city ordinances in asserting a right to termination pay. *Id.* at 402. The First Court of Appeals declined to treat the ordinances as a contract for purposes of determinating the appropriate statute of limitations governing the case, stating: "The ordinances *alone* . . . cannot form a contract with the plaintiffs in this case." *Id.* at 403–04 (emphasis added). To the extent the reasoning in *Overton* suggests an ordinance alone can never establish a unilateral contract, we disapprove it, and conclude that, in some circumstances, an ordinance or group of ordinances can constitute a unilateral contract.

A municipality utilizes ordinances as a means to conduct its business. *Cf. Cent. Power & Light Co. v. City of San Juan*, 962 S.W.2d 602, 613 (Tex. App.—Corpus Christi 1998, pet. dism'd w.o.j.). It is therefore unsurprising that this Court has implicitly recognized that municipalities

[8] The City cites several other court of appeals decisions to support this contention as well, but these cases addressed the question of what limitations period applies to a *statutory* right, and none of them considered whether there was a contract. *See, e.g.*, *Creps v. Bd. of Firemen's Relief & Ret. Fund Trs. of Amarillo*, 456 S.W.2d 434, 439–40 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.).

sometimes contract with third parties by way of ordinance. *See City of San Antonio v. Frizzell*, 91 S.W.2d 1056, 1056–57 (Tex. 1936) (noting that an ordinance evidenced the entire contract between a city and a third party). When an ordinance evidences a contract, and is sought to be enforced as one, we have construed it as any other contract. *See id.* (construing the ordinance as a contract, and ruling accordingly). We have further concluded that a statute (and ordinances passed pursuant to it) authorizing a pension plan for policemen and firefighters was "necessarily a part of the contract of employment." *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928). In *Byrd*, by virtue of their employment with the city and acceptance of the pension scheme, the policemen and firemen's participation in the pension plan became "as much a part of the agreed compensation as is the monthly stipend." *Id.* at 741. Although the pension scheme at the time of the decision was derived from a statute, it was also realized through ordinances. *See id.* at 739. Similarly, a franchise agreement between a municipality and a gas company was "embodied" in a city ordinance, apparently standing alone. *See S. Union Co. v. City of Edinburg*, 129 S.W.3d 74, 76 (Tex. 2003). In reviewing the City of Edinburg's contract claims against a natural gas utility, we construed the city's ordinance as a contract, discerning from it the parties' intent and the scope of their respective obligations. *See id.* at 84–85.

We have also read two ordinances and related documents together as a single agreement, and noted that "a court may determine, as a matter of law, that multiple documents comprise a written contract." *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 840–41 (Tex. 2000). It is "well-established law that instruments pertaining to the same transaction may be read together

to ascertain the parties' intent."[9] *Id.* at 840. In addition, the multiple documents need not contain all of the terms; instead, only the essential terms are required. *Osborne v. Moore*, 247 S.W. 498, 499 (Tex. 1923). Therefore, different ordinance sections can potentially be read together in a single contract. *See City of Fort Worth*, 22 S.W.3d at 840–41.

Further, no particular words are required to create a contract; therefore the fact that an ordinance does not contain the word "contract" in its text does not preclude it from having contractual effect. *See* 14 TEX. JUR. 3D *Contracts* § 46 (2006); *Farmers' State Bank & Trust Co. v. Gorman Home Refiner*y, 3 S.W.2d 65, 66 (Tex. Comm'n App. 1928, judgm't adopted); *Coffman v. Woods*, 696 S.W.2d 386, 387–88 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

3. City Ordinances as Unilateral Contract Under Section 271.151(2)

Guided by these principles, we turn to the particular Ordinances at issue to determine if they constitute a unilateral employment contract between the City and the Firefighters within section 271.152's waiver of immunity. As discussed above, in order to determine if the Ordinances can collectively constitute a contract to which section 271.152 applies, we must determine whether five elements are met: (1) the contract must be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to the local governmental entity, and (5) be properly executed on behalf of the local governmental entity. TEX. LOC. GOV'T CODE § 271.151(2). Because the Ordinances at issue here meet each of these five elements, we conclude the Ordinances collectively

[9] This rule is echoed in statute of frauds jurisprudence: in order to satisfy a statute of frauds, multiple documents can be read together. RESTATEMENT (SECOND) OF CONTRACTS § 132.

constitute a unilateral employment contract between the City and the Firefighters, thereby meeting the third requirement of section 271.152's waiver of immunity.

First, the Ordinances comprise a contract, and that contract is in writing. "A promise, acceptance of which will form a contract, 'is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 2(1)). The City manifested its intention to act in a specific way in the Ordinances by its extensive use of the word "shall"[10] and similar provisions that make the benefits offered to the Firefighters mandatory upon performance. The Ordinances are authored by the City, and are addressed to a discrete group of offerees: those persons qualifying as "eligible employees," who are defined as "all classified members of the fire department." HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. III, § 34-59(a)(2). As such, the Ordinances constitute an offer that was communicated to the Firefighters, *see* RESTATEMENT OF CONTRACTS § 22, which the Firefighters accepted by performing, *see Vanegas*, 302 S.W.3d at 303.

The City's Ordinances further promised the Firefighters specific compensation in the form of overtime pay and termination pay. That promise required acceptance by performance, making the promise a unilateral contract that became binding when the Firefighters performed. *See id.* The performance the City requested is detailed in parts of Chapter 34, Article III,[11] of the Houston Code

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[10] *See, e.g.*, HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. I, § 34-3(b) ("[A]ny firefighter . . . who leaves the classified service for any reason *shall* receive . . . .") (emphasis added); *id.* § 34-59(b) ("Any fireman . . . *shall* be entitled to overtime pay . . . .") (emphasis added).

[11] Article III is entitled "Fire Department."

of Ordinances. *See* HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. III, §§ 34-46, 34-48, 34-50. Those sections describe the duties of the Firefighters generally, *id.* § 34-46, and of the three particular divisions of the fire department: fire prevention, *id.* §§ 34-48, 34-50(d), fire suppression, *id.* § 34-50(b), and fire alarm, *id.* § 34-50(c). These duties include valuable services such as "extinguishing fires and conflagrations and preventing loss of human life and property," *id.* § 34-50(b), "operating the fire alarm system," *id.* § 34-50(c), and "conducting inspections, reviewing plans for construction and conducting public information campaigns to reduce the loss of life and property by fire," *id.* § 34-50(d). The Firefighters each performed such services for various periods of time, rendering the City's promises binding as to each of them individually. Those promises included overtime compensation, *id.* § 34-59(a)(3), (b), (d), holidays, and compensation for holidays not taken, *id.* § 34-59(e)(1), (e)(2), (e)(6), sick leave, *id.* § 34-59(i), vacation leave, *id.* § 34-59(j), and compensation for accrued sick and vacation leave upon termination of employment, *id.* § 34-3(b).

The contract is also in writing. *See generally* HOUSTON, TEX., CODE OF ORDINANCES, ch. 34. As explained earlier, "written" contracts may be "embodied in more than one document," RESTATEMENT (SECOND) OF CONTRACTS § 95 cmt. b, including, as here, multiple ordinances, *see City of Fort Worth*, 22 S.W.3d at 840–41.

Second, the Ordinances state the essential terms of the agreement between the Firefighters and the City. Section 271.151(2) does not define "essential terms," but we have characterized "essential terms" as, among other things, "'the time of performance, the price to be paid, . . . [and] the service to be rendered.'" *Kirby Lake Dev. Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829,

838 (Tex. 2010) (quoting *Liberto v. D.F. Stauffer Biscuit Co.*, 441 F.3d 318, 324 (5th Cir. 2006)). In the context of employment agreements, typical essential terms include, among others, "compensation, duties or responsibilities." *Martin v. Credit Prot. Ass'n, Inc.*, 793 S.W.2d 667, 669 (Tex. 1990). Here, the Ordinances plainly reflect such terms. The time of performance is specified in the definitions of "workweek," HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. III § 34-59(a)(5), "time actually worked or actual work," *id.* § 34-59(a)(6), and "overtime," *id.* § 34-59(a)(3); and in the various holiday, vacation, and leave provisions, *id.* § 34-59(e), (i), (j). The price to be paid or compensation is located in the definitions of "overtime," *id.* § 34-59(a)(3), and "regular rate of pay," *id.* § 34-59(a)(4); and in the various termination pay, overtime, holiday, vacation, and leave provisions, *id.* §§ 34-3, 34-59(d), (e), (i), (j). The services to be rendered (duties or responsibilities) are likewise described in the Ordinances, as discussed above. *See id.* §§ 34-46, 34-48, 34-50 (describing the duties of the Firefighters).

Third, the Ordinances provide for goods or services. We have previously held that "services" under section 271.151(2) encompass a wide array of activities, generally including any act performed for the benefit of another. *Kirby Lake*, 320 S.W.3d at 839. The Firefighters benefitted the City by providing fire protection services as defined in the Ordinances themselves. HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. III, §§ 34-46, 34-48, 34-50.

Fourth, the services were provided to a local governmental entity. The services were rendered to the City, and the Firefighters' performance of those services was tracked by the fire chief. *See id.* § 34-59(c); *see also Byrd*, 6 S.W.2d at 740–41 (noting that a pension plan was given to retired firefighters as compensation for services rendered to the City of Dallas).

Finally, the Ordinances were executed by the City. The City does not deny that the Ordinances were duly enacted, but does challenge whether they were "executed." Section 271.151(2) does not define "executed." We have noted that to "execute" means to "finish" or to "complete," and that it is not necessary to sign an instrument in order to execute it, unless the parties agree that a signature is required. *Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151, 157 (Tex. 2010) (per curiam). No agreement between the City and the Firefighters establishing that a signature was required is before us. Therefore, the Ordinances, when duly enacted by the City with the intent to be bound, were "executed" under section 271.151(2). *See id.*

In summary, the Ordinances meet each of the five elements required by section 271.151(2), and thus comprise a unilateral employment contract within the scope of section 271.152's waiver of immunity.

4. Debt in Violation of Article XI, Section 5, Texas Constitution

In an effort to negate contractual intent behind the Ordinances, the City argues that it could not have intended to be contractually bound by the Ordinances, because doing so would create a debt in violation of Article XI, Section 5, of the Texas Constitution. Our Constitution ordains that "no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent. thereon." TEX. CONST. art. XI, § 5. But we long ago noted that this prohibition does not extend to "that class of pecuniary obligations in good faith intended to be, and lawfully, payable out of either the current revenues for the year of the contract or any other fund within the immediate control" of the municipality. *McNeill v. City of Waco*, 33 S.W. 322, 323–24 (Tex. 1895). In practice, municipal

contract expenses can be covered with current revenues. *Cf. Mun. Admin. Servs. Inc. v. City of Beaumont*, 969 S.W.2d 31, 39 (Tex. App.—Texarkana 1998, no pet.). Therefore, Article XI, Section 5 does not necessarily preclude an ordinance-based contract.

5. Disclaimer of Vested Rights

In a further effort to negate contractual intent, the City asserts that Houston Ordinance No. 96-1088 disclaims any contractual effect in the Ordinances at issue in this case. Houston Ordinance No. 96-1088 provides:

> That the provisions of article III of chapter 14 of the Code of Ordinances, Houston, Texas, as amended in section 2 of this ordinance, are subject to amendment or repeal at any time and payment of benefits thereunder is subject to the appropriation or allocation of funds for that purpose by the city council. No provision of this ordinance shall be construed to create a vested right of compensation for sick leave benefits or, where applicable, for termination payments.

Houston, Tex., Ordinance 96-1088 § 7 (Oct. 23, 1996).

The City points us to several cases in which documents that might otherwise have constituted contracts included statements that effectively disclaimed contractual intent, particularly *County of Dallas v. Wiland*, 216 S.W.3d 344 (Tex. 2007). In *Wiland*, the disclaimer stated: "Nothing in this [manual] is to be construed as a contract of employment or a provision guaranteeing the specific term or tenure of employment." *Id.* at 349. We recognized that this statement precluded giving the manual in question any contractual effect. *Id.* at 352, 354. The City contends the instant ordinance likewise disclaims contractual intent. We disagree.

Disclaiming a vested right to compensation is not equivalent to a disclaimer of contractual intent—to the contrary, an employee may have a valid employment contract, promising that benefits

will accrue upon performance, but those benefits will not vest until the employee actually performs. *See Vanegas*, 302 S.W.3d at 303 ("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."). The disclaimer amounts to a warning to City employees that the City can change the benefits over time—in other words, the *offer* that the City is making, as regards to sick leave benefits, is subject to change.[12] At most, the disclaimer indicates that the promises contained in the Ordinances remained illusory until the Firefighters performed. *See id.* ("Almost all unilateral contracts begin as illusory promises.").

Further, the scope of the disclaimer in Ordinance 96-1088 is limited by its express language. It refers only to Article III of Chapter 14 of the Houston Code of Ordinances. That Article is concerned only with sick leave for City civil service employees generally, *see* HOUSTON, TEX., CODE OF ORDINANCES ch. 14, art. III, while the Ordinances the Firefighters point to as evidencing contractual intent are located in the Fire Department provisions of Chapter 34, not Chapter 14. The disclaimer is likewise limited to "sick leave benefits or, where applicable, for termination payments." The plain meaning of the clause "where applicable, for termination payments" is to include accrued sick leave benefits that would give rise to a termination payment. Thus, even if we accept the City's construction of the disclaimer—that it is a contractual disclaimer—its scope would only cover the Firefighters' right to that portion of their claims based on sick leave. But, in fact, the Firefighters'

[12] This warning is not strictly necessary; offerors generally have the power to revoke or modify offers until the offeree accepts or performs, assuming the revocation or modification is communicated to the offeree before any attempted acceptance. *See Antwine v. Reed*, 199 S.W.2d 482, 485 (Tex. 1947); RESTATEMENT (SECOND) OF CONTRACTS § 42 cmt. a, illus. 1 (offer that states it is open for thirty days can nevertheless be revoked the next day, unless it was an option contract).

claims are based on several other components of compensation, such as premium pay, vacation leave, holiday leave, and overtime pay, *see City of Houston*, 183 S.W.3d at 419, 424, all of which fall outside the scope of any disclaimer achieved by Ordinance 96-1088.

6. Scope of Section 271.152's Waiver of Immunity

The City next claims that the Firefighters seek to avoid, rather than enforce, their ordinance-based contract, and their suit is therefore not a suit for *breach* of a contract within the limited scope of section 271.152's waiver. *See* TEX. LOC. GOV'T CODE § 271.152 (waiving immunity "for the purpose of adjudicating a claim for breach of the contract"). The pleadings provide some indication that the Firefighters' ultimate recovery could depend on a showing that certain parts of the City of Houston Code of Ordinances violated state law, specifically the civil service provisions of Chapters 142 and 143 of the Local Government Code. *See City of Houston*, 183 S.W.3d at 424–25. That indeed was the basis for much of the court of appeals' original opinion in favor of the Firefighters. *See generally id.* at 419–26. We decline to decide whether any of the Ordinances violate these specific statutory provisions, leaving this merits determination to the trial court, *see Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000), but conclude the City's argument fails because the Firefighters' claim is, overall, one for breach of contract.

In determining whether jurisdiction is proper, we look to the pleadings, "construing them liberally in favor of the plaintiffs and looking to the pleader's intent." *City of Waco v. Kirwan*, 298 S.W.3d 618, 621 (Tex. 2009). Viewing the Firefighters' pleadings as a whole, the Firefighters currently plead a cause of action for breach of contract.

Further, it is "settled that the laws which subsist at the time and place of the making of a contract . . . form a part of it, as if they were expressly referred to or incorporated in its terms." *Von Hoffman v. City of Quincy*, 71 U.S. 535, 550 (1867). Relevant statutes can form a part of an employment contract. *Byrd*, 6 S.W.2d at 740 (holding that a state law governing civil service pensions was "part of the contract of employment and is read into the contract as fully as though it had been actually incorporated therein"); *see also Wilson v. Andrews*, 10 S.W.3d 663, 667–68 (Tex. 1999) (holding that the Civil Service Act, as amended, becomes part of the employment contract between a city and its firefighters when the city adopts it). The trial court may determine that at least some portions of the relevant statutes form a part of the unilateral contract between the City and Firefighters. Therefore, the Firefighters' suit is properly characterized as one for breach of contract.

7. Intersection of Local Government Code Sections 271.152 and 180.006

The City asserts the Legislature did not intend for section 271.152 to waive immunity in this type of suit, as evidenced by its subsequent enactment of Local Government Code section 180.006. The City argues that the Legislature's enactment of section 180.006—which prospectively waives governmental immunity from back-pay claims by police and firefighters[13]—would be a meaningless act if the same waiver already existed under section 271.152. The City contends the Firefighters' claims would clearly fall within the scope of section 180.006, but for the fact that section 180.006

[13] Section 180.006 waives governmental immunity for suits by firefighters or police officers whose employment falls under (1) Chapters 141, 142, or 143 of the Local Government Code, (2) "a municipal charter provision conferring civil service benefits of a municipality that has not adopted Chapter 143," or (3) a municipal ordinance enacted under Chapter 142 or 143. TEX. LOC. GOV'T CODE § 180.006(a). The waiver is limited to "denial of monetary benefits associated with the recovery of back pay" and to certain related monetary penalties. *Id.* § 180.006(b)–(c). Finally, section 180.006's waiver does not apply to contract-based claims. *Id.* § 180.006(c).

is not retrospective. *See* Act of May 25, 2007, 80th Leg., R.S., ch. 1200, § 3, 2007 Tex. Gen. Laws 4071, 4072. Accordingly, the City claims that if the Legislature had intended to waive immunity for a suit of this type, it would have made the waiver in section 180.006 retrospective. The City invokes the rule of statutory construction that "the legislature is never presumed to do a useless act." *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981). We disagree that applying section 271.152 here would in any way render section 180.006 "useless" given the distinctions between the two statutes.

Sections 180.006 and 271.152 differ significantly in scope and effect. Section 271.152 is a retroactive waiver of immunity, while section 180.006 is prospective only. *Compare* Act of May 23, 2005, 79th Leg., R.S., ch. 604, § 2, 2005 Tex. Gen. Laws 1548, 1549, *with* Act of May 25, 2007, 80th Leg., R.S., ch. 1200, § 4, 2007 Tex. Gen. Laws 4071, 4072. Section 271.152 applies to breaches of contract generally, while section 180.006 is limited to back-pay claims and related penalties only. *Compare* TEX. LOC. GOV'T CODE § 271.152, *with id.* § 180.006(b)–(c). Moreover, section 180.006 does not require a contract in writing, while section 271.152 does. *Compare id.* § 180.006(b), *with id.* § 271.151(2). Finally, section 180.006 is limited to a specific class of persons—civil service firefighters or police officers—while section 271.152 has no such limitation. *Compare id.* § 180.006(a), *with id.* § 271.152.

Although the Firefighters' suit might fall within the scope of both waivers if it accrued and were filed today, that does not render section 180.006 "useless." Because section 180.006 does not require a written contract, it also applies to those qualifying civil service firefighters and police officers who, unlike the Firefighters in this case, cannot point to a written contract, and for whom

there was previously no waiver of immunity until its enactment. *See id.* § 180.006(a). Accordingly, the "no useless act" rule of construction does not preclude applying section 271.152 to the Firefighters' claims.[14]

Moreover, section 271.152 is otherwise clear and unambiguous, and so there is no reason to speculate further as to legislative intent. *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006). We have determined that a written contract exists here, as embodied in the Ordinances, and the contract meets the elements the Legislature set forth in section 271.151(2). Therefore, by its plain language, section 271.152's waiver applies to this suit.

8. Other Considerations and Conclusion

Finally, the City and amici raise concerns about the impact of our holding, claiming it will transmute vast numbers of ordinances into contracts. But this fear overlooks the basic requirements of contract law—just as with any writing alleged to be a contract, an ordinance can only be enforced as a contract in a court of law if it satisfies the requirements of a contract. Moreover, most municipal ordinances will not function as contracts within the meaning of section 271.151(2), because most will not contain the detailed request for performance and promised compensation found in Chapter 34 of the Houston Code of Ordinances, nor will they be cognizable as an offer to identifiable offerees as these Ordinances are. In addition, as discussed above, ordinances have long functioned at times

[14] Indeed, if the Legislature had intended to reinstate immunity from a suit like the Firefighters' when it enacted section 180.006, it could have done so by amending section 271.152. *See* Act of May 25, 2007, 80th Leg., R.S., ch. 1200, § 2, 2007 Tex. Gen. Laws 4071, 4071–72 (amending Chapter 174 of the Local Government Code in light of the addition of section 180.006). However, section 180.006's enabling Act provides that "[a] claim initially asserted before the effective date of this Act is governed by the law in effect when the claim was initially asserted, and the former law is continued in effect for that purpose." *Id.* § 3.

as contractual instruments in this state, without any apparent adverse effect. *See, e.g.*, *City of San Antonio*, 91 S.W.2d at 1056–57.

In conclusion, because the Ordinances at issue are addressed to the Firefighters, promising in detail specific compensation in return for specified services, and meet each element in the definition of a contract under Local Government Code section 271.151(2), we hold the relevant provisions of Chapter 34 of the City of Houston Code of Ordinances constitute a unilateral contract that became effective and enforceable as to these retired Firefighters who have completed the requested performance, and the City's immunity is thereby waived pursuant to section 271.152.[15]

E. Civil Service Statutes as Contract

In their cross-petition, the Firefighters assert that certain provisions of Local Government Code Chapter 143 likewise constitute a contract between the City and the Firefighters. Chapter 143 creates a civil service classification system for emergency service personnel in those qualifying municipalities that vote to adopt it. TEX. LOC. GOV'T CODE § 143.002(a); *Wilson*, 10 S.W.3d at 666. The Firefighters argue that, when the City voted to "opt-in" to Chapter 143, the statute became an offer by the City that the Firefighters accepted by performing.

In order to qualify as a contract, the document or documents must evidence the parties' intent to be bound. *See Owen v. Hendricks*, 433 S.W.2d 164, 166–67 (Tex. 1968). That intention must be manifested in a way that justifies a promisee's understanding that a promise has been made to him. *See Montgomery Cnty. Hosp. Dist.*, 965 S.W.2d at 502. Because Chapter 143 was written by

[15] We do not decide today whether other documents are incorporated by reference into the unilateral contract evidenced in Chapter 34, but simply note that, as with any contract, incorporation by reference is possible under contract law. *See City of Fort Worth*, 22 S.W.3d at 840–41.

the Legislature, not by the City, we cannot presume that it is a communication of intent by the City. Rather, we must examine the manner in which the City adopted Chapter 143 to determine whether the City communicated an intent to be bound to any potential promisees. Although the original City Ordinance adopting Chapter 143 is not part of the record, we note the reference to Chapter 143 that currently appears in the Houston Code of Ordinances is as follows:

> At an election held in the city January 31, 1948, this Act was adopted by a majority vote of the votes cast at the election. It differs in many important respects from the city's civil service charter provisions (Art. Va of the foregoing charter) and no action should be taken in the matter of civil service, whether pertaining to policemen and firemen or to other employees without first consulting ch. 143 . . . since some of its provisions touch upon the entire subject of composition of the city's civil service commission and of the executive administration of the civil service functions.

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Unlike the Ordinances discussed above, which make specific, detailed promises *to* the Firefighters, the above statement is addressed to City policy makers and the City's civil service commission. It is a warning to them that the City, having elected to be governed by the Civil Service Act, must comply with it, or risk adverse consequences in court. *See Wilson*, 10 S.W.3d at 668 ("As long as the Civil Service Act governs [the city], however, it must adhere to the Act[] . . . ."). In other words, it fails the basic contract requirement of communication of an offer to the offeree. *See* RESTATEMENT (SECOND) OF CONTRACTS § 24; RESTATEMENT OF CONTRACTS § 23 ("[I]t is essential to the existence of an offer that there should be a proposal by the offeror to the offeree . . . ."). Accordingly, we cannot say the City has adopted Chapter 143 in a manner that communicates a promise or an offer to the Firefighters. We thus conclude that Chapter 143 does not, in itself,

constitute a contract entered into by the City, and so cannot be a "contract subject to this subchapter" for purposes of section 271.152's waiver of immunity.

We of course do not hold that a statute cannot be incorporated by reference into a contract—as mentioned above, the trial court may conclude that at least some portions of Chapter 143 were incorporated by reference into the unilateral employment contract at issue here. Rather, we hold that when a municipality adopts Chapter 143—without sufficient manifestation of an intent to be *contractually bound* in the ordinance or other instrument by which it is adopted—Chapter 143 does not, in itself, constitute a stand-alone municipal contract.[16]

F. The Agreements as Contracts for Purposes of Local Government Code Section 271.152's Waiver of Governmental Immunity

As a final basis for waiver of immunity under Local Government Code section 271.152, the Firefighters' cross-petition also attacks the court of appeals' holding that those Firefighters whose employment fell within the scope of the MCAs and the CBA lacked standing to sue under those Agreements. 290 S.W.3d at 271. Finding a lack of standing, the court of appeals did not reach the issue of whether the Agreements qualify under section 271.152's waiver of immunity. *See id.* We first address the issue of standing, then determine whether the Agreements fall within the scope of section 271.151(2)'s definition of a "contract subject to this subchapter."

[16] The parties' briefs also contest whether (1) Chapter 143 was "executed on behalf of the local governmental entity" within the meaning of Local Government Code section 271.151(2), or (2) the City waived that issue in the lower courts. Because Chapter 143 does not independently constitute a contract between the Firefighters and the City, we do not reach either issue.

Standing is a constitutional prerequisite to suit. *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001). It is founded in the separation-of-powers doctrine, and in the Texas open-courts provision. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993). The separation-of-powers doctrine precludes courts from issuing advisory opinions on abstract questions of law that do not bind actual parties. *See* TEX. CONST. art. II, § 1; *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001). In complementary fashion, the open-courts provision guarantees access to the courts, but the purpose is to make whole those who have suffered actual injury, not to provide a forum for general injuries or hypothetical complaints. *Tex. Air Control Bd.*, 852 S.W.2d at 444. "Thus, as a general rule, to have standing an individual must demonstrate a particularized interest . . . distinct from . . . the public at large." *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007) (per curiam).

1. Standing Under the MCAs

In holding the Firefighters had no standing to sue for alleged breaches of the MCAs, the court of appeals invoked the doctrine of *inclusio unius est exclusio alterius*, 290 S.W.3d at 271, which is the presumption that purposeful inclusion of specific terms in a writing implies the purposeful exclusion of terms that do not appear. *See Newman v. Blum*, 9 S.W. 178, 178 (Tex. 1888). Both MCAs state they were negotiated "by and between the Houston Professional Fire Fighters Association and the City of Houston, Texas." Both provide that grievances may be resolved either through the statutory grievance procedures of Local Government Code sections 143.127–.134, or by judicial resolution under section 143.206 upon "application by either party." Section 143.206 (which the MCAs incorporate by reference) likewise speaks in terms of "either party" and "other party."

TEX. LOC. GOV'T CODE § 143.206(b). "The state district court of the judicial district in which the municipality is located has full authority and jurisdiction on the application of *either party* aggrieved by an action or omission of the *other party* . . . ." *Id.* (emphasis added). From this language, applying the *inclusio unius* doctrine, the court of appeals concluded that only the Union and the City had standing to sue for breach of the MCAs. 290 S.W.3d at 271. Although *inclusio unius* is a sound maxim of construction, judicial review cannot start and end on such a narrow basis when, as here, there is another valid ground to confer standing—the Firefighters' status as third-party beneficiaries under the MCAs.

Texas law recognizes that third parties have standing to recover under a contract that is clearly intended for their direct benefit. *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002) (per curiam). In determining whether there is intent to benefit a third party, we look to the entire agreement, giving effect to all its provisions. *Id.* at 590. The contract need not have been executed *solely* to benefit the noncontracting party. *Id.* at 591. We do not create a third-party benefit by implication; the presumption is the parties contracted only for themselves, absent a clear showing of intent otherwise. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651–52 (Tex. 1999). However, the agreement need not state "third-party beneficiary" or any similar magic words. *See Stine*, 80 S.W.3d at 590–91. Finally, a third party cannot enforce a contract if the third party benefits only incidentally from it. *MCI*, 995 S.W.2d at 651–52.

The MCAs reflect an intent to benefit the Firefighters as third parties to the agreements—indeed, the Union was required by its duty of representation to seek benefits for the Firefighters in the agreements. Both agreements make this purpose plain in their preambles by

stating that one purpose is to provide certain wages, hours, and conditions of employment.[17] Both agreements directly guarantee benefits to the Firefighters, in particular in terms of salary and termination payments,[18] overtime pay,[19] and vacation leave.[20] These benefits are not offered to the world at large as a general beneficence, but are limited to the Firefighters through the definition of "employee"[21] included in the agreements. These guarantees of compensation are not promised to the City or to the Union, but to the Firefighters. As such, the City and the Union expressed a clear

[17] Both the 1995 and 1997 MCAs contain the following statement of purpose in their preambles: "It is the purpose of this Agreement to achieve and maintain harmonious relations between the parties; to establish proper standards for wages, hours and other conditions of employment; and to provide for equitable and peaceful adjustments to differences which may arise."

[18] Article 16 of the 1995 MCA and Article 19 of the 1997 MCA make the following promises, among others, as to the Firefighters' salary: (1) longevity pay of two dollars bi-weekly for year of service, up to twenty-five years maximum, (2) classification pay as specified in Local Government Code sections 141.033(b) and 143.111, (3) educational incentive pay, assignment pay, and bilingual pay as per Local Government Code sections 143.112 and 143.113 and applicable ordinances, and (4) lump-sum termination pay for "all unpaid salary, accumulated overtime, and compensatory time. They shall also receive a lump sum payment for vacation leave, holiday leave, and sick leave in accordance with TEXAS LOCAL GOVERNMENT CODE §§143.115, 143.1155 and 143.116, and applicable City of Houston Ordinances."

[19] Article 7 of the 1995 MCA and Article 9 of the 1997 MCA both state "All overtime pay and hours calculations . . . shall be governed by the Fair Labor Standards Act, and the TEXAS LOCAL GOVERNMENT CODE Chapter 142 and applicable city ordinances."

[20] Article 17 of the 1995 MCA and Article 20 of the 1997 MCA both promise vacation leave as per Local Government Code § 143.046, "except that employees with [fifteen] or more years of seniority will earn one (1) additional vacation day with pay per year for each year of longevity in excess of [fifteen], to a maximum of [twenty-two] vacation days per year."

[21] Article 1 of both MCAs defines "employee" as: "all fire fighters, as the term fire fighter is defined in TEXAS LOCAL GOVERNMENT CODE §143.003(4), in the Houston Fire Department except the head of the department and assistant department heads in the rank or classification immediately below that of the department head."

intent to benefit the Firefighters when they contracted through the MCAs.[22] Accordingly, the Firefighters have standing to enforce the agreements.[23]

2. Standing under the CBA

The City asserts two arguments to defeat the Firefighters' claim to standing under the CBA: failure to establish a breach of the duty of fair representation by the Firefighters' Union, and failure to exhaust the CBA's grievance procedures. We reject both objections, and conclude the Firefighters have standing as third-party beneficiaries to sue for breach of the CBA.

The court of appeals held the Firefighters lack standing under the CBA because they failed to establish that their Union breached its duty of fair representation. The court of appeals reasoned that showing such a breach "is an 'indispensable predicate' to an employee's action against the City for violation of the collective bargaining agreement." 290 S.W.3d at 271 (quoting *Metro. Transit Auth. v. Burks*, 79 S.W.3d 254, 257 (Tex. App.—Houston [14th Dist.] 2002, no pet.)). However, that "predicate" only applies to "hybrid" suits—cases in which the employee alleges both breach of the collective bargaining agreement by the employer, *and* breach of the duty of fair representation

[22] It is worth noting that although some language in Local Government Code Chapter 143 likewise appears intended to benefit firefighters and police officers, that language is not found in a contract, but in a statute (as discussed above). Third-party beneficiary status is a rule of contract law, not of statutory enforcement or interpretation. As such, third-party beneficiary analysis, while relevant to the MCAs as contracts, is irrelevant to the preceding discussion of Chapter 143, because it is not, in itself, a contract.

[23] The City also asserts the Firefighters lack standing because they failed to exhaust the grievance procedures under the MCAs. The court of appeals did not reach this issue, having incorrectly found a lack of standing based on the language in the MCAs and section 143.206. We do not decide it either, finding it waived by the City's stipulation that "[a]t the time each Plaintiff received their termination pay check, Plaintiffs were no longer subject to the jurisdiction of the Civil Service Commission of the City of Houston, Texas or the grievance procedure in Texas Local Government Code, Chapter 143." *See Shepherd v. Ledford*, 962 S.W.2d 28, 33 (Tex. 1998). Since the grievance procedure in both MCAs is simply an incorporation of Chapter 143 by reference, the City's stipulation and waiver extends to them. Indeed, the court of appeals originally acknowledged this stipulation and held the Firefighters were not required to exhaust the grievance procedures. *City of Houston*, 183 S.W.3d at 416, 416 n. 4.

by the union, as when the union has mishandled grievance and arbitration proceedings. *See Reed v. United Transp. Union*, 488 U.S. 319, 328 (1989). It typically is an issue in suits under federal labor law, such as when an employee who is covered by a collective bargaining agreement sues for wrongful termination *after* losing under grievance and binding arbitration procedures. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 62 (1981). Here, no grievance or arbitration occurred at all, so whether the Union breached its duty is not an issue. *See id.* As such, the Firefighters are not required to establish the predicate of any breach of duty. In short, the rule invoked by the court of appeals does not apply to this case.

The City argues in the alternative the Firefighters have no standing under the CBA because they have not exhausted the administrative remedies required by it.[24] This argument ignores the undisputed fact that the Firefighters are no longer active employees or members of the bargaining unit, but are retirees. As retirees, the CBA's grievance procedures by their own plain language no longer apply to the Firefighters.

Once employees retire, they cease to be employees and become retirees. *See Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). "The ordinary meaning of 'employee' does not include retired workers; retired employees have ceased to work for another for hire." *Id.* Indeed, such retirees are no longer even a part of the collective bargaining unit. *Id.* at 175–76. This is so not only because they are no longer employees, but

[24] The court of appeals did not reach this issue, finding a lack of standing when it incorrectly concluded the Firefighters were required to show a breach by the Union of the duty of fair representation, as discussed above.

because their interests are no longer adequately aligned with that of active employees so as to be jointly represented as a unit. *Id.* at 172–73.

The CBA's plain language does not include retired firefighters in the class of persons who are bound by the Agreement.[25] Article 14 of the CBA makes the grievance procedure available only to the Union and active firefighters: "The Association or any *bargaining unit Firefighter* may file a grievance under the terms of this Agreement." (Emphasis added.) Article 1 of the CBA defines both "Member of the Bargaining Unit" and "Firefighter" as "any full time, permanent paid employee" of the Fire Department. As retirees, the Firefighters do not meet that definition: they are no longer full-time employees, nor are they paid employees. *See id.* at 168. Therefore they do not fall within the class of persons to whom the grievance procedure is made available.

Moreover, the terms of the grievance procedures confirm that they do not logically apply to retirees like the Firefighters. Article 14, section 2, of the CBA encourages an aggrieved firefighter to "verbally inform his/her immediate supervisor of the grievance." As retirees, the Firefighters have no immediate supervisors to inform.

Further, because the Firefighters' cause of action only accrued when they received their allegedly deficient termination payments, which was after they retired, they had no grievance to assert during the time period when they were employees governed by the CBA's grievance

[25] Article 1 of the CBA provides: "'Member,''Employee,''Firefighter,' 'Member of the Bargaining Unit' means any *full time*, *permanent* paid employee of the Houston Fire Department who has been hired in substantial compliance with Chapter 143 of the Texas Local Government Code excluding municipal employees (civilians), volunteer fire fighters, applicants and the head of the Fire Department (Fire Chief)." (Emphasis added.)

procedures. Accordingly, we conclude the Firefighters' failure to exhaust the CBA's administrative remedies is not a bar to their standing to sue.

Finally, as with the MCAs, the Firefighters have standing as third-party beneficiaries under the CBA. Like the MCAs, it was negotiated by the Union with the clear intent to benefit the Firefighters. Significantly, collective bargaining agreements are recognized as a type of third-party beneficiary contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d, illus. 14 ("A, a labor union, enters into a collective bargaining agreement with B, an employer, in which B promises not to discriminate against any employee because of his membership in A. All B's employees who are members of A are intended beneficiaries of the promise.").

The CBA states:

> It is the intent and purpose of this Agreement to achieve and maintain harmonious relations between the parties, adjust and to establish the rates of pay, hours of work, and other conditions of employment for all Bargaining Unit Members and provide for the equitable and orderly adjustment of grievances which may arise during the term of this Agreement.

In its references to rates of pay, hours of work, and conditions of employment, this is a clear statement of an intent to benefit parties other than the Union and the City. As former Bargaining Unit Members, the Firefighters became entitled to rights under the agreement by performing in accordance with it. Like the MCAs, the CBA made specific promises to the Firefighters when they

were active employees. In particular, these included terms concerning salary,[26] overtime pay,[27] sick leave,[28] and vacation leave.[29] All these provisions in the CBA demonstrate a manifest intent to benefit the Firefighters by guaranteeing certain terms of compensation to them. As such, we conclude the Firefighters have standing as third-party beneficiaries to enforce the CBA.

3. Section 271.152's Waiver of Immunity as to the MCAs and CBA

The MCAs and CBA, like the Ordinances, constitute contracts subject to section 271.152's waiver of immunity, because they also meet the five definitional elements in section 271.151(2). First, they are indisputably written contracts. Second, they each state the essential terms of the agreement, such as salary, overtime compensation, vacation leave, and work conditions. Third, like the Ordinances, they provide for services, namely the provision of fire protection services to the City. Fourth, the services are provided to a local governmental entity—the City. Finally, all three Agreements are signed by the mayor of the City, who appears to have been duly authorized to do so, thus constituting execution of the Agreements.

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[26] Article 21 sets base salary, while Article 23 includes additional salary components, including among others: longevity pay, classification pay, and education and training pay.

[27] Article 29 specifies regular work hours for Emergency Operations Division firefighters as an average of 46.7 hours per week, in twenty-four-hour shifts, within a seventy-two-day work cycle. Article 30 provides: "Except as may otherwise be specified in the terms of this Agreement, all Firefighters shall be compensated at the rate of time-and-one-half (1 1/2) that of their regular rate of pay for all actual hours worked outside that of their regular scheduled 24 hour shift or work schedule."

[28] Article 20 governs sick leave by incorporating by reference "Chapter 143 of the Texas Local Government Code and applicable federal statutes."

[29] Article 26 provides modifications to the Firefighters' existing vacation leave entitlement, allowing them to use vacation leave accrued in a year within the same year, but requiring that a "Firefighter may request the use of additional accrued leave balances, which shall be subject to the scheduling needs of the Department."

IV. Conclusion

Having concluded the City entered into a unilateral contract with the Firefighters through its Ordinances, and because the Legislature waived the City's immunity from suit through its enactment of Local Government Code section 271.152 for a suit claiming breach of that contract, we hold the trial court properly denied the City's plea to the jurisdiction. We also hold that section 271.152 waives immunity from suit for breach of the MCAs and CBA, and the Firefighters have standing to sue under those Agreements. Finally, we hold Chapter 143 of the Local Government Code, as adopted by the City, does not, in itself, constitute a contract between the City and the Firefighters, and it therefore is not a contract within the scope of section 271.152's waiver of immunity. Accordingly, we affirm the judgment of the court of appeals in part, reverse in part, and remand the case to the trial court for further proceedings consistent with this opinion.

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Eva. M. Guzman
Justice

OPINION DELIVERED: March 18, 2011

Appendix

HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. I, § 34-3(b)—Payment for sick or vacation leave upon firemen's or policemen's death or termination of employment; repayment upon reemployment.

(a) Reserved.

(b) Firefighters or police officers who are members of the classified service of the fire and police departments of the city may accumulate vacation time to a total of 720 working hours; however, any firefighter or police officer who leaves the classified service for any reason shall receive, in a lump sum payment, the full amount of his salary for the period of his accumulated vacation leave, minus any hours of vacation leave previously taken during the calendar year in which the termination occurs. However, any fire fighter or police officer who loses his life, or is forced to leave the classified service, as a result of a line of duty injury or illness, or the beneficiaries of such fire fighter or police officer, shall receive in a lump sum payment the full amount of his salary for the total number of his working hours of accumulated vacation time.

(c) For purposes of determining the amount to which a fireman or policeman or his beneficiaries is entitled under subsections (a) and (b) of this section, "salary" shall mean the authorized base pay of the employee plus the longevity rate he has attained up to the date of separation or death. For purposes of this section, "salary" shall not include educational or training incentive pay or any other form of premium pay except as provided above.

(d) Reserved.

(Code 1968, § 2-35; Ord. No. 71-1592, § 1, 9-1-71; Ord. No. 75-139, § 1, 1-28-75; Ord. No. 76-1882, § 1, 11-2-76; Ord. No. 78-180, § 1, 2-1-78; Ord. No. 90-1138, § 2, 9-19-90; Ord. No. 96-1076, § 5, 10-16-96; Ord. No. 96-1088, § 4, 10-23-96).

HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. III, § 34-46—Created; duties generally.

There is hereby created a fire department, the officers and employees of which, excepting those attending the firemen's training school, those designated as apprentice fireman and those who are on probation, are charged with the duty of preventing and extinguishing fires and conflagrations and preventing the loss of human life and property by fire, and doing all such other duties as are imposed upon them by ordinance of the city council. In addition to the duties and functions specifically set forth in this article for the various officers of the fire department, each of such officers and those employees acting under them shall perform such other and further duties as may be required of them by the mayor or their superior officers, or by the provisions of the state law, the Charter and ordinances of the city.

(Code 1968, § 18-1; Ord. No. 73-2079, § 1, 11-21-73).

HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. III, § 34-48—Fire prevention division; duties generally.

The fire prevention division of the fire department and its personnel shall be charged with the primary duty of enforcing all laws of the state and ordinances of the city covering the following:

(1) The prevention of fires.

(2) The storage and use of explosives and inflammables.

(3) The installation and maintenance of automatic and other fire alarm systems and protection systems, fire extinguishers and equipment.

(4) The maintenance and regulation of fire escapes.

(5) The means and adequacy of exits in cases of fires from factories, schools, lodging houses, convalescent homes, hotels, asylums, hospitals, churches, public halls, theaters, and in all other places where numbers of persons work, live, or congregate from time to time for any purposes.

(6) The investigation of causes, origin and circumstances of fire.

(7) The conducting of fire prevention campaigns and the circulation of fire prevention literature, for the benefit of civic clubs, labor organizations, business and commercial enterprises, schools, factories, lodging houses, hotels, lodges, hospitals, convalescent homes, churches, halls, theaters and the general public in the interest of fire prevention and public safety.

(8) Such other duties as may be imposed from time to time by the mayor, the laws of the state, ordinances of the city, and by the chief of the fire department and the fire marshal.

(Code 1968, § 18-3; Ord. No. 73-2079, § 1, 11-21-73).

HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. III, § 34-50—Divisions of fire department; general duties and responsibilities of each division.

(a) The fire department shall consist of three divisions, to be known as the fire suppression division, the fire alarm division and the fire prevention division.

(b) The fire suppression division and its personnel shall be charged with the primary duty of extinguishing fires and conflagrations and preventing the loss of human life and property by fire.

(c) The fire alarm division of the fire department and its personnel shall be charged with the primary duty of operating the fire alarm system in the city, and performing

or causing to be performed such other duties and functions as may be assigned to or required of it or them by the mayor, the chief of the fire department, by state law and the provisions of the Charter or ordinances of the city.

(d) The fire prevention division and its personnel shall be charged with the primary duty of conducting inspections, reviewing plans for construction and conducting public information campaigns to reduce the loss of life and property by fire.

(e) In addition to the duties of the divisions and their personnel, as hereinabove set out, each division and its personnel shall do and perform, or cause to be done and performed, such other duties and functions as may be assigned to or required of such section by the mayor, the fire chief, and the provisions of the state law, the Charter and ordinances of the city.

(Code 1968, § 18-5; Ord. No. 73-2079, § 1, 11-21-73; Ord. No. 2010-803, § 9, 10-13-2010).

HOUSTON, TEX., CODE OF ORDINANCES ch. 34, art. III, § 34-59—Workweek; overtime compensation; sick leave; vacation leave.

(a) Definitions. Unless otherwise indicated, the following words shall, for purposes of this section, have the following meanings:

(1) *Compensatory time* or *compensatory time off.* Hours during which eligible employees are not working and which are not counted as hours worked during the applicable workweek for purposes of overtime compensation and for which the employee is compensated at the employee's regular rate.

(2) *Eligible employee.* All classified members of the fire department subject to the provisions of articles 1269m and 1269p of the Revised Civil Statutes of Texas.

(3) *Overtime.* Dependent upon the duty assignment and work cycle of the firemen, overtime shall be that time worked in excess of either:

a. 40 hours in a workweek; or

b. An average number of hours of actual work per week over a calendar year of 46.7 hours as authorized by the provisions of article 1269p.

(4) *Regular rate of pay.* Regular rate of pay shall include:

a. Base pay;

b. Longevity pay;

c. Educational incentive pay;

d. Assignment pay; and

e. Higher classification pay where authorized.

The term "regular rate of pay" shall not include compensation excluded under Section 7(e) of the Fair Labor Standards Act of 1938, as amended, or the interpretative regulations and administrative or judicial opinions construing that section.

(5) *Workweek.* Dependent upon the duty assignment and work cycle of the fireman, the workweek shall be either:

a. Forty hours of actual work within the consecutive one hundred sixty-eight-hour period beginning with the dayshift Saturday; or

b. An average number of hours of actual work per week over a calendar year of 46.7 hours as authorized by the provisions of article 1269p.

(6) *Time actually worked* or *actual work.* The time the employee is actually on duty or on a council declared holiday, on authorized sick leave, vacation leave, compensatory time off, death in the family leave or any other authorized leave, provided that this is for the purpose of overtime calculations dealt with in this section only and not for purposes of determining compliance with article 1269p, section 6(D) of the Revised Civil Statutes of Texas, which shall be governed by state law. Hours spent by a fireman doing the work of an injured or ill fireman pursuant to section 26(h) of article 1269m shall not count as hours worked for purposes of overtime compensation. Hours worked in "substitution" pursuant to subsection (f) hereof shall not be counted as time actually worked for purposes of overtime compensation. Calculation of time actually worked shall commence upon the arrival of the fireman at his or her assigned place of duty for the particular duty day at the time established for the commencement of the work shift.

(b) Eligible employees shall have a regularly scheduled workweek on a schedule established by the department. Any fireman whose duties involve either the extinguishment of fires or the delivery of emergency medical services shall be entitled to overtime pay for those hours in excess of the scheduled work cycle as established pursuant to article 1269p. Any fireman whose duty assignment is not described by the foregoing shall be entitled to overtime pay for all time actually worked in excess of his or her forty-hour workweek.

(c) The fire chief shall cause to be maintained accurate, complete and permanent records of all employee attendance and time actually worked during each workweek. He shall make reports of attendance and time actually worked as may be prescribed by the civil service commission. He shall certify the correctness of the reports. The reports shall be forwarded to the human resources department on a weekly basis.

(d) All eligible employees shall be compensated for working overtime beyond their regularly scheduled workweek by the payment of either monetary compensation at the rate of 1½ times their regular rate of pay or compensatory time at the rate of 1½

hours for each overtime hour worked. The following shall apply to the payment of overtime compensation:

(1) The fire chief or his designated subordinate shall verify that the overtime is needed to complete a required city service or operation.

(2) Upon request of the fireman, the fire chief may, in his discretion, grant compensatory time in lieu of cash payment for overtime. Where overtime is paid in cash it shall be paid in the pay period in which it is earned or as soon thereafter as is possible, taking into consideration both the work cycle and the payroll system used.

(3) Where the employee is granted compensatory time the following shall apply:

a. The number of hours of compensatory time which may be accumulated shall not exceed 480.

b. Accrued compensatory time which is given must be used within 365 calendar days from the date accrued, provided that it does not unduly disrupt departmental operations. The fire chief shall issue appropriate regulations governing the use of compensatory time.

c. Accrued compensatory time not taken within 365 days from the date of accrual shall be paid for, in cash, at the greater of:

1. The employee's average regular rate of pay over the employee's last three years of employment by the city preceding the date of payment; or

2. The employee's regular rate of pay as of the end of the pay period preceding the date of payment.

Such payment shall be made in the pay period following expiration of the three hundred sixty-five-day period.

d. The fire department shall maintain detailed records of the accumulation and use of compensatory time on a form prescribed by the human resources director.

e. Accumulated compensatory time shall be used in accordance with the first-in-first-out (FIFO) accounting principle.

f. Any compensatory time accrued prior to April 15, 1986 and not used shall be carried on the records of the department until such time as it is used by the employee. The employee shall not be entitled to monetary compensation for any compensatory time accrued prior to April 15, 1986.

(e) All classified firefighters of the fire department who are subject to the provisions of chapter 142 and chapter 143 of the Local Government Code shall be entitled to the same number of holidays or days in lieu thereof as are granted to all other employees of the city as provided below:

(1) All holidays shall have an accrual value of eight hours. When a classified employee is unable to take the holiday, he or she shall have eight hours posted to his or her accrued holiday balance. When an accrued holiday day is taken in lieu of the regularly scheduled holiday, eight hours will be charged; however, its usage value will be dependent upon the shift worked by the classified employee at the time the day in lieu of the holiday is taken. Any classified employee in the Emergency Operations Division assigned to the average of 46.7 hours per week work schedule shall receive 12 hours off for each holiday accrued. Classified personnel assigned to ten-hour work days shall receive ten hours of leave and all other classified personnel shall receive eight hours off for each holiday accrued.

(2) Where a holiday falls on a regularly scheduled day off, any employee so affected shall accrue the holiday in the manner described in subsection (e)(1) above.

(3) Employees in the Emergency Operations Division and assigned to the average of 46.7 hours per week work schedule who are normally scheduled to work on the actual dates of July 4th, December 24th, December 25th, and January 1st, as well as the following City approved Holidays (Martin Luther King Jr. Day, Memorial Day, Labor Day, Veteran's Day, Thanksgiving Day, and the day after Thanksgiving Day) shall accrue two holidays, provided the member is physically on-duty and completes the entire 24-hour shift, beginning at 0630 hours of the holiday in question. The holidays will accrue as two eight-hour accruals for the holiday shift worked.

Employees in the Emergency Operations Division, not normally scheduled to work, that are called in to work on the actual dates of July 4th, December 24th, December 25th, and January 1st, as well as the following City approved Holidays (Martin Luther King Jr. Day, Memorial Day, Labor Day, Veteran's Day, Thanksgiving Day) shall accrue one eight-hour accrual for the holiday shift worked.

(4) Employees in the Emergency Operations Division and assigned to the average of 46.7 hours per week work schedule who are not normally scheduled to work, that are called in to work on the actual dates of July 4th, December 24th, December 25th and January 1st, as well as the following City approved Holidays (Martin Luther King Jr. Day, Memorial Day, Labor Day, Veteran's Day, Thanksgiving Day, and the day after Thanksgiving Day) shall be paid at the rate of time and one-half the hourly rate for actual hours worked during the 24-hour period beginning at 0630 hours of the holiday in question in lieu of the extra board straight time rate.

(5) When a holiday occurs during any paid leave of absence (vacation, sick time, injury on duty, etc.), the holiday is considered to have not been observed and the holiday shall be accrued and that day's absence will be changed against paid leave.

(6) Any classified employee who terminates his or her employment and has an accrued holiday leave-balance shall be paid for such holidays, not to exceed a total

of 11 holidays. The limitation of 11 holidays shall not apply to a classified employee who leaves the classified service because of disability or death, and in such event, the employee, or his/her estate, shall be paid for all of the accrued holiday balance. All holidays for which payment is made upon termination, disability or death shall be valued at eight hours, regardless of the scheduled work hours or duties assigned to the firefighter at the time they were earned.

(f) The fire chief shall prepare and issue administrative guidelines to implement the provisions of section 26(h) of article 1269m wherein firemen are authorized to voluntarily do the work of an injured or ill fireman.

(g) If the fire chief elects to permit "substitution," as that term is used in the context of the Fair Labor Standards Act and as the practice is described by section 7 of article 1269p, he shall prepare and issue administrative guidelines to implement the provisions of section 7 of article 1269p subject to all applicable provisions of the Fair Labor Standards Act and the interpretations thereof.

(h) The fire chief shall prepare and issue administrative guidelines regarding on-call status for firemen. Such guidelines shall be structured so as to limit the number of firemen on-call to a number reasonably required to meet the needs of the department. Further, such policy shall conform with the standards pertaining to overtime pay for on-call time under the Fair Labor Standards Act of 1938, as amended, and the interpretations thereof.

(i) Employees of the fire department classified pursuant to article 1269m of the Revised Civil Statutes of Texas, shall be allowed sick leave consistent with the provisions of section 26(b)(a) of article 1269m and Ordinance No. 84-1962, as amended. When a sick day is taken, its value will be dependent upon the shift or duty assignment held by the fireman at the time the day is taken. Any fireman engaged in fighting fires or the actual delivery of emergency medical services shall receive 12 hours off for each sick day taken. All other classified personnel shall receive eight hours off for each sick day taken. Officers and employees whose absences on authorized sick leave are for periods other than a full working day as defined herein shall be assessed sick leave in proportion to the number of full working days or fraction thereof they are absent.

(j) Officers and employees of the fire department classified pursuant to article 1269m of the Revised Civil Statutes of Texas, shall earn 15 days of vacation with pay per year to be accrued at a rate of 1¼ days per month. After 15 years of service employees shall be entitled to a vacation according to the following schedule:

16 years	16 days
17 years	17 days
18 years	18 days

19 years	19 days
20 years	20 days
21 years	21 days
22 years	22 days
23 or more years	22 days

When a vacation day is taken, its value will be dependent upon the shift held by the fireman at the time the day is taken. Any fireman engaged in fighting fires or the actual delivery of emergency medical services shall receive 12 hours off for each vacation day taken. All other classified personnel shall receive eight hours off for each vacation day taken. Officers and employees whose absences on authorized vacation leave are for periods other than a full working day as defined herein shall be assessed vacation leave in proportion to the number of full working days or fractions thereof they are absent.

(Code 1968, § 18-20; Ord. No. 73-2079, § 1, 11-21-73; Ord. No. 74-2184, § 1, 12-17-74; Ord. No. 77-2411, § 1, 11-22-77; Ord. No. 79-1035, § 1, 6-21-79; Ord. No. 80-2873, § 1, 9-30-80; Ord. No. 81-1319, § 1, 7-8-81; Ord. No. 86-489, § 1, 4-9-86; Ord. No. 86-517, § 1, 4-15-86; Ord. No. 92-1412, § 1, 10-28-92; Ord. No. 94-189, § 1, 2-23-94; Ord. No. 94-1005, § 1, 9-21-94; Ord. No. 96-1290, §§ 25, 26, 12-4-96; Ord. No. 98-669, § 1, 8-19-98).

IN THE SUPREME COURT OF TEXAS

NO. 09-0794

LTTS CHARTER SCHOOL, INC. D/B/A UNIVERSAL ACADEMY, PETITIONER,

v.

C2 CONSTRUCTION, INC., RESPONDENT

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

Argued December 7, 2010

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

JUSTICE GUZMAN delivered a dissenting opinion, in which CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA joined.

Since 1995, open-enrollment charter schools have been a part of the Texas public-school system. These nontraditional public schools, created and governed by Chapter 12 of the Education Code, receive government funding and comply with the state's testing and accountability system, but they operate with greater flexibility than traditional public schools, in hopes of spurring innovation and improving student achievement.

This interlocutory appeal poses a narrow issue: Is an open-enrollment charter school a "governmental unit" as defined in Section 101.001(3)(D) of the Tort Claims Act[1] and thus able to take an interlocutory appeal from a trial court's denial of its plea to the jurisdiction?[2] We answer yes. An open-enrollment charter school qualifies under the Tort Claims Act as an "institution, agency, or organ of government" deriving its status and authority from legislative enactments.[3] Accordingly, it may bring an interlocutory appeal. We reverse the court of appeals' judgment dismissing the interlocutory appeal for lack of jurisdiction and remand to that court to reach the merits of the school's immunity claim.

I. Background

LTTS Charter School, Inc., d/b/a Universal Academy, is an open-enrollment charter school that retained C2 Construction, Inc. to build school facilities at a site Universal Academy had leased. C2 filed a breach-of-contract suit, and Universal Academy filed a plea to the jurisdiction claiming immunity from suit. The trial court denied the plea, and Universal Academy brought an interlocutory appeal under Section 51.014(a)(8) of the Civil Practice and Remedies Code. In the court of appeals, C2 moved to dismiss the interlocutory appeal, arguing Universal Academy was not

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[1] *See* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D).

[2] *Id.* § 51.014(a)(8) (permitting an appeal from an interlocutory order of a district court order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001").

[3] *See id.* § 101.001(3)(D).

entitled to one because it is not a "governmental unit" under the Tort Claims Act.[4] The court of appeals agreed and dismissed the interlocutory appeal.[5]

We granted Universal Academy's petition for review to address whether the court of appeals properly dismissed the interlocutory appeal. Regardless of whether we have jurisdiction over the substance of an interlocutory appeal, we have jurisdiction to determine whether the court of appeals properly determined its own jurisdiction—the only issue raised in the petition and the briefing.[6]

II. Discussion

A. Standard of Review

A statute's meaning is a question of law we review de novo.[7] Our goal in construing a statute is to honor the Legislature's expressed intent,[8] and ordinarily the truest manifestation of legislative intent is legislative language—the words the Legislature chose.[9] We thus give unambiguous text its ordinary meaning, aided by the interpretive context provided by "the surrounding statutory landscape."[10]

B. Statutory Provisions

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[4] 288 S.W.3d 31, 32.

[5] *Id.* at 38.

[6] *See Klein v. Hernandez*, 315 S.W.3d 1, 3 (Tex. 2010).

[7] *See First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008).

[8] *See City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex. 2009).

[9] *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006).

[10] *See Presidio Ind. Sch. Dist. v. Scott*, 309 S.W.3d 927, 929–30 (Tex. 2010).

Section 51.014(a)(8) permits an appeal of an interlocutory order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001."[11] Section 101.001(3) states a four-part definition of "governmental unit," including this broad provision:

> (D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.[12]

Universal Academy argues it qualifies under this catch-all language as an "institution, agency, or organ of government" deriving its status and authority from statutory enactments.[13] C2 Construction disputes that this statutory provision, or any other, bestows "governmental unit" status on open-enrollment charter schools.

Our cases "strictly construe Section 51.014(a) as a narrow exception to the general rule that only final judgments are appealable."[14] Today's decision, however, turns not on the "strictness" or "narrowness" of Section 51.014(a) but on a simpler ground: whether Universal Academy fits within the Legislature's broad definition of "governmental unit" in Section 101.001(3)(D).[15]

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[11] TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

[12] *Id.* § 101.001(3)(D).

[13] Universal Academy also argues it qualifies for "governmental unit" status as a "political subdivision" under Section 101.001(3)(B), specifically as a "school district." *See id.* § 101.001(3)(B). We need not discuss Subsection (3)(B) since we hold that open-enrollment charters fall under Subsection (3)(D).

[14] *See, e.g.*, *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007) (quotations and citation omitted).

[15] TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D).

We have received two amici curiae briefs, both supporting Universal Academy, one from the State of Texas (whose views the Court requested) and one from the Texas Charter Schools Association. Both amici echo Universal Academy's contention that it falls within Section 101.001(3)(D), and we agree: An open-enrollment charter school qualifies as a "governmental unit" under the Tort Claims Act.

C. The "Status and Authority" of Open-Enrollment Charter Schools Arise From Statute.

Open-enrollment charter schools, governed by Chapter 12 of the Education Code, are indisputably part of the Texas public-education system. Several statutes in the Education Code and elsewhere amply demonstrate that open-enrollment charter schools derive their governmental "status and authority" from legislative enactments. Capped at 215 statewide,[16] open-enrollment charter schools are one of three classes of charter schools created by Chapter 12.[17] These open-enrollment charter schools are authorized to "operate in a facility of a commercial or nonprofit entity, an eligible entity, or a school district, including a home-rule school district."[18]

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[16] TEX. EDUC. CODE § 12.101.

[17] *Id.* § 12.002 (stating that the three classes of charter schools are: "(1) a home-rule school district charter . . . ; (2) a campus or campus program charter . . . ; or (3) an open-enrollment charter . . . ."); *see id.* § 12.011 (describing the "[a]uthorization" for and "[s]tatus" of home-rule school district charter schools); *see id.* § 12.052 (describing the "[a]uthorization" for campus or campus program charter schools); *see id.* § 12.101 (describing the "[a]uthorization" for open-enrollment charter schools); *see id.* § 12.105 (describing the "[s]tatus" of open-enrollment charter schools).

[18] *Id.* § 12.101.

Chapter 12 of the Education Code, which authorizes the operation of charter schools, seeks to "ensure[] the fiscal and academic accountability" of charter holders while still preserving the "innovations of charter schools" from excessive regulation.[19] As publicly funded institutions,[20] charter schools are designed to spark academic innovation and thus boost student learning.[21] Additionally, charter schools "increase the choice of learning opportunities within the public school system," "create professional opportunities that will attract new teachers to the public school system," and "establish a new form of accountability for public schools."[22]

As for status, Section 12.105 of the Education Code—titled "Status"—statutorily (and categorically) declares open-enrollment charter schools to be "part of the public school system of this state."[23] In addition, Section 11.002 explains that charter schools are "created in accordance with the laws of this state" and, together with traditional public schools, "have the primary

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[19] *Id.* § 12.001(b).

[20] *Id.* § 12.106(a) (A charter holder is entitled to receive funding for the open-enrollment charter school that is based in part on student "weighted daily attendance" and on "the state average tax effort."); *id.* § 12.106(b) ("An open-enrollment charter school is entitled to funds that are available to school districts from the agency or the commissioner in the form of grants or other discretionary funding unless the statute authorizing the funding explicitly provides that open-enrollment charter schools are not entitled to the funding."); *see id.* § 12.106(c) ("The commissioner may adopt rules to provide and account for state funding of open-enrollment charter schools under this section.").

[21] *See id*. § 12.001(a).

[22] *Id.*

[23] *Id.* § 12.105.

responsibility for implementing the state's system of public education . . . ."[24] Moreover, Section 12.1053 confers "governmental entity" status, "political subdivision" status, and "local government" status on open-enrollment charter schools for purposes of myriad public purchasing and contracting laws (like dealings with construction companies).[25]

As for authority, that too derives from "laws passed by the legislature under the constitution."[26] Several statutes discuss the authority that open-enrollment charter schools may exercise under their charters. The most explicit grant of authority is Section 12.104(a), which provides that open-enrollment charter schools have "the powers granted to [traditional public] schools" under Title 2 of the Education Code.[27] The scope of a charter school's authority is further detailed in Section 12.102, titled "Authority Under Charter": An open-enrollment charter school "is governed under the governing structure described by the charter" and "retains authority to operate under the charter" assuming acceptable student performance.[28] But just as importantly, that section

[24] *Id.* § 11.002.

[25] *See id.* § 12.1053.

[26] TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D).

[27] TEX. EDUC. CODE § 12.104(a).

[28] *Id.* § 12.102.

is also authority-limiting, itemizing what powers open-enrollment charter schools do *not* possess—namely, broad authority to impose taxes[29] and tuition.[30]

Put simply, open-enrollment charter schools wield many of the same powers as traditional public schools. They have statutory entitlements to state funding[31] and to the same services that school districts receive;[32] they are generally subject to "state laws and rules governing public schools";[33] and they are subject to the "specifically provided" provisions of and rules adopted under the Education Code.[34] Many specific provisions applicable to the educational programs of traditional public schools also apply to open-enrollment charter schools, including provisions relating to "the Public Education Information Management System," reading instruments and instruction, high school graduation, special education, bilingual education, prekindergarten programs, health and safety, and "public school accountability."[35]

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[29] *Id.* § 12.102(4) (An open-enrollment charter school "does not have authority to impose taxes.").

[30] *Id.* § 12.108(a) ("An open-enrollment charter school may not charge tuition to an eligible student who applies under Section 12.117.").

[31] *Id.* § 12.106(a) ("A charter holder is entitled to receive for the open-enrollment charter school funding under Chapter 42 . . . .").

[32] *Id.* § 12.104(c) ("An open-enrollment charter school is entitled to the same level of services provided to school districts by regional education service centers.").

[33] *Id.* § 12.103(a).

[34] *Id.* § 12.103(b).

[35] *Id.* § 12.104.

Chapter 12 further subjects open-enrollment charter schools to a host of statutes that govern governmental entities outside the Education Code. For example, for purposes of the Government Code's regulation of open meetings and access to public information, "the governing body of an open-enrollment charter school [is] considered to be [a] governmental bod[y]."[36] Likewise, for purposes of the Government Code's and Local Government Code's regulation of government records, "an open-enrollment charter school is considered to be a local government" and its records "are government records for all purposes under state law."[37] And lastly, under Section 12.1053, as noted above, an open-enrollment charter school is considered to be: (1) a "governmental entity" for purposes of Government Code and Local Government Code provisions relating to property held in trust and competitive bidding; (2) a "political subdivision" for purposes of Government Code provisions on procurement of professional services; and (3) a "local government" for purposes of Government Code provisions on authorized investments.[38]

In sum, numerous provisions of Texas law confer "status" upon and grant "authority" to open-enrollment charter schools. Their status as "part of the public school system of this state"[39]—and their authority to wield "the powers granted to [traditional public] schools"[40] and to

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[36] *Id.* § 12.1051.

[37] *Id.* § 12.1052.

[38] *See id.* § 12.1053.

[39] *Id.* § 12.105.

[40] *Id.* § 12.104(a).

receive and spend state tax dollars[41] (and in many ways to function as a governmental entity[42])—derive wholly from the comprehensive statutory regime described above. With this legislative backdrop in mind, we are confident that the Legislature considers Universal Academy to be an "institution, agency, or organ of government" under the Tort Claims Act[43] and thus entitled to take an interlocutory appeal here.[44]

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[41] *See id.* §§ 12.106, .107.

[42] *See id.* § 12.1053.

[43] *See* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D).

[44] We leave undecided the separate issue of whether Universal Academy is immune from suit. The Solicitor General of Texas—responding to our request for briefing from the State—contends that denying "governmental unit" status "would make little sense because the Legislature has expressly granted open-enrollment charter schools immunity from liability." It is true that Section 12.1056 of the Education Code, while not mentioning immunity from suit, specifies that open-enrollment charter shools are "immune from liability to the same extent as a school district." TEX. EDUC. CODE § 12.1056. Our holding today that Universal Academy is a "governmental unit" under the Tort Claims Act entitled to take an interlocutory appeal does not turn on Section 12.1056's mention of immunity from liability. While that provision, like several other Education Code provisions, implies legislative recognition of "governmental unit" status for open-enrollment charter schools, we reserve judgment on: (1) whether Universal Academy, while entitled to take an interlocutory appeal, also has immunity from suit; and more fundamentally (2) whether the Legislature in fact has the authority to confer (as opposed to waive) immunity, a common-law creature traditionally delimited by the judiciary. That said, the Solicitor General pivots on Section 12.1056's grant of immunity from liability to argue that if open-enrollment charter schools are *not* governmental units under the Tort Claims Act, then the Act does not apply. And if the Act does not apply, then an open-enrollment charter school's immunity from tort liability is never waived. And if immunity is never waived, then Section 12.1056 would suggest that open-enrollment charter schools are immune from all tort liability, unique among all governmental entities in the State. The Solicitor General sees this as an illogical and surely unintended outcome—traditional public schools exposed to tort liability but charter schools exempt from it. We do not consider today the scope or effect of Section 12.1056, but assuming *arguendo* the Legislature can grant immunity from liability, it would seem odd for lawmakers to imbue open-enrollment charter schools with greater tort immunity than cities, counties, school districts, and other purely governmental entities. Again, we reserve judgment on Universal's immunity from suit, an issue not before us.

D. Arguments Against "Governmental Unit" Status Fall Short.

C2 suggests that Universal Academy is not a "governmental unit" because it is a private institution and can engage in for-profit activities. This is unpersuasive. It is true that open-enrollment charter schools can be operated by private institutions or private entities.[45] However, Universal Academy cannot earn profits and direct those profits to shareholders as do private for-profit corporations, as the statute does not permit private for-profit corporations to operate open-enrollment charter schools. In this case, Universal Academy is run by a non-profit corporation organized under Texas law and qualifying under Section 501(c)(3) of the Internal Revenue Code. As Section 12.101(a) provides, this non-profit organization is eligible to operate an open-enrollment charter school.[46] The open-enrollment charter granted to Universal Academy specifically states that the charter holder "shall take and refrain from all acts necessary to be and remain in good standing as an organization exempt from taxation under Section 501(c)(3)." Though C2 points out that Universal Academy subleased a portion of its facilities to a private prekindergarten school that charges tuition, nothing in the record suggests the proceeds went to anywhere but the operations of Universal Academy.[47]

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[45] *See* TEX. EDUC. CODE § 12.101(a). Open-enrollment charter schools may be operated by any one of four eligible entities: a public institution of higher education, a governmental entity, a private or independent institution of higher education, or, in this case, a non-profit organization. *Id.*

[46] *See id.* § 12.101(a)(3).

[47] Further, more than 93% of Universal Academy's funding comes from the State of Texas, through per-pupil allotments similar to allotments paid to public independent school districts. *See id.* § 12.106. Universal Academy also receives federal funding and private donations, so the revenue from the sublease generates only a minuscule portion of Universal Academy's revenues.

Further, even though Universal Academy is in some sense a nonpublic entity, its activities are narrowly circumscribed by statute. Universal Academy has no authority to operate outside of the educational mandate contained in its governing statutory framework, its articles of incorporation, and its charter. A charter may be granted only if Universal "meets any financial, governing, and operational standards adopted by the commissioner under" Subchapter D of Chapter 12,[48] the subchapter governing open-enrollment charter schools. The Commissioner of Education may audit Universal Academy[49] and may revoke its charter for failure to satisfy generally accepted accounting standards of fiscal management or for failure to comply with its charter or Subchapter D.[50] Like all other open-enrollment charter schools, Universal Academy is required by law to "provide instruction to students at one or more elementary or secondary grade levels as provided by the charter."[51] Further, Universal Academy's articles of incorporation state that "[t]he corporation is organized exclusively for the following purpose: the non profit operation of an open-enrollment charter school which shall be operated for educational purposes."

Universal Academy's use of state-funded property and state funds is also carefully circumscribed. Property purchased or leased with state public funds—the source of more than 93%

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[48] *Id.* § 12.101(b); *see also id.* § 12.113(a)(1).

[49] *Id.* § 12.1163(a)(1). The Commissioner also has the power to audit the records of the charter holder and any management company that provides management services to the school. *See id.* §§ 12.1163(a)(1)–(2), .1012.

[50] *Id.* § 12.115. Whether Universal Academy complied with statutory accountability and financial standards is not before us today.

[51] *Id.* § 12.102(1).

of Universal Academy's funding—is held in trust for the benefit of the students[52] and "may be used only for a purpose for which a school district may use school district property."[53] In other words, if traditional public schools can rent their facilities to private groups—like to churches for Sunday services or to dance studios for ballet recitals—then so can charter schools.[54] Likewise, open-enrollment charter schools may spend state funds only in the manner that public schools may spend such funds,[55] and such funds are also held in trust for the benefit of the students.[56]

The dissent, however, maintains that Universal Academy lacks "governmental unit" status because, while the overall charter-school regime is set forth by statute, it is the State Board of Education (SBOE) that issues charters and the Commissioner of Education who revokes or denies renewal.[57] That is, the dissent views open-enrollment charter schools as creatures of a state agency, not the state legislature.[58] Because "specific charter schools are not mentioned"—one by one—in statute, "they therefore do not derive status as governmental units" under Section 101.001(3)(D) of

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[52] *Id.* § 12.128(a)(2).

[53] *Id.* § 12.128(a)(3).

[54] *See id.*; *see also id.* § 45.033. Under Chapter 45, which covers school district funding, the governing board of a school district "may set and collect rentals, rates, and charges from students and others for the occupancy or use of any of the facilities, in the amounts and manner determined by the board . . . ."

[55] *Id.* § 12.107(a)(3).

[56] *Id.* § 12.107(a)(2).

[57] __ S.W.3d __, __.

[58] *Id.* at __.

the Tort Claims Act.[59] In other words, unless and until our biennial Legislature passes statutes that identify each open-enrollment charter school by name, a school can never achieve "governmental unit" status under Subsection (3)(D).[60] This argument is textually untenable.

True enough, a charter school cannot operate without a charter. And charters are granted by the SBOE, not by 181 legislators sifting through mounds of applications.[61] But that does not mean a charter school's status and authority derive from administrative as opposed to legislative action. The dispositive issue is not who grants a charter but who grants a charter *meaning*. Who bestows the status and authority that a charter brings; what does having a charter mean, and who says so? The wellspring of open-enrollment charter schools' existence and legitimacy is the Education Code and its multiplicity of provisions that both detail and delimit what these public schools can and cannot do. The SBOE can issue no charters absent the Education Code,[62] which dictates the

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[59] *Id*. at __.

[60] *Id.* at __. The dissent sees two narrow paths to "governmental unit" status for privately run open-enrollment charter schools: (1) under Subsection (3)(B), if such schools are added as a general category of "political subdivision" like junior college districts, or (2) under Subsection (3)(D), if each school has its existence statutorily declared, like each of our State's various public universities. *Id.* As explained above, this constrained view lacks any textual support, and we decline to graft this ancillary requirement onto the Legislature's straightforward definition of "governmental unit" in Subsection (3)(D).

[61] TEX. EDUC. CODE § 12.101 (providing that the SBOE "may grant a charter for an open-enrollment charter school only to an applicant that meets any financial, governing, and operational standards adopted by the commissioner").

[62] *Id.* § 12.113.

requirements for charter eligibility[63] and details with precision what powers are conferred.[64] The "powers" of an open-enrollment charter school derive from statute;[65] likewise its "authority to operate under the charter"[66] (along with limitations upon that authority[67]); same for its "[s]tatus."[68] All emanate from legislative command. The Legislature has tasked the SBOE and the Texas Education Agency with certain day-to-day duties, but the fact that non-legislators have been delegated such tasks does not obscure the all-encompassing legislative regime that called charter schools into existence and that defines their role in our public-education system.[69] The Legislature's own pronouncements declare the status and authority of open-enrollment charter schools. Other state

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[63] *Id.* § 12.101(a).

[64] *See id.* § 12.102 (titled "Authority Under Charter"). The Education Code is the authority for these charter agreements; it defines the scope of their content and limits their effect on future renewals. Section 12.111, titled "Content," says that "each charter granted under this subchapter must" include, among other things, the period of the charter's validity, the conditional nature of its renewal, the minimum level of student performance, and the basis for revoking a charter. *Id.* § 12.111. Furthermore, "[t]he grant of a charter under [Subchapter D] does not create an entitlement to a renewal of a charter on the same terms as it was originally issued." *Id.* § 12.113(b).

[65] *Id.* § 12.104(a) (Open-enrollment charter schools have "the powers granted to [traditional public] schools" under Title 2 of the Education Code.).

[66] *Id.* § 12.102(3).

[67] *See id.* § 12.102(4) (An open-enrollment charter school "does not have authority to impose taxes."); *see also id.* § 12.108(a) ("An open-enrollment charter school may not charge tuition to an eligible student who applies under Section 12.117.").

[68] *Id.* § 12.105 (titled "Status").

[69] *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 730 n.8 (Tex. 1995) ("As long as the Legislature establishes a suitable regime that provides for a general diffusion of knowledge, the Legislature may decide whether the regime should be administered by a state agency, by the districts themselves, or by any other means.").

entities and officials may exercise a measure of oversight pursuant to those statutory commands, but the commands themselves, and that they are legislative, are what matter most.

III. Conclusion

Open-enrollment charter schools are governmental units for Tort Claims Act purposes because: (1) The Act defines "governmental unit" broadly to include "any other institution, agency, or organ of government" derived from state law;[70] (2) the Education Code defines open-enrollment charter schools as "part of the public school system,"[71] which are "created in accordance with the laws of this state,"[72] subject to "state laws and rules governing public schools,"[73] and, together with traditional public schools, "hav[ing] the primary responsibility for implementing the state's system of public education;"[74] and (3) the Legislature considers open-enrollment charter schools to be "governmental entit[ies]"[75] under a host of other laws outside the Education Code.

Accordingly, because Universal Academy is a "governmental unit" under the Tort Claims Act, the court of appeals had jurisdiction to hear Universal Academy's interlocutory appeal under Section 51.014(a)(8).[76] Our holding does not resolve the underlying issue of whether Universal

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[70] *See* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D).

[71] TEX. EDUC. CODE § 12.105.

[72] *Id.* § 11.002.

[73] *Id.* § 12.103(a).

[74] *Id.* § 11.002.

[75] *Id.* § 12.1053; *see also id.* §§ 12.1051–.1052.

[76] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

Academy enjoys immunity from C2's contract claim. We reverse the court of appeals' judgment dismissing the appeal and remand to that court for further proceedings.

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Don R. Willett
Justice

OPINION DELIVERED: June 17, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0794

LTTS CHARTER SCHOOL, INC. D/B/A UNIVERSAL ACADEMY, PETITIONER,

v.

C2 CONSTRUCTION, INC., RESPONDENT

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

Argued December 7, 2010

JUSTICE GUZMAN, joined by CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA, dissenting.

A party's ability to take an interlocutory appeal is a limited exception to the general rule that only final orders are appealable. As applicable here, the contours of that exception are found in sections 51.014(a)(8) and 101.001(3) of the Civil Practice and Remedies Code. Despite these limits, the Court embarks on a perilous expedition through the Education Code in an attempt to locate some indicia that the Legislature intended to allow privately run, open-enrollment charter schools to take this circumscribed form of appeal. In so doing, the Court ventures beyond the narrow procedural question presented in this case: whether a privately run, open-enrollment charter school is a "governmental unit" as defined by section 101.001(3) of the Civil Practice and Remedies Code. If it is, then an interlocutory appeal is proper from denial of a plea to the jurisdiction by the school, as

authorized by section 51.014(a)(8). But, because it is not, I would affirm the court of appeals. Privately run, open-enrollment charter schools do not meet the Legislature's definition as set out in section 101.001(3), and therefore no interlocutory appeal may be taken from an order granting or denying a plea to the jurisdiction by such a school.

Moreover, not only does the Court allow for an interlocutory appeal that is contrary to the expressed intent of the Legislature, the Court has also effectively answered an important substantive question that is not before us: what type of immunity does a privately run, open-enrollment charter school possess? Specifically, do such schools: (1) possess governmental immunity from suit, (2) merely have immunity from liability, or (3) lack immunity entirely? The Court's reasoning, while masquerading as an answer to the narrow procedural issue before us, portends to address the merits of this immunity question. By doing so, the Court provides courts below with a signal that such schools possess immunity from suit. As a result, a private, nonprofit corporation can take on the mantle of governmental immunity, leaving other litigants wrongfully deprived of their day in court and without an opportunity to have this issue addressed through the rigors of our adversarial system. Accordingly, I must respectfully dissent.

I. Interlocutory Appeal Under Section 51.014(a)(8)

LTTS Charter School, Inc. (LTTS), is a private, nonprofit corporation, operating an open-enrollment charter school. LTTS does so under authority of a charter issued by the State Board of Education, pursuant to the charter school regime established by Chapter 12 of the Education Code. It is being sued by C2 Construction for breach of contract relating to the construction of new facilities. LTTS filed a plea to the jurisdiction, asserting governmental immunity. The trial court

denied that plea, and when LTTS attempted an interlocutory appeal, the court of appeals dismissed its appeal for lack of jurisdiction, holding that LTTS is not a governmental unit under section 101.001(3). 288 S.W.3d 31, 38.

Civil Practice and Remedies Code section 51.014(a)(8) allows immediate appeal of an order denying or granting a plea to the jurisdiction by a governmental unit and, in doing so, incorporates by reference section 101.001(3)'s definition of what constitutes a governmental unit. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). In construing section 51.014, it is "the Legislature's intent that section 51.014 be strictly construed as a narrow exception to the general rule that only final judgments and orders are appealable." *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001) (quotation marks omitted). LTTS asserts that it is a "governmental unit" for purposes of section 51.014(a)(8) under two provisions found in section 101.001(3). Specifically, LTTS argues that it is a governmental unit both as a "school district" under section 101.001(3)(B), and also as "any other institution, agency, or organ of government" as provided by section 101.001(3)(D).[1]

II. Privately Run, Open-Enrollment Charter Schools Are Not Governmental Units

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[1] As relevant here, section 101.001(3) defines a "governmental unit" as:

> (B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;
>
> . . . .
>
> (D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B), (D).

A. "Any Other Institution, Agency, or Organ of Government" Under Section 101.001(3)(D) and "School District" Under Section 101.001(3)(B)

The Court holds that LTTS is a governmental unit under section 101.001(3)(D), concluding it qualifies as "any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution." TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D). The first part of that definition, "any other institution, agency, or organ of government," appears quite broad. But that apparent breadth is circumscribed by the language that follows: "status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution." The linchpin of section 101.001(3)(D) is the word "derive." "Derive" means "to receive or obtain from a source or origin." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 536 (2d ed. 1987). The plain language of section 101.001(3)(D) thus covers only two classes of governmental entities: those whose status and authority comes directly from our Constitution, and those whose status and authority is received or obtained by a legislative enactment. *See* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D).

Unquestionably, LTTS does not derive its status from the Constitution. We therefore examine whether it falls within the other class of entities covered by section 101.001(3)(D)—those whose status and authority is conferred by a legislative enactment. LTTS does not fall within that class either, because it does not obtain or receive status or authority from any statute or other enactment. Rather, its status is derived from a charter granted by the State Board of Education. *See* TEX. EDUC. CODE §§ 12.101, .113. If LTTS's charter is revoked, or if the commissioner of

education denies its renewal, *see id.* §§ 12.115, .116, LTTS will cease to have any kind of governmental status and will simply be a private, nonprofit corporation. *See id.* § 12.1161(a) ("[I]f the commissioner revokes or denies the renewal of a charter of an open-enrollment charter school . . . the school may not: (1) continue to operate under this subchapter; or (2) receive state funds under this subchapter."). In point of fact, although the Education Code authorizes the State Board of Education to grant charters, it does not itself grant them to any particular entities. Therefore, LTTS does not derive its status or authority from any legislative enactment.

LTTS also asserts that it is a governmental unit under section 101.001(3)(B) as a "political subdivision, specifically, a school district." The Court does not reach that question. I would hold that the plain meaning of "school district" does not cover a privately operated, open-enrollment charter school. A school district is a "political subdivision," TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B), exercising "jurisdiction over a portion of the State," *Guar. Petroleum Corp. v. Armstrong*, 609 S.W.2d 529, 531 (Tex. 1980). Rather than exercising jurisdiction, an open-enrollment charter school "provide[s] instruction to students at one or more" locations, and "does not have authority to impose taxes." TEX. EDUC. CODE § 12.102(1), (4). Furthermore, the Legislature, far from defining charter schools as school districts, generally goes to great lengths in the Education Code to list each separately, a clear indication that a charter school is not equivalent to a school district. *See, e.g.*, *id.* § 7.009.

Rather than employing this strict textual analysis to determine whether the requirements of section 101.001(3) are met, the Court largely ignores the statutory text and instead meanders through a wide-ranging consideration of Chapter 12 of the Education Code. Seeking to buttress its

conclusion, the Court cites sections of the Education Code that generally describe how open-enrollment charter schools operate, but are irrelevant to the narrow procedural issue before us. The Court thus mistakenly focuses only on the inclusive, general part of the definition "institution, agency, or organ of government," while disregarding the limiting language "status and authority of which are derived . . . from laws passed by the legislature under the constitution." TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D), thereby rendering meaningless the limiting language in that section and thwarting the Legislature's intent. The Court is also oblivious to the rule that interlocutory appeals are disfavored, and that section 51.014 is to be strictly construed accordingly. *See Bally Total Fitness*, 53 S.W.3d at 355.

The Court makes a bold but brief effort to identify legislative enactments that confer status and authority on LTTS under section 101.001(3)(D). It particularly cites sections 12.104 and 12.105 of the Education Code, asserting that charter schools derive authority and status respectively from those enactments. But section 12.104 does not confer authority on LTTS, or on any other charter school. *See* TEX. EDUC. CODE § 12.104. It merely provides that charter schools have the same powers as public schools under Title 2 of the Education Code. *See id.* Whether a particular entity like LTTS *is* an open-enrollment charter school, and is thus able to avail itself of those powers, is entirely dependent on the grant of a charter from the State Board of Education. *See id.* §§ 12.101, .113. Section 12.105 likewise does not confer status on LTTS, or any other charter school, but instead provides that open-enrollment charter schools are part of the public school system. *See id.* § 12.105. As with section 12.104, whether any particular entity is an open-enrollment charter

school—and hence part of the public school system—depends on the grant of a charter from the State Board of Education.

The Court also cites Education Code section 12.1053 as conferring governmental status on open-enrollment charter schools. But, in addition to the fact that it does not confer status for the reasons discussed above, an examination of section 12.1053 demonstrates a clear intent to only apply very specific definitions and provisions from the Government and Local Government Codes to charter schools. It defines open-enrollment charter schools as (1) "governmental entit[ies]" under subchapter D, Government Code Chapter 2252 (providing that real property is held in trust); (2) "governmental entit[ies]" under subchapter B, Local Government Code Chapter 271 (addressing competitive bidding on certain public works contracts); (3) "political subdivision[s]" under subchapter A, Government Code Chapter 2254 (governing professional services contracts); and (4) "local government" under Government Code sections 2256.009 to 2256.016 (regulating authorized investments). TEX. EDUC. CODE § 12.1053. None of those four definitions is the same as "'governmental unit' under Civil Practice and Remedies Code section 101.001(3)," which is, after all, the inquiry here.

Finally, the Court notes that "[s]everal statutes discuss the authority that open-enrollment charter schools may exercise *under* their charters." __ S.W.3d __ (emphasis added). But this merely underscores the flaw in the Court's reasoning: open-enrollment charter schools derive status and authority *under* the charters granted to them by the State Board of Education, not from any legislative enactment.

This is not to say that the Legislature could never allow a privately run, open-enrollment charter school like LTTS to take an interlocutory appeal. And, contrary to the Court's understanding, I am not suggesting that only a legislative enactment specifically naming each charter school would suffice, or that the Legislature must approve each charter application. __ S.W.3d __. Rather, had the Legislature chosen to do so, it could readily have provided for interlocutory appeals by open-enrollment charter schools *as a class*. For example, it could have amended the interlocutory appeal statute. *Cf.* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6) (authorizing interlocutory appeal from an order denying a motion for summary judgment "based in whole or in part upon a claim against or defense by a member of the electronic or print media"). But, the Legislature did not so choose. *Cf. Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 463 (Tex. 2009) (Willett, J., concurring) (citation omitted) ("[T]he 'surest guide' to what lawmakers intended is what lawmakers enacted."). Nor is this to say that an interlocutory appeal would always be improper for a *publicly* run, open-enrollment charter school—such a school would likely be a governmental unit independent of its charter.[2] But LTTS is not a publicly run school, and the Legislature simply has not granted privately run, open-enrollment charter schools a right to interlocutory appeal. The Court errs in granting them that right today.

B. Comparison to Public Universities and Junior College Districts

The Legislature's treatment of public universities and junior colleges under section 101.001(3) illustrates the actual manner in which the Legislature designates entities as governmental

[2] Chapter 12 of the Education Code provides that charters can be granted not only to private entities, but also to public institutions of higher learning, and other governmental entities. TEX. EDUC. CODE § 12.101(a)(1), (4).

units under that section, and further highlights the flaw in the Court's reasoning. Specifically, junior college districts are governmental units under section 101.001(3)(B) because they are listed in that subsection, whereas public universities are governmental units under section 101.001(3)(D) because their authority and status is conferred by legislative enactments.

Civil Practice and Remedies Code section 101.001(3)(B) includes "junior college district[s]," as well as school districts, in its enumeration of entities that are governmental units. TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B). By contrast, public universities are treated differently from both junior colleges and charter schools. Although, like charter schools, they are not listed anywhere in section 101.001(3), public universities nevertheless satisfy the precise standards articulated by section 101.001(3)(D), which requires that an entity's governmental status be "derived from . . . laws passed *by the legislature*." *Id.* § 101.001(3)(D) (emphasis added). The extensive provisions of Title III of the Education Code, entitled "Higher Education," confer status and authority on the various public universities of this state. *See, e.g.*, TEX. EDUC. CODE § 67.02 ("The University of Texas at Austin is a coeducational institution of higher education within The University of Texas System."); *id.* §§ 109.001, .01 (establishing the Texas Tech University System and providing that Texas Tech University "is a coeducational institution of higher education located in the city of Lubbock").

Unlike public universities, specific charter schools are not mentioned in the Education Code, nor any other statute, and they therefore do not derive status as governmental units from legislation, as section 101.001(3)(D) requires. Rather, like junior colleges, the Legislature has provided administrative procedures for their creation, but has not actually conferred status on them itself. *See id.* §§ 130.011–.013 (providing for establishment of junior college districts by joint action of the

coordinating board, commissioner of higher education, and the independent school district or city that wishes to establish a junior college district); *id.* §§ 12.101, .113 (authorizing the State Board of Education to grant charters).[3] But, unlike junior colleges, charter schools are *not* among the entities enumerated in Civil Practice and Remedies Code section 101.001(3). The Court largely ignores the rest of section 101.001(3) in its analysis, focusing almost entirely on subsection (D). But, in construing a statute, "[w]e determine legislative intent from the entire act and not just isolated portions." *20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex. 2008).

Accordingly, I would conclude that privately run, open-enrollment charter schools such as LTTS do not fall within the plain language of section 101.001(3)(D), because they gain and lose their status and authority through agency actions, not by legislative enactments. I would also conclude that they are not "school districts," and therefore are not governmental units under section 101.001(3)(B). Thus, I would hold that LTTS is not entitled to an interlocutory appeal under section 51.014(a)(8).

III. The Court Effectively Answers a Substantive Question Not Before Us

The Court's reasoning further effectively answers a question not before us today—that is, whether privately run, open-enrollment charter schools like LTTS possess governmental immunity from suit. Although the Court professes to reserve judgment on this issue, the reasoning of the

[3] Junior college districts are by no means unique in this respect. Similarly, for example, water improvement districts derive their authority from local governments, not the Legislature, and, like junior colleges—but unlike charter schools—they are listed in section 101.001(3). *See* TEX. WATER CODE §§ 55.021–.053 (establishing rules and procedures by which local governments may create water improvement districts); TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B) (defining governmental unit as "a political subdivision of this state, including any . . . water improvement district").

Court's opinion appears to be animated by a concern raised by the Solicitor General. *See* __ S.W.3d __ n.44. The Solicitor General asserts that it would be "illogical" to hold that open-enrollment charter schools are not governmental units under section 101.001(3)(D), because if they are not, the waiver in the Tort Claims Act allegedly would not apply. In other words, charter schools would be governmental entities that enjoy immunity from suit in the first instance, but they would not be "governmental units" under section 101.001(3), for which certain immunity is waived by the Tort Claims Act. The Solicitor General further reasons that such a result would leave charter schools entirely immune from tort claims, whereas school districts' immunity is waived by the Act.

The Court endorses this reasoning. __ S.W.3d __ n.44. ("[A]ssuming arguendo the Legislature can grant immunity from liability, it would seem odd for lawmakers to imbue open-enrollment charter schools with greater tort immunity than cities, counties, school districts, and other purely governmental entities."). But the Solicitor General's argument fails for a multitude of reasons. First, public school districts themselves possess near complete immunity under the Tort Claims Act,[4] thus proving the argument that the Legislature could not have intended to treat public schools and privately run, open-enrollment charter schools disparately to be a non-sequitur. There is no parade of horribles that would result from holding that private charter schools are not governmental units under section 101.001(3), even if this meant they possessed complete immunity. Only a narrow group of tort actions would be affected.

[4] School districts as a practical matter are almost entirely immune—the Tort Claims Act *excludes* them from its waiver "[e]xcept as to motor vehicles." TEX. CIV. PRAC. & REM. CODE § 101.051; *see also Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617, 619 (Tex. 1987) (holding school district immune from suit for injuries suffered by a student aboard a school bus, because the injuries did not result from the "operation" or "use" of the bus).

Second, as discussed above, the Court avoids the question of whether an open-enrollment charter school is a "school district" today, but we will inevitably face this issue in the future. If open-enrollment charter schools do possess immunity from suit, as the Court's opinion suggests, it follows that the only way immunity would be waived for contract claims such as those brought here would be through the contract-claims waiver in Local Government Code section 271.152. And that waiver would most likely apply to privately run, open-enrollment charter schools only if such schools are "school districts," which, as previously explained, they are not. This is because the definition of "local governmental entity" to which that waiver applies contains no catch-all provision equivalent to section 101.001(3)(D). *See* TEX. LOC. GOV'T CODE § 271.151(3). Rather, it is limited to a list of entities nearly identical to those found in section 101.001(3)(B). Both definitions cover the following entities: (1) city or municipality, (2) school district or junior college district, and (3) "levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority." *Compare id.* § 271.151(3)(A)–(C), *with* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B). The only substantive difference between the two is that section 271.151(3) excludes counties, while section 101.001(3)(B) includes them. *Compare* TEX. LOC. GOV'T CODE § 271.151(3), *with* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B). Section 271.152's waiver is therefore limited to the same governmental units that fall under section

101.001(3)(B), with the exception of counties. And because open-enrollment charter schools are not included in section 271.152's list of entities, they also would not fall within its waiver of immunity.[5]

Third, given that an open-enrollment charter school's very existence as a public school is dependent on an agency's grant of a charter, and is subject to revocation at the whim of an agency, it is unclear what the effect of a charter revocation mid-suit would have on the school's supposed immunity under the Court's reasoning. Would the school retain immunity, even though it was no longer a governmental unit? Or would the school immediately lose immunity, even though sued for events occurring while a charter school? And what if a private nonprofit corporation operating a charter school were sued on a basis removed from its provision of education services? Would that private corporation enjoy immunity simply because it operated a charter school? These sorts of difficult questions deserve the opportunity for consideration and debate in our adversarial system, and further illustrate the infirmity of the Court's implicit reaching of the substantive issue not before us.

Finally, such reasoning simply begs the question of whether privately run, open-enrollment charter schools are immune at all. It is far from clear that the Legislature can confer immunity upon private entities like LTTS. Sovereign immunity (and by extension, governmental immunity, which is derived from it) is a common-law doctrine of the courts. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006). Generally, the Legislature's role is limited to waiving immunity, while

[5] Notably, although Education Code section 12.1053 makes subchapter B (covering competitive bidding on certain public works contracts) of Local Government Code Chapter 271 applicable to open-enrollment charter schools, it does not apply subchapter I (which includes the waiver provisions found in sections 271.151 and 271.152) to them. *See* TEX. EDUC. CODE § 12.1053.

recognition of immunity's existence is left to the courts. *See id.* at 331–32 (noting that the Court has long upheld the rule of sovereign immunity, while deferring to the Legislature to waive it). Indeed, after a review of the doctrine's foundations, we concluded that "it remains the judiciary's responsibility to define the boundaries of the . . . doctrine and *to determine under what circumstances sovereign immunity exists in the first instance*." *Reata Constr. Co. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006) (emphasis added); *see also City of Galveston v. State*, 217 S.W.3d 466, 475 (Tex. 2007) (Willett, J., dissenting) ("The Legislature's focus is critical but confined; its role is limited to waiving *pre-existing* common-law immunity."). We further noted that "[s]overeign immunity is a common-law doctrine that initially developed without any legislative or constitutional enactment." *Reata*, 197 S.W.3d at 374. In part for policy reasons, we defer to the Legislature to *waive* such immunity as has been recognized by the courts. *See id.* at 375 ("We have generally deferred to the Legislature to waive immunity because the Legislature is better suited to address the conflicting policy issues . . . ."). Our sovereign immunity jurisprudence therefore suggests, at least as a general matter, that courts create or recognize sovereign immunity, while the Legislature waives it.[6]

It is true that there are some forms of *statutory* immunity. *See, e.g.*, *Franka v. Velasquez*, 332 S.W.3d 367, 371 n.9 (Tex. 2011) (holding that section 101.106 of the Civil Practice and Remedies Code confers immunity in some instances to employees of governmental units); *Entergy Gulf States*,

[6] Significantly, we have also reserved the possibility that, having created sovereign immunity, the judiciary "may modify or abrogate such immunity by modifying the common law," *Reata*, 197 S.W.3d at 375, though we have cautioned that courts should not lightly set aside immunity, once recognized, as doing so "could become a ruse for avoiding the Legislature," *City of Galveston*, 217 S.W.3d at 471.

282 S.W.3d at 436 (noting that general contractors have limited immunity as "statutory employers" under Texas Labor Code section 408.001(a)). But the precise contours of the Legislature's power to grant immunity by statute remain unclear—it is no doubt limited by the Open Courts and Due Course of Law provisions of our Constitution. It may be constitutionally significant that both of the above examples involve special circumstances that limit the breadth of the immunity in question. In the first, the government is simply extending its own immunity to its employees (in a manner largely coterminous with governmental immunity for acts of government employees within their official capacity). *See Franka*, 332 S.W.3d at 371 n.9. In the second, a limited form of immunity is extended in conjunction with a comprehensive workers' compensation scheme, one designed to provide an alternative form of compensation to the traditional tort remedies in some cases. That immunity, unlike sovereign immunity, does not entirely preclude a plaintiff's recovery, it merely limits recovery to the statutory scheme. *See HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 350 (Tex. 2009). It is also an affirmative defense, not a bar to jurisdiction. *See id.* Furthermore, there is a question as to whether the Legislature can delegate to an agency the power to confer immunity upon separate private entities.

In sum, it is unsettled whether the Legislature has the power to confer immunity from suit on privately operated, open-enrollment charter schools via the statutory scheme in question. But, leaving aside that thorny issue, the only legislative act that addresses immunity for open-enrollment charter schools narrowly provides that they are "immune from *liability* to the same extent as a school district." TEX. EDUC. CODE § 12.1056 (emphasis added). Immunity from liability is not the same as immunity from suit. *Tooke*, 197 S.W.3d at 332. The former "bars enforcement of a judgment

against a governmental entity," *id.*, while only the latter is the basis for a plea to the jurisdiction, *see id.*; *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). The plain meaning of section 12.1056 therefore gives no indication that LTTS is immune from suit, independent of whether it is immune from liability, and as such provides no basis for a plea to the jurisdiction. In other words, regardless of whether the Legislature has the power to confer immunity from suit in this case, section 12.1056 does not suffice to do so, making it anything but a foregone conclusion that privately operated, open-enrollment charter schools have immunity from suit.

Despite these unsettled questions, the Court's reasoning will strongly imply to our state's lower courts that we have already determined that privately run, open-enrollment charter schools are immune from suit. Indeed, nearly all of the Court's analysis would be more properly addressed to the merits of LTTS's assertion of immunity, rather than the narrow procedural question that is actually before us. I fear that the Court's approach will effectively deprive litigants of their day in court to properly contest whether privately run, open-enrollment charter schools in fact have immunity from suit. We should not predetermine this important decision now, but should wait until it is squarely presented to this Court, and we should decide it explicitly, not by implication.

IV. Conclusion

Because (1) the plain meaning of Civil Practice and Remedies Code section 101.001(3) does not cover a privately run, open-enrollment charter school like LTTS, and (2) the Court has effectively resolved the underlying substance of whether such schools enjoy immunity from suit, rather than the procedural issue properly before us, I respectfully dissent, and would affirm the court of appeals' holding that it lacked jurisdiction over this interlocutory appeal.

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Eva M. Guzman
Justice

OPINION DELIVERED: June 17, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0828

GENESIS TAX LOAN SERVICES, INC. AND M. SUZANNE FROSSARD, TRUSTEE, PETITIONERS,

v.

KODY AND JANET KOTHMANN AND KODY KOTHMANN, TRUSTEE, RESPONDENTS

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

Argued November 10, 2010

JUSTICE HECHT delivered the opinion of the Court.

Section 32.06 of the Texas Tax Code provides that a tax lien on real property, which takes priority over many other liens, may be transferred, under specified conditions, to a person who pays the taxes with the owner's permission.[1] The principal issue before us is whether those conditions were met in this case. The court of appeals held that the statute does not permit a verified photocopy of the lien transfer to be recorded when the original has been lost.[2] We disagree and hold that the

[1] TEX. TAX CODE § 32.06.

[2] 288 S.W.3d 503 (Tex. App.–Amarillo 2009).

statutory conditions were met. We reverse the judgment of the court of appeals and remand to the trial court.

I

Respondents Kody and Janet Kothmann have a vendors' lien on each of four tracts of land. Each lien is secured by a duly recorded deed of trust. At the purchaser's request, petitioner Genesis Tax Loan Services, Inc. paid one year's ad valorem taxes on the tracts and claims a tax lien on each tract by transfer from the county tax collector.

Each transfer is on a one-page form with two parts. The top part is entitled "Affidavit Authorizing Transfer of Tax Lien", signed by the owner, authorizing Genesis's payment of the taxes and the tax collector's transfer of the tax lien to Genesis. The bottom part is entitled "Tax Collector's Certification/Transfer of Tax Lien", signed on behalf of the tax collector, certifying Genesis's payment of the taxes, and transferring the tax lien to Genesis. Both the authorization and the certification bear notarized acknowledgments, including notarial seals. The certification did not bear the tax collector's seal of office because the office did not have one. Receipts issued to Genesis by the tax collector less than a month after the certifications were executed mistakenly showed the Kothmanns to be the owners of the tracts. The tax collector did not keep a record of the transfers.

The original tax lien transfers were never recorded. Instead, Genesis recorded a photocopy of each, attached to an affidavit by Genesis's president, stating that the original had been mailed to the county clerk but had been lost either in the mail or at the courthouse. Each affidavit stated that the attached lien transfer was a true and correct copy of the original.

Neither the Kothmanns nor Genesis was paid. The Kothmanns foreclosed their liens and purchased the tracts at the sale. When Genesis attempted to foreclose its liens, the Kothmanns sued to have their liens declared superior to Genesis's. Genesis answered with a general denial. At trial to the bench, the Kothmanns established the validity of their liens and objected to Genesis's offer of evidence of the superiority of its liens on the ground that it had not pleaded an affirmative defense. The trial court deferred its ruling and heard Genesis's evidence. Eventually, the court overruled the Kothmanns' objection and rendered judgment for Genesis.

The court of appeals reversed, holding that the Kothmanns' objection should have been sustained, and alternatively, that Genesis's liens are not enforceable under section 32.06(d) of the Texas Tax Code.[3] Regarding the objection, the court reasoned that to establish the superiority of a lien, one need prove only that it was senior.[4] The burden is then on a competing claimant, according to the court, to prove that its lien is superior for some reason other than seniority, such as, that it is a tax lien.[5] Because the competing claimant has that burden, the court continued, the issue is an affirmative defense and must be pleaded.[6] Since Genesis pleaded only a general denial, the court concluded, the Kothmanns' objection should have been sustained.[7] Regarding section 32.06(d), the court held that for a tax lien to be enforceable, the original, not a photocopy, of the taxpayer's

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[3] *Id.*

[4] *Id.* at 510.

[5] *Id.* at 511.

[6] *Id.*

[7] *Id.* at 512.

authorization and the tax collector's transfer must be recorded.[8] If Genesis's original documents were lost, the court explained, its remedies were to obtain replacement originals or to prove up the contents of the lost documents in a judicial proceeding under Chapter 19 of the Texas Civil Practice and Remedies Code.[9]

We granted Genesis's petition for review.[10] The Kothmanns argue that the court of appeals was correct in both its holdings and in addition, that Genesis's lien was not enforceable because section 32.06(b)'s requirements for transfer were not met. We address all these arguments in turn.

II

The court of appeals' holding that a defendant must raise by affirmative defense a claim of lien superiority that competes with the plaintiff's claim is flawed in its premise: that all the plaintiff must do to establish a *prima facie* case is prove that its lien is senior. Seniority does not always establish superiority. A tax lien on real property, for example, is made superior by statute to many (though not all) other liens on the property irrespective of when the liens were perfected.[11] The

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[8] 288 S.W.3d at 514.

[9] *Id*.

[10] 53 Tex. Sup. Ct. J. 1023 (Aug. 20, 2010).

[11] TEX. TAX CODE § 32.05(b) ("Except as provided by Subsection (c)(1), a tax lien provided by this chapter takes priority over: (1) the claim of any creditor of a person whose property is encumbered by the lien; (2) the claim of any holder of a lien on property encumbered by the tax lien, including any lien held by a property owners' association, homeowners' association, condominium unit owners' association, or council of owners of a condominium regime under a restrictive covenant, condominium declaration, master deed, or other similar instrument that secures regular or special maintenance assessments, fees, dues, interest, fines, costs, attorney's fees, or other monetary charges against the property; and (3) any right of remainder, right or possibility of reverter, or other future interest in, or encumbrance against, the property, whether vested or contingent."); *id*. § 32.05(c) ("A tax lien provided by this chapter is inferior to: (1) a claim for any survivor's allowance, funeral expenses, or expenses of the last illness of a decedent made against the estate of a decedent as provided by law; (2) except as provided by Subsection (b)(2), a recorded restrictive covenant that runs with the land and was recorded before January 1 of the year the tax lien arose; or (3) a valid easement of record recorded

Kothmanns' proof of *when* their liens were created and recorded was insufficient to establish the superiority of their liens. Genesis claimed tax liens, as the Kothmanns pleaded. Given the statutory priority of tax liens, the Kothmanns were required to prove not only the validity of their own liens but also the invalidity of Genesis's tax liens in order to obtain judgment.

Even when the only issue in a lien-priority case is seniority, a plaintiff must do more to prevail than simply offer evidence of the date of its own lien and rest. The plaintiff must also prove that the defendant's competing lien is junior. The general denial of the plaintiff's claim puts the entire matter at issue. Pleading an affirmative defense is required to raise a matter of avoidance,[12] "an independent reason why the plaintiff should not recover."[13] The defense that a plaintiff's lien is not superior as alleged is not an independent reason to deny recovery; it goes to the heart of the plaintiff's case.

Thus, the trial court did not err in overruling the Kothmanns' objection to Genesis's evidence.

III

A tax collector may transfer a tax lien under the conditions specified by section 32.06 of the Texas Tax Code. The parties agree that this case is governed by the version of this statute in effect

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before January 1 of the year the tax lien arose.").

[12] TEX. R. CIV. P. 94.

[13] *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 (Tex. 1991).

in 2004, when Genesis recorded its affidavits and attached lien transfers.[14] The relevant provisions are as follows:

> (a) A person may authorize another person to pay the taxes imposed by a taxing unit on the person's real property by filing with the collector for the unit a sworn document stating the authorization, naming the other person authorized to pay the taxes, and describing the property.
>
> (b) If a person authorized to pay another's taxes pursuant to Subsection (a) pays the taxes and any penalties and interest imposed, the collector shall issue a tax receipt to the person paying the taxes. In addition, the collector shall certify on the sworn document that payment of the taxes and any penalties and interest on the described property has been made by a person other than the person liable for the taxes when imposed and that the taxing unit's tax lien is transferred to the person paying the taxes. The collector shall attach to the document the collector's seal of office and deliver the document to the person paying the taxes. The collector shall keep a record of all tax liens transferred as provided by this section.
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> * * *
>
> (d) To be enforceable, a tax lien transferred as provided by this section must be recorded in the deed records of each county in which the property encumbered by the lien is located.[15]

We agree with the court of appeals that section 32.06(d) plainly states that a tax lien is enforceable only if transferred in accordance with the section's requirements. The Kothmanns argue that Genesis failed to meet those requirements in four respects.

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[14] *See* Act of May 25, 2007, 80th Leg., R.S., ch. 1329, § 4(a), 2007 Tex. Gen. Laws 4484, 4487 ("The change in law made by this Act applies only to the transfer of an ad valorem tax lien that occurs on or after the effective date of this Act. A transfer of an ad valorem tax lien that occurs before the effective date of this Act is covered by the law in effect at the time the transfer occurred, and the former law is continued in effect for that purpose.").

[15] Act of May 7, 1995, 74th Leg., R.S., ch. 131, § 1, 1995 Tex. Gen. Laws 957, 957-958, *amended by* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 13, 2005 Tex. Gen. Laws 3717, 3720 (rewriting subsections (a), (b), and (d)); Act of May 22, 2007, 80th Leg., R.S., ch. 1220, § 3, Tex. Gen. Laws 4111, 4116 (making minor numbering amendments); Act of May 25, 2007, 80th Leg., R.S., ch. 1329, § 1, 2007 Tex. Gen. Laws 4484, 4484-4485 (rewriting subsections (a), (b), and (d)) (current version at TEX. TAX CODE § 32.06). All references to section 32.06 of the Tax Code refer to the Code as it existed in 2004.

First: Although section 32.06 does not expressly require that only original documents be recorded, the Kothmanns argue, and the court of appeals held, that this is necessary to prevent fraud. But this concern is fully met by allowing a challenge to the authenticity of verified photocopies. Thus, for example, Rule 1003 of the Texas Rules of Evidence provides that "[a] duplicate is admissible to the same extent as an original unless (1) a question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."[16] While this rule applies in court proceedings, not to recordations, its principle is instructive. Decades since the invention of xerography and the manufacture of the photocopier, the only legitimate basis for refusing to consider a photocopy as conclusive evidence of an original document is that reason exists to think the photocopy is not an exact duplicate, because of alteration or in some other way. We decline to impose a prerequisite to the enforceability of a tax lien, a creature of statute, for which there is no basis in the statute or, for that matter, in common sense.

The court of appeals suggested that it is unnecessary to allow a verified copy to be recorded in place of an original when the contents of the original can be proved in a proceeding under Chapter 19 of the Texas Civil Practice and Remedies Code,[17] or the original can simply be replaced by applying to the tax collector. Both are viable alternatives. The latter obviously is. And Chapter 19 allows a person to "supply a lost, destroyed, or removed record by parol proof of the record's

[16] TEX. R. EVID. 1003.

[17] TEX. CIV. PRAC. & REM. CODE §§ 19.001-.009

contents"[18] and obtain a court order to serve as a replacement.[19] But neither alternative is exclusive. Chapter 19 is best used when there is no copy of the original and its contents must be established by other evidence, such as testimony. Though it could be used in the present circumstances, it necessarily involves the delay and expense of a court proceeding that could make it undesirable. Prudently, Chapter 19 expressly states that its "method . . . for supplying a record is in addition to other methods provided by law."[20] The existence of two different, non-exclusive means for replacing originals reinforces the general principle of Rule 1003.[21]

We therefore hold that Genesis's tax liens are not unenforceable because verified copies were recorded in lieu of originals.[22]

Second: The Kothmanns argue that Genesis's lien transfers are unenforceable because they do not meet section 32.06(b)'s requirement that "[t]he collector shall attach to the document the

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[18] *Id*. § 19.002.

[19] *Id*. § 19.006 ("The order supplying the record: (1) stands in the place of the original record; (2) has the same effect as the original record; (3) if recorded, may be used as evidence in a court of the state as though it were the original record; and (4) carries the same rights as the original record, including: (A) preserving liens from the date of the original record; and (B) giving parties the right to issue execution under the order as under the original record.").

[20] *Id*. § 19.007.

[21] *See* Letter Brief of Amicus Curiae Texas Land Title Association in Support of Petition at 1 ("It has been a common practice since photocopies were commonly in use to forward a photocopy of the document, together with an original authenticity affidavit, for recording in the deed records. In this manner, notice of the document is provided, thereby protecting the title of the grantee or other persons, without requiring a re-execution or a lengthy and expensive prove-up process through the courts. In this manner, the same notice is achieved as would have been achieved by recording the original had the county clerk not lost the document, and the appropriate and intended title is protected.").

[22] Section 12.0011(b) of the Texas Property Code, enacted since the events of this case, expressly authorizes the practice Genesis followed: "A paper document concerning real or personal property may not be recorded or serve as notice of the paper document unless: (1) the paper document contains an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law; or (2) the paper document is attached as an exhibit to a paper affidavit or other document that has an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law."

collector's seal of office".[23] The evidence establishes that the tax collector had no seal of office at the time and did not acquire one until a year later. Instead, the tax collector's certification was acknowledged before a notary, whose seal is affixed. Generally, "[a]n instrument concerning real or personal property may be recorded if it has been acknowledged",[24] as the certifications here were.[25]

If Genesis's lien transfers are unenforceable, so is every lien transfer issued by the tax collector before he obtained a seal. This is not a reasonable construction of the statute. In effect, the tax collector here made the required certification before a notary, sealed with a notarial seal, in lieu of a seal of his own. We hold that this procedure complied with section 32.06(d).

Third: The Kothmanns argue that tax liens were not "transferred [to Genesis] as provided by [section 32.06]"[26] because the tax collector did not "keep a record of all tax liens transferred", as required by section 32.06(b).[27] The statutory transfer process involves an authorization by the property owner and a certification by the tax collector. These sworn documents must be recorded for the lien transfer to be enforceable. The record-keeping requirement is entirely separate. If the Kothmanns were correct, no duly recorded tax lien transfer could be taken at face value. Its validity

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[23] TEX. TAX CODE § 32.06(b) (2004 version).

[24] TEX. PROP. CODE § 12.001(a).

[25] TEX. CIV. PRAC. & REM. CODE § 121.004 ("(a) To acknowledge a written instrument for recording, the grantor or person who executed the instrument must appear before an officer and must state that he executed the instrument for the purposes and consideration expressed in it. (b) The officer shall: (1) make a certificate of the acknowledgment; (2) sign the certificate; and (3) seal the certificate with the seal of office.").

[26] TEX. TAX CODE § 32.06(d) (2004 version).

[27] *Id*. § 32.06(b) (2004 version).

could only be established by ascertaining whether the tax collector kept proper records at the time. This is not a reasonable construction of the statute. We hold that the tax collector's record-keeping is irrelevant to the enforceability of Genesis's liens.

Fourth: The Kothmanns argue that tax liens were improperly transferred to Genesis because the tax collector did not issue the receipts required by section 32.06(b) until a month after the certifications were made, the receipts incorrectly identified the Kothmanns as the owners of the property, and one of Genesis's checks bounced. The statute imposes no deadline on issuance of the receipts and no requirement regarding their contents. The Kothmanns do not deny that Genesis paid the taxes due. Moreover, issuance of receipts cannot reasonably be regarded as any more a part of the transfer process than the tax collector's record-keeping. We hold that the receipts, too, are irrelevant to the enforceability of Genesis's liens.

* * *

For these reasons, we conclude that the judgment of the court of appeals must be reversed. We remand the case to the trial court.

Nathan L. Hecht
Justice

Opinion delivered: May 13, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0830

ULYSSES L. ROSEMOND, PETITIONER,

v.

MAHA KHALIFA AL-LAHIQ, M.D., RESPONDENT

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

PER CURIAM

In the underlying suit, a physician filed three motions to dismiss, each alleging the plaintiff's failure to comply with the expert report requirements of section 74.351 of the Texas Civil Practice and Remedies Code. Two of the motions were premised on timeliness objections and one on adequacy . The trial court dismissed the plaintiff's claims by signing an order attached to the motion attacking the report's adequacy. The court of appeals affirmed, implying a finding that the report was not timely served as required by section 74.351(a). We conclude the court of appeals erred when it implied such a finding because (1) that finding was not necessary to support the judgment, and (2) the trial court implicitly overruled the motions asserting untimely service. We accordingly reverse the court of appeals' judgment and remand the case to that court to review the remaining basis for dismissal: the report's adequacy under section 74.351(l), (r)(6).

On October 11, 2007, Ulysses Rosemond sued Memorial Hermann Hospital System (the Hospital), Dr. Maha Khalifa Al-Lahiq, and other entities, alleging that their failure to provide physical therapy while he was immobilized and subject to prolonged bed rest caused him to develop severe contractures.[1] Rosemond's counsel faxed an expert report and curriculum vitae to attorneys for both the Hospital and Dr. Al-Lahiq on February 6, 2008, two days before the 120-day statutory deadline required for health care liability claims. TEX. CIV. PRAC. & REM. CODE § 74.351(a). Rosemond's counsel experienced technical difficulties faxing the report by computer, and ultimately a paralegal faxed the report using the fax machine of an engineering company that shared office space with the law firm. The fax transmissions yielded a confirmation sheet for each indicating that the transmission took about four minutes and that the result was "OK." The Hospital, which was later non-suited, apparently admits it received the fax containing the expert report. Dr. Al-Lahiq's law firm maintains it did not.

After the 120-day deadline for serving the expert report had passed, Dr. Al-Lahiq filed three motions to dismiss. Two of the motions asserted failure to timely serve an expert report as the ground for dismissal. The other was based on an objection to the adequacy of the expert report and requested dismissal on that basis.

The first motion, filed on February 22, 2008, was styled "Motion for Dismissal Pursuant to TEX. CIV. PRAC. & REM. CODE § 74.351." It asserted that as of February 8, 2008 (the 120-day

[1] As defined in Rosemond's petition, contractures are "the chronic loss of joint motion due to structural changes in non-bony tissue." They apparently occur when a bedridden patient is not given adequate physical therapy over a prolonged period of time. Rosemond claims that he has lost the use of his hands and legs as a result, and that surgery cannot repair his injuries.

deadline), Dr. Al-Lahiq had not been served with an expert report. The motion accordingly requested dismissal with prejudice for failure to timely serve an expert report. *See id.* § 74.351(b).

The second, an "Objection to the Sufficiency of Plaintiff's Expert Report and Motion to Dismiss Made Subject to Defendant's Motion for Dismissal Pursuant to TEX. CIV. PRAC. & REM. CODE § 74.351," was filed February 26, 2008. The motion was specifically subject to the prior motion asserting lack of timely service, not only in its title, but also in a footnote stating: "Defendant did not receive this report until after the 120-day deadline imposed by CPRC 74.351 and, as such, files this Objection and Motion *subject to* a previously filed Motion to Dismiss for Plaintiff's failure to adhere to that deadline." (Emphasis added.) This second motion attacked the adequacy of the report and the expert's qualifications, and requested dismissal with prejudice. *Id.* § 74.351(l), (r)(6).

Dr. Al-Lahiq filed her third and final motion on March 3, 2008, styled "Supplemental Motion for Dismissal Pursuant to TEX. CIV. PRAC. & REM. CODE § 74.351." In it, she supplemented her first motion by preemptively denying Rosemond's assertion that an expert report was faxed to Dr. Al-Lahiq's counsel on February 6, 2008, two days before the deadline. In support, the motion included an affidavit by defense counsel's information technology administrator, averring that a search of the law firm's databases and records revealed no trace of such a fax.[2] On that basis, the Supplemental

[2] This was the first salvo in a fact dispute between the parties over whether the fax was ever received. Rosemond ultimately produced (1) an affidavit from his counsel, and (2) the aforementioned fax confirmation sheet stating that the transmission status was "OK," as evidence showing actual receipt by defense counsel. He also requested discovery of defense counsel's fax machine and an evidentiary hearing. Rosemond further requested a thirty-day extension to cure any deficiencies in the report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c). As discussed below, we conclude the court of appeals incorrectly inferred that the trial court resolved this factual dispute in favor of Dr. Al-Lahiq and do not review the propriety of the trial court's determination.

Motion again urged the trial court to dismiss with prejudice for failure to timely serve an expert report on Dr. Al-Lahiq, as required by section 74.351(b).

The trial court dismissed Rosemond's case with prejudice by signing the draft order attached to the second of the three motions, which concerned the adequacy of the expert report. No findings of fact or conclusions of law were requested or filed. In a memorandum opinion, the court of appeals affirmed the dismissal, concluding that the trial court "did not abuse its discretion in dismissing the claims based on a determination that the expert report was not timely filed." __ S.W.3d __.

Generally, an appellate court reviews a trial court's dismissal of a health care liability claim under an abuse of discretion standard of review. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001); *see also Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 665 (Tex. 2010). In the absence of findings of fact or conclusions of law, a trial court's judgment will be upheld on any theory supported by the record, *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978), and any necessary findings of fact will be implied, *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992).

In affirming the trial court's dismissal, the court of appeals reasoned that "[b]ecause the trial court granted Dr. Al-Lahiq's motion to dismiss, we must infer that the trial court resolved any factual dispute regarding timely service of the expert report . . . in favor of Dr. Al-Lahiq." __ S.W.3d __. Thus, the court of appeals did not address the adequacy of the expert report. We conclude, however, that the court of appeals incorrectly implied that the trial court resolved the factual dispute regarding timely service of the expert report in favor of Dr. Al-Lahiq.

Because Dr. Al-Lahiq submitted a draft order with each of her three motions, the trial court had three different draft orders to choose from, each asserting its own ground for dismissal. Of those three, the trial court chose to sign the second draft order, which was attached to a motion attacking the adequacy of Rosemond's expert report at length, but which included no argument as to untimely service. Indeed, the trial court's order dismissing Rosemond's claim is entitled "Order Sustaining Defendant['s] . . . Objection to the Sufficiency of Plaintiff's Expert Report." Our rules of civil procedure require that motions to a district or county court set forth the relief or order sought. TEX. R. CIV. P. 21. By signing the order attached to the second motion, the trial court specifically granted the relief sought in that motion—sustaining Dr. Al-Lahiq's objection to the adequacy of Rosemond's expert report, and dismissing Rosemond's claims with prejudice accordingly. *See* TEX. R. CIV. P. 301 ("The judgment of the court shall conform to the pleadings . . . ."). The trial court did not sign the orders attached to the motions concerning timeliness.

Further, before the trial court could rule on the report's adequacy, it had to conclude that the report was timely served. Otherwise, the trial court's only option was to dismiss the claim for failure to timely serve an expert report. Hence, we conclude the trial court implicitly overruled the first motion to dismiss. This is made plain by the title of the second motion and footnote therein stating that dismissal based on inadequacy of the expert report is only sought *subject to* the prior motion

seeking dismissal for untimely service.[3] In other words, Dr. Al-Lahiq only sought relief under her second motion if the trial court declined to dismiss based on timeliness under the first.

The issue of timeliness is a threshold issue in the expert report framework the Legislature enacted. In order to rule on the merits of the report's adequacy, and have the authority under section 74.351 to grant an extension, a trial court must first determine whether the report was timely served. *See Ogletree v. Matthews*, 262 S.W.3d 316, 319–20 (Tex. 2007) (explaining that if no report is served within section 74.351's "statute-of-limitations-type" 120-day deadline, the trial court has no discretion to deny motions to dismiss or to grant extensions). It follows that Dr. Al-Lahiq's objection to the adequacy of Rosemond's report would be a moot point if the court had found that the report was not timely served.

Finally, on appellate review, we imply only those findings of fact that are *necessary* to support the judgment. *See State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996) ("Conclusions of law which are *necessary*, but not made, are deemed in support of the judgment." (emphasis added)); *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989) (per curiam) ("[I]t is implied that the trial court made all the *necessary* findings to support its judgment." (emphasis added)). Similarly, the trial court's order is upheld not on *any* theory, but on any theory "supported by the record." *Davis*, 571 S.W.2d at 862. Here, the trial court's order granted a motion based on adequacy of the expert report, not

[3] As an aside, it was *ex ante* entirely logical for Dr. Al-Lahiq to have made her second motion subject to her first. As this Court explained previously, the Legislature has provided only two avenues for interlocutory review under section 74.351. *Lewis v. Funderburk*, 253 S.W.3d 204, 207 (Tex. 2008). These are (1) when a motion to dismiss for lack of timely service is *denied*, and (2) when relief is *granted* on a motion to dismiss challenging the adequacy of the report. *Id.* Obviously, only the first is an avenue of appeal for health care liability *defendants* like Dr. Al-Lahiq. Interlocutory appeal is not available when the defendant's challenge to the report's adequacy is denied. *In re Watkins*, 279 S.W.3d 633, 634 (Tex. 2009) (orig. proceeding). Therefore, an able defense counsel will prefer to first obtain a ruling on timeliness in order to have the option to undertake an interlocutory appeal, should the motion be denied.

failure to timely serve the report. The court of appeals erred by effectively holding that the trial court found *all* facts and conclusions favorable to the prevailing party rather than implying only those facts and conclusions *necessary* to support the judgment. As discussed above, a failure to timely serve was not a necessary fact to support a dismissal order on adequacy grounds.

Because the record demonstrates the trial court did not implicitly rule in favor of Dr. Al-Lahiq on the timeliness issue, the remaining issue—which the trial court resolved in favor of Dr. Al-Lahiq and which the court of appeals did not reach—is the adequacy of the expert report. As a result, we remand this case to the court of appeals for consideration of whether the trial court abused its discretion in concluding the expert report was inadequate.

For the foregoing reasons, we grant the petition for review and, without hearing oral argument, TEX. R. APP. P. 59.1, reverse the judgment of the court of appeals and remand the case to that court for (1) consideration of the adequacy of Rosemond's expert report, and (2) review of the trial court's order dismissing Rosemond's health care liability claim in light of that inquiry.

OPINION DELIVERED: January 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0834

CITY OF ELSA, TEXAS, PETITIONER,

v.

JOEL HOMER GONZALEZ, RESPONDENT

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

PER CURIAM

Joel Homer Gonzalez sued the City of Elsa, alleging he was unlawfully terminated from his position as city manager in violation of the Texas Whistleblower Act. *See* TEX. GOV'T CODE § 554.002. The trial court denied the City's plea to the jurisdiction and the court of appeals affirmed. The court of appeals determined that Gonzalez in good faith reported violations of law by both the mayor and the city council to appropriate law enforcement authorities sufficient to come within the Whistleblower Act's waiver of governmental immunity. We disagree. We reverse the court of appeals' judgment and dismiss the cause for lack of jurisdiction.

In early 2003, Gonzalez was Elsa's city manager and Tony Barco was its mayor. After Barco was appointed assistant director of the Hidalgo County Urban County Program (HCUCP), the city attorney issued an opinion letter addressing conflicts of interest that might exist if Barco served in the positions concurrently. In the opinion letter the city attorney stated that under the common-law

doctrine of incompatibility and under the Texas Constitution, Barco *ipso facto* resigned from and relinquished his position as mayor upon assuming the HCUCP position and that Barco's *ipso facto* resignation mooted any potential conflicts of interest. Based on the city attorney's letter, the city council voted to accept Barco's implied resignation as mayor.

Following the city council meeting, Gonzalez was directed by one of the council members to notify various county authorities and the public of the results of the meeting. Pursuant to those instructions, Gonzalez delivered a copy of the city attorney's letter to the Hidalgo County judge, the director of the HCUCP, the Hidalgo County district attorney, and a local newspaper. He informed each entity that the city council had accepted the mayor's resignation.

Notice was posted on July 14, 2003 for a meeting to be held on July 17, at which Gonzalez's employment status was the only item to be considered. In preparing the notice for the meeting, the city secretary typed "TUESDAY THE 17th DAY OF JULY 2003" on the meeting notice instead of "THURSDAY THE 17th DAY OF JULY 2003." Two days before the meeting, the word "Tuesday" was crossed out on the posted notice and the word "Thursday" was added; the date remained unchanged.

At the July 17 meeting, Gonzalez verbally objected to the meeting and argued it would be illegal because the Texas Open Meetings Act requires seventy-two hours notice of a meeting. The record before us does not make clear at what point in the meeting Gonzalez made his objection, but in any event the city council held the meeting and terminated Gonzalez's employment. The reason given was "No confidence to administer the City as a result of the City's financial conditions."

Gonzalez sued the City, alleging that it had violated the Open Meetings Act, the Texas Public Information Act, and the Texas Whistleblower Act. He sought damages, injunctive relief, and attorney's fees. The City filed a plea to the jurisdiction, asserting the trial court lacked jurisdiction over all of Gonzalez's claims. The trial court held a hearing on the plea, then denied it. Gonzalez later filed a motion for summary judgment that the trial court granted. The trial court rendered final judgment in favor of Gonzalez for back pay damages and attorney's fees.

The City appealed. One of its arguments was that Gonzalez failed to establish that the trial court had jurisdiction. The court of appeals held the trial court had jurisdiction over Gonzalez's Whistleblower Act claim[1] and affirmed. 292 S.W.3d 221. In this Court, the City continues to assert the trial court lacked jurisdiction over Gonzalez's Whistleblower Act claim because he failed to allege that he made a good-faith report of a violation of law by another public employee or governmental entity to an appropriate law enforcement authority. *See* TEX. GOV'T CODE §§ 554.001-.010.

The Whistleblower Act provides that "a state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." TEX. GOV'T CODE § 554.002(a). If the suspension, termination, or adverse personnel action occurs within ninety days of the employee's

[1] Gonzalez asserts in his brief on the merits that the trial court also awarded him damages under the Texas Open Meetings Act. However, the court of appeals concluded that the trial court only awarded damages under the Whistleblower Act and noted that Gonzalez did not cross-appeal or otherwise complain of the trial court's failure to award other relief. 292 S.W.3d 221, 225 n.2. Gonzalez has not sought review of the court of appeals' determination, so we address only the issue presented by the City.

report, then a rebuttable presumption arises that the employer's action was because the employee made the report. *Id.* at § 554.004(a). Governmental immunity is waived for violations of the Whistleblower Act, so the elements of section 554.002(a) can be considered in determining both jurisdiction and liability. *State v. Lueck*, 290 S.W.3d 876, 883 (Tex. 2009); *see* TEX. GOV'T CODE § 554.0035.

Whether a court has jurisdiction is a question of law that is reviewed *de novo*. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). When reviewing a trial court's ruling on a challenge to its jurisdiction, we consider the plaintiff's pleadings and factual assertions, as well as any evidence in the record that is relevant to the jurisdictional issue. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). When considering the pleadings, we construe them liberally in favor of the plaintiffs, look to the pleader's intent, and determine if the pleader has alleged facts affirmatively demonstrating the court's jurisdiction. *Miranda*, 133 S.W.3d at 226. The Whistleblower Act waives the City's immunity from suit for Gonzalez's claim if Gonzalez alleged sufficient facts to establish that he was a public employee and he in good-faith reported a violation of law by the City or another public employee to an appropriate law enforcement authority. *See Tex. Gov't Code* § 554.002; *Lueck*, 290 S.W.3d at 882-83 (Tex. 2009).

The relevant factual allegations in Gonzalez's petition are that he was serving as city manager when he

> in good faith reported to appropriate law enforcement authorities including the Elsa City Commission, Hidalgo County Judge, [HCUCP], Texas Municipal League, an Assistant District Attorney, and the District Attorney activities that he in good faith believed were violations of the laws, ordinances, and other rules by the governmental

> entity and its officials. [Gonzalez] reported illegal acts of the mayor, and other acts of the City Council that were in violation of the Texas Open Meetings Act.

These conclusory pleadings do not provide sufficient jurisdictional facts to determine if the trial court had jurisdiction. *See Lueck*, 290 S.W.3d at 882, 884 (holding that the plaintiff's pleadings cannot stand on mere reference to the Whistleblower Act and/or bare allegations without giving jurisdictional facts sufficient to establish the section 554.002 elements).

Even though Gonzalez's pleadings do not sufficiently allege jurisdictional facts, before his claim is dismissed for want of jurisdiction we will look to the arguments and evidence the parties presented relevant to the existence of jurisdictional facts. *See Blue*, 34 S.W.3d at 555 (noting that a court deciding a plea to the jurisdiction must look at the evidence when necessary to resolve jurisdictional issues). If the evidence creates a fact question regarding the jurisdictional issue, then the trial court was correct in denying the plea to the jurisdiction. *Miranda*, 133 S.W.3d at 227-28. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, then the trial court should rule on the City's plea to the jurisdiction as a matter of law. *Id.* at 228.

A report of a violation of law under the Whistleblower Act must be in "good faith." TEX. GOV'T CODE § 554.002. This means that Gonzalez must have believed he was reporting conduct that constituted a violation of law and his belief must have been reasonable based on his training and experience. *See Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 320 (Tex. 2002). In his brief, Gonzalez claims he reported a violation of law on two separate occasions. The first was when he delivered the city attorney's letter to the four entities and complained to them that the mayor was violating the law by continuing to act as mayor while holding an incompatible job with HCUCP.

The second was when he objected to the city council meeting because proper notice had not been given. We will address each purported report in turn.

In regard to delivery of the city attorney's letter, Gonzalez pled that he reported "illegal acts" of the mayor, but he did not specify what those illegal acts were. In his brief he asserts that the illegal action he believed he was reporting was the city attorney's conclusion that the Mayor had violated the law by accepting a position with HCUCP while continuing to serve as mayor. However, Gonzalez's deposition testimony and the other evidence conflicts with his appellate assertions. During his deposition, Gonzalez repeatedly testified about the city council's actions, not the mayor's. He specified what he believed he was reporting when he delivered the city attorney's letter to the entities: "[I] was reporting what the council -- the action that the council took based on the attorney's opinion. And if the attorney is saying that the mayor -- that they had the right to accept the mayor's resignation then I'm assuming that's in the law as his opinion stated." He testified later in his deposition that the activities he reported were those he had been instructed to report: the actions of the city council. Gonzalez did not at any point testify that he believed he was reporting the mayor had acted illegally. Nor is there other evidence he believed he was reporting that the mayor acted illegally.

In support of Gonzalez's claim that he reported a violation of law by reporting the mayor held incompatible positions, as opposed to reporting the City Council's decision to accept the mayor's resignation, he points to an affidavit submitted as an exhibit to his motion for summary judgment. But in the affidavit Gonzalez stated, consistent with his deposition testimony, "I believe that my employment was terminated as City Manager because I made reports of what I believed were illegal

acts *by the City Council*." (emphasis added). In the affidavit Gonzalez averred that the city attorney issued an opinion the mayor was "in violation of Texas law" and Gonzalez "proceeded to report the violations." But Gonzalez did not explain what those violations were and the city attorney's letter, which was also attached to the motion for summary judgment, clearly does not contain an allegation or opinion that the mayor violated any laws by accepting the position with the HCUCP. Rather, the city attorney concluded in the letter that the common-law doctrine of incompatibility and the Texas Constitution effected Barco's *ipso facto* resignation and relinquishment of the mayor's office upon accepting the HCUCP position, so any conflict of interest concern was moot. The only specific reference Gonzalez made to a violation of law by the mayor based on the city attorney's letter was a statement during his deposition that "if [Barco] *remained* as mayor I would assume it would be in violation of that state statute or what was involved." (emphasis added).

Gonzalez's testimony and affidavit reflect that when he circulated the city attorney's letter as he had been instructed to do immediately after the city council voted to accept Barco's implied resignation, Gonzalez did not believe the mayor had violated any laws.[2] Assuming that when he made the reports Gonzalez believed Barco might violate laws in the future if he remained as mayor, it does not follow that he made a good-faith report of an existing or past violation of law. *See Lueck*, 290 S.W.3d at 885 (noting that "prediction of possible regulatory non-compliance" in the future does not equate to reporting a violation of law).

[2] We do not address the issue of whether the persons and entities to whom Gonzalez reported when he delivered the city attorney's letter were appropriate law enforcement authorities under the Whistleblower Act or whether he had a good faith belief they were.

We conclude the record establishes that by distributing the city attorney's letter and reporting the city council's acceptance of Barco's resignation, Gonzalez did not in good faith report a violation of law.

We next address Gonzalez's claim that he was terminated for reporting the city council's alleged violation of the Open Meetings Act.[3] He bases this claim on his informing the council that its meeting violated the Texas Open Meetings Act because the incorrect day of the week for the meeting had appeared on the initial meeting notice.

One element of a Whistleblower Act claim is that a claimant must have reported a violation of law to an "appropriate law enforcement authority."[4] TEX. GOV'T CODE § 554.002(a). An entity is an appropriate law enforcement authority if it is "part of a state or local governmental entity or of the federal government that the employee in good-faith believes is authorized to (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law." *Id.* § 554.002(b); *see Needham*, 82 S.W.3d at 319 (holding that the entity must have the authority to regulate, enforce, investigate, or prosecute the particular law that the employee reported had been violated; general authority is not enough).

[3] The parties dispute whether the city council violated the Open Meetings Act. Because we conclude that Gonzalez's report was not made to an appropriate law enforcement authority, we need not address the issue. We note, however, that an actual violation of law is not required by the Whistleblower Act. The Act requires only a good-faith belief that a violation of law has occurred. *See* TEX. GOV'T CODE § 554.002(a).

[4] In its plea to the jurisdiction, the City asserted that Gonzalez did not report a violation of law to an "appropriate law enforcement authority." Although the parties do not address the issue in their briefs, we must consider it sua sponte because it is a jurisdictional matter. *See Lueck*, 290 S.W.3d at 883.

The Open Meetings Act provides civil remedies for violations of its meeting-notice requirements. *See* TEX. GOV'T CODE §§ 551.141-.142.[5] Any action taken by a governmental body in violation of the Open Meetings Act is voidable, and "an interested person . . . may bring an action by mandamus or injunction to stop, prevent, or reverse a violation of threatened violation." *Id.* at §§ 551.141-.142(a). The city council's being required to comply with the Open Meetings Act does not equate to its having authority to "regulate under or enforce" those provisions as to itself. *See id.* § 554.002(b)(1).

In the court of appeals, Gonzalez argued that the city council was an appropriate law enforcement authority because the council members had the authority to postpone or recommend postponement of the meeting until such a date that would comply with the seventy-two hour notice requirement. But the Whistleblower Act's limited definition of a law enforcement authority does not include an entity whose power is not shown to extend beyond its ability to comply with a law by acting or refusing to act or by preventing a violation of law by acting or refusing to act. *See id.* § 554.002(b); *see also Needham*, 82 S.W.3d at 321 (holding that the statutory definition's limiting language does not include an employer's power to regulate and investigate employee's conduct in order to internally discipline employees for an alleged violation); *Duvall v. Tex. Dep't of Human Services*, 82 S.W.3d 474, 481-82 (Tex. App.—Austin 2002, no pet.) (holding that the authority to take remedial action does not equate to the authority to regulate under, enforce, prosecute, or investigate a violation of law).

[5] Criminal penalties are also available for violations of certain Open Meetings Act provisions not at issue in this case. *See* TEX. GOV'T CODE §§ 551.143-.146.

In addition, Gonzalez fails to address or point to evidence that he had a good-faith belief the city council had authority under the Open Meetings Act to regulate, enforce, prosecute, or investigate its own alleged violation of the Act apart from its inherent authority to simply decide not to meet. *See Needham*, 82 S.W.3d at 320-21 (holding that the Whistleblower Act applies if the employee had a good-faith, reasonable belief that the report was made to an appropriate law enforcement authority). In the absence of other evidence, the fact that Gonzalez believed the city council had the authority to postpone the meeting or otherwise prevent an alleged violation of the Open Meetings Act from occurring does not satisfy either the objective or subjective components of a good-faith belief that the city council was an appropriate law enforcement authority as defined in section 554.002(b). *See id.* at 321; *see also Duvall*, 82 S.W.3d at 481-82.

We conclude that Gonzalez did not report his concerns about an Open Meetings Act violation to an appropriate law enforcement authority. Nor did he provide evidence that he had a good-faith belief the city council was an appropriate law enforcement authority. Nor did he report a violation of law when he delivered the city attorney's letter to the four entities. Gonzalez did not satisfy the jurisdictional requirements of the Whistleblower Act as a matter of law. The trial court thus lacked jurisdiction over his claim. We reverse the court of appeals' judgment and dismiss the case.

OPINION DELIVERED: October 1, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0850

LTTS CHARTER SCHOOL, INC. D/B/A UNIVERSAL ACADEMY, PETITIONER,

v.

JIMMY PALASOTA D/B/A PALASOTA PROPERTY COMPANY, RESPONDENT

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

PER CURIAM

We decided last week in *LTTS Charter School, Inc. v. C2 Construction, Inc.* that an open-enrollment charter school is a "governmental unit" as defined in Section 101.001(3)(D) of the Tort Claims Act for purposes of taking an interlocutory appeal from a trial court's denial of its plea to the jurisdiction. __ S.W.3d __ (Tex. 2011) (citing TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D); *id.* § 51.014(a)(8)). This case, involving the same petitioner, poses the same issue.

Jimmy Palasota, d/b/a Palasota Property Company, is a real estate listing agent who sued LTTS Charter School, Inc., d/b/a Universal Academy, claiming he was owed a commission. Universal Academy filed a plea to jurisdiction, asserting immunity from suit. The trial court denied the plea, and Universal Academy brought an interlocutory appeal under Section 51.014(a)(8). The court of appeals held that Universal Academy was not a "governmental unit" and dismissed the appeal for lack of jurisdiction. *See* 293 S.W.3d 830, 838–39. Universal Academy then petitioned this Court for review.

As in *C2 Construction*, we do not decide the underlying issue of whether an open-enrollment charter school possesses immunity from suit. Our focus is narrower: whether Universal Academy

is a "governmental unit" under Section 101.001(3)(D) and thus entitled to bring an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D); *id.* § 51.014(a)(8). In light of our controlling decision in *C2 Construction*, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment dismissing Universal Academy's interlocutory appeal and remand to that court to reach the merits of the school's immunity claim. *See* TEX. R. APP. P. 59.1, 60.2(d).

OPINION DELIVERED: June 24, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0857

JOSE CARRERAS, M.D., P.A., PETITIONER,

v.

CARLOS FRANCISCO MARROQUIN, ET AL., RESPONDENTS

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

Argued October 14, 2010

JUSTICE WAINWRIGHT delivered the opinion of the Court.

In this dispute, parents brought wrongful death claims against a physician who allegedly caused their adult child's death. The parents attempted to toll the statute of limitations by sending pre-suit notice of their health care liability claims to the physician shortly before the statute of limitations ran, but failed to accompany it with an authorization form for the release of their daughter's medical information as required by Chapter 74 of the Texas Civil Practice and Remedies Code. After the parents filed suit, the doctor moved for summary judgment, arguing that the notice alone did not toll the statute of limitations, and the suit therefore was untimely. The trial court denied the motion and entered an agreed order permitting appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d). The court of appeals affirmed the denial. 297 S.W.3d 420, 424 (Tex. App.—Corpus Christi-Edinburg 2009, pet. granted). Because we hold that Chapter 74 requires that an authorization

form accompany the provision of notice for the statute of limitations to be tolled, we reverse and render.

I. FACTUAL AND PROCEDURAL BACKGROUND

Twenty-three-year-old Priscilla Marroquin fell off a bicycle and broke her leg on December 16, 2001. Priscilla was treated at Starr County Hospital in Rio Grande City, Texas, and then transferred to Mission Hospital in Mission, Texas. At Mission Hospital, Dr. Jose Carreras operated on Priscilla's leg on December 18, 2001. Priscilla died on December 20, 2001 due to bilateral pulmonary embolisms, bilateral fat embolisms,[1] respiratory depression, and cardiac arrest allegedly resulting from insufficient post-surgery treatment. Priscilla's parents, Carlos and Cynthia Marroquin (the Marroquins), prosecuted claims for damages resulting from Priscilla's wrongful death.

Health care liability claims are governed by special procedures in Chapter 74 of the Texas Civil Practice and Remedies Code. One of these is pre-suit notice; health care liability plaintiffs must provide written notice of a health care liability claim "by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit . . . ." TEX. CIV. PRAC. & REM. CODE § 74.051(a). Providing notice of a health care liability claim will toll the statute of limitations for seventy-five days, if the notice is "given as provided" in Chapter 74. *Id.* § 74.051(c). Chapter 74 requires that "notice must be accompanied by [an] authorization form for release of protected health information . . . ." *Id.*

[1] A pulmonary embolism is "the closure of the pulmonary artery or one of its branches by an embolus." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 614 (31st ed. 2007). An embolus is "a mass, which may be a blood clot or some other material, that is brought by the bloodstream through the vasculature, lodging in a vessel or bifurcation too small to allow it to pass, obstructing the circulation." *Id.* A fat embolism is "an embolism caused by fat that has entered the circulation, especially after fractures of large bones." *Id.* at 613.

§ 74.051(a). Section 74.052 provides that failure to accompany notice with such an authorization results in an abatement of sixty days from the date an authorization is received. *Id.* § 74.052. The statute prescribes the form and content of the required authorization form. *Id.* § 74.052(c).

On December 17, 2003, two days before the two-year statute of limitations would have expired, the Marroquins provided Dr. Carreras with notice of their health care liability claims. However, the Marroquins did not send an authorization form to Dr. Carreras at that time. On February 26, 2004, the Marroquins filed suit in Hidalgo County. After his counsel refused to accept service on his behalf because of the possibility that the statute of limitations had run, Dr. Carreras was served personally. He filed a plea in abatement and answer objecting to the case proceeding because he had not received the statutorily required authorization and requesting an abatement under section 74.052. The trial court granted Dr. Carreras's plea in abatement on June 2, 2004.

Two weeks later, the Marroquins provided Dr. Carreras with another notice including a list of medical providers and an authorization form that complied with the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), but not with the state requirements under Chapter 74.[2] Counsel for Dr. Carreras sent a letter to the Marroquins on September 7, 2004 advising them that the authorization provided was not in the form specified by section 74.052. The Marroquins responded by providing Dr. Carreras with an authorization form on September 10, 2004 that complied with sections 74.051 and 74.052, approximately nine months after the Marroquins

[2] The HIPAA authorization form was signed by Cynthia Marroquin, Priscilla's mother, and witnessed on November 10, 2003, over a month before the Marroquins gave Dr. Carreras notice of their claims. The Marroquins do not explain why it was not sent to Dr. Carreras with the original notice.

provided their original notice unaccompanied by an authorization and almost seven months after they filed suit.

Dr. Carreras moved for summary judgment, claiming that the Marroquins' claims were barred by the applicable statute of limitations. The Marroquins argued that notice was provided and the suit was filed within the statute of limitations as tolled by Chapter 74, and contended that the uncooperative nature of the defense counsel was responsible for the confusion regarding the authorization form. In a letter ruling, the trial court held that the requirement for notice and an authorization form under sections 74.051 and 74.052 were separate. Because notice had been given, the statute of limitations was tolled, notwithstanding the Marroquins' failure to simultaneously provide the statutorily required authorization. The trial court therefore denied Dr. Carreras's motion for summary judgment.[3] The court issued a written order for interlocutory appeal, and Dr. Carreras appealed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d).[4] The court of appeals affirmed the trial court. 297 S.W.3d at 424. Dr. Carreras filed a petition for review with this Court, which we granted.

II. JURISDICTION AND STANDARD OF REVIEW

Our jurisdiction over interlocutory appeals is limited. One ground for our jurisdiction is for cases in which "one court holds differently from another" on a question of law material to a decision

[3] Prior to the interlocutory appeal at issue here, Dr. Carreras also brought an interlocutory appeal pursuant to Texas Civil Practice and Remedies Code section 51.014(a)(9) challenging the trial court's denial of Dr. Carreras's motion for dismissal and sanctions, in which he claimed the Marroquins' expert report was untimely and insufficient. The court of appeals affirmed the trial court's ruling, and we denied the petition for review. *Carreras v. Marroquin*, No. 13-05-082-CV, 2005 WL 2461744 (Tex. App.—Corpus Christi-Edinburg Oct. 6, 2005, pet. denied).

[4] In 2005, the Legislature amended section 51.014 ("Appeal from Interlocutory Order") to allow a trial court, with agreement of the parties, by written order to certify an interlocutory appeal on a "controlling question of law as to which there is substantial ground for difference of opinion." Act of May 27, 2005, 79th Leg., R.S., ch. 1051 § 1, 2005 Tex. Gen Laws 3512, 3512–13 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(d)).

of the case such that "there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." TEX. GOV'T CODE §§ 22.001(e), .225(e). We have jurisdiction over this petition as there are two courts of appeals opinions that conflict with two other appellate courts' opinions in interpreting the effect of sections 74.051 and 74.052 on tolling of the statute of limitations when a medical authorization form has not been provided as required under the statute. In *Nicholson v. Shinn*, the Houston First Court of Appeals held that "notice is not proper, and the statute of limitations [is] not tolled" when notice is provided without an authorization form or with a deficient authorization form. No. 01-07-00973-CV, 2009 WL 3152111, at *4 (Tex. App.—Houston [1st Dist.] Oct. 1, 2009, no pet.). A similar conclusion was reached by the El Paso Court of Appeals in *Rabatin v. Kidd*, where the court held that both notice and an authorization form were required to toll the statute of limitations. 281 S.W.3d 558, 562 (Tex. App.—El Paso 2008, no pet.). On the other hand, two courts of appeals—including the court of appeals in this case—have held that failing to accompany notice with an authorization form does not prevent tolling of the statute of limitations, but merely allows the defendant to obtain an abatement until sixty days after the authorization form is received. *Hill v. Russell*, 247 S.W.3d 356, 360 (Tex. App.—Austin 2008, no pet.); *Carreras*, 297 S.W.3d at 423–24.

This is an interlocutory appeal certified by the trial court after denial of a motion for summary judgment. We review issues of statutory construction and summary judgments de novo. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

III. LAW AND ANALYSIS

Health care liability claims have a two-year limitations period. TEX. CIV. PRAC. & REM. CODE § 74.251(a). There is no dispute that the Marroquins filed suit more than two years after their causes of action against Dr. Carreras accrued. However, the Civil Practice and Remedies Code provides for tolling of the statute of limitations for a health care liability claim if notice of the claim is "given as provided" in Chapter 74 to the health care provider. *Id.* §§ 74.051, .052. Section 74.051(a) requires that "notice must be accompanied by [an] authorization form for release of protected health information as required under Section 74.052," permitting the health care provider access to the claimant's pertinent medical records. *Id.* § 74.051(a). The question before us is whether notice provided without an authorization form is considered to be given "as provided" in Chapter 74 and effective to toll the statute of limitations, or whether notice given without an authorization form is insufficient to toll limitations.

Statutory interpretation begins by examining the text of the statute. *McIntyre*, 109 S.W.3d at 745. Section 74.051 provides:

> (a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. *The notice must be accompanied by the authorization form for release of protected health information as required under Section 74.052.*
>
> (c) *Notice given as provided in this chapter shall toll the applicable statute of limitations* to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

TEX. CIV. PRAC. & REM. CODE § 74.051 (a), (c) (emphasis added). In addition, section 74.052 provides:

> (a) Notice of a health care claim under Section 74.051 must be accompanied by a medical authorization in the form specified by this section. Failure to provide this authorization along with the notice of health care claim shall abate all further proceedings against the physician or health care provider receiving the notice until 60 days following receipt by the physician or health care provider of the required authorization.
>
> (b) If the authorization required by this section is modified or revoked, the physician or health care provider to whom the authorization has been given shall have the option to abate all further proceedings until 60 days following receipt of a replacement authorization that must comply with the form specified by this section.

Id. § 74.052 (a),(b).

The text of section 74.051(c), which states that notice must be "given as provided," does not provide a facial definition of notice. Both sections 74.051(a) and 74.052(a) specify that the notice "must be accompanied by" an authorization form, and section 74.052(a) provides for abatement if an authorization form is not provided "along with" notice. *Id.* §§ 74.051(a), .052(a). "Must accompany" is a directive that creates a mandatory condition precedent. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001) (holding that the legislated requirement that a person "must" perform an act creates a condition precedent (citing TEX. GOV'T CODE § 311.016(3))). If the authorization does not accompany the notice, then the benefit of the notice—tolling—may not be utilized.

The statutory history of these two sections bolsters our interpretation. The Legislature originally introduced the notice requirement provision in section 74.051 as part of the Medical Liability and Insurance Improvement Act (MLIIA) in 1977. Medical Liability and Insurance

Improvement Act, 65th Leg., R.S., ch. 817, § 4.01, 1977 Tex. Gen. Laws 2039, 2047–48, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. The original language of the statute provided, as it does now, that any person asserting a health care liability claim must give written notice to the health care provider at least sixty days before filing suit. *Id.* However, it did not include the last sentence in the successor provision, section 74.051(a). At that time, written notice of a claim would trigger tolling. The notice requirement remained unchanged until 2003. In House Bill 4 in 2003, the MLIIA was codified in Chapter 74 of the Civil Practice and Remedies Code, and the Legislature added specific language to section 74.051(a) requiring that notice of a health care liability claim "must be accompanied" by a medical authorization form.[5] TEX. CIV. PRAC. & REM. CODE § 74.051(a). Although notice and a medical authorization are treated separately for some purposes, after the 2003 amendment to the text, both are required to constitute notice "as provided" by Chapter 74.

This interpretation also follows from the purpose of the notice provision, which is to encourage negotiations and settlement of disputes prior to suit, thereby reducing litigation costs. *Garcia v. Gomez*, 319 S.W.3d 638, 643 (Tex. 2010). The Legislature intended that "by requiring a potential claimant to authorize the disclosure of otherwise privileged information sixty days before suit is filed, the statute [would] provide[] an opportunity for health care providers to investigate claims and possibly settle those with merit at an early stage." *In re Collins*, 286 S.W.3d 911, 916–17 (Tex. 2009). By encouraging pre-suit negotiation and settlement, the authorization requirement

[5] HIPAA, enacted in 1996, includes a general rule requiring authorization prior to use or disclosure of medical records. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 262, 110 Stat. 1936, 2021–31 (codified as amended at 42 U.S.C. §§ 1320d to 1320d-8 (2006)).

furthers an original goal of the MLIIA, resolving claims before suit is filed. Conversely, allowing the advantages of tolling the statute of limitations without provision of an authorization form would undermine the Legislature's intention to provide a method for quick, efficient settlement of claims and to identify non-meritorious claims early. If an authorization form is not provided pre-suit, the pre-suit negotiation period triggered by the notice requirement would become meaningless, as doctors receiving notice without an authorization form could not procure medical records from other physicians or institutions to investigate the claims asserted against them. The statute of limitations is tolled only if both notice and an authorization form are provided.

We also interpret statutes to avoid an absurd result. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008) ("[W]e construe the statute's words according to their plain and common meaning . . . unless such a construction leads to absurd results."). If the authorization form was not considered a part of the notice requirement, an absurd result would be possible under Chapter 74. Section 74.052(a) provides that "[f]ailure to provide [the] authorization along with the notice of health care claim shall abate all further proceedings . . . until 60 days following receipt by the physician or health care provider of the required authorization." TEX. CIV. PRAC. & REM. CODE § 74.052(a). This language does not set a deadline by which plaintiffs must abide. Instead, the abatement could continue at the plaintiff's leisure until sixty days after the plaintiff chooses to provide the defendant with an authorization. It is not reasonable to interpret a statute which is meant to provide speedy resolution of meritorious health care liability claims and quick dismissal of nonmeritorious claims to allow a lengthy or indefinite delay of the resolution of a health care liability claim.

The Marroquins argue, and the court of appeals held, that service of an authorization form is unnecessary to toll the statute of limitations because a separate remedy—abatement—is provided for failure to accompany notice with an authorization form. *See id.* § 74.052(b). However, the abatement has a use in situations in which the tolling provision is not at issue. If notice is provided without an authorization well within the statute of limitations, and the case could be filed sixty days later and still fall within the limitations period, the defendant's statutory remedy is to halt proceedings until an authorization form is received. The abatement remedy fulfills that purpose.

IV. CONCLUSION

Accordingly, considering the text, history, and purpose of the statutes at issue, we conclude that for the statute of limitations to be tolled in a health care liability claim pursuant to Chapter 74, a plaintiff must provide both the statutorily required notice and the statutorily required authorization form. The Marroquins did not provide the statutorily required authorization form until after the statute of limitations expired, their claims were untimely, and the court of appeals erred in holding that Chapter 74 does not bar tolling of limitations when a plaintiff provides the required pre-suit notice without also providing the required medical authorization form. Accordingly, we reverse the judgment of the court of appeals and render judgment that the Marroquins take nothing.

_____
Dale Wainwright
Justice

OPINION DELIVERED: April 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0901

TEXAS RICE LAND PARTNERS, LTD. AND MIKE LATTA, PETITIONERS,

v.

DENBURY GREEN PIPELINE-TEXAS, LLC, RESPONDENT

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

Argued April 19, 2011

JUSTICE WILLETT delivered the opinion of the Court.

The Texas Constitution safeguards private property by declaring that eminent domain can only be exercised for "public use."[1] Even when the Legislature grants certain private entities "the right and power of eminent domain,"[2] the overarching constitutional rule controls: no taking of property for private use.[3] Accordingly, the Natural Resources Code requires so-called "common carrier" pipeline companies to transport carbon dioxide "to or for the public for hire."[4] In other words, a CO_2 pipeline company cannot wield eminent domain to build a *private* pipeline.

[1] TEX. CONST. art. I, § 17(a); *see also infra* note 12 and accompanying text.

[2] TEX. NAT. RES. CODE § 111.019(a).

[3] This restriction also bars "the taking of property . . . for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues." TEX. CONST. art. I, § 17(b).

[4] TEX. NAT. RES. CODE § 111.002(6).

This property-rights dispute asks whether a landowner can challenge in court the eminent-domain power of a CO_2 pipeline owner that has been granted a common-carrier permit from the Railroad Commission. The court of appeals answered no, holding that (1) a pipeline owner can conclusively acquire the right to condemn private property by checking the right boxes on a one-page form filed with the Railroad Commission, and (2) a landowner cannot challenge in court whether the proposed pipeline will in fact be public rather than private. We disagree. Unadorned assertions of public use are constitutionally insufficient. Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets statutory common-carrier requirements. Nothing in Texas law leaves landowners so vulnerable to unconstitutional private takings. We reverse the court of appeals' judgment and remand to the district court for further proceedings consistent with this opinion.

I. Background

Denbury Resources, Inc. is a publicly traded Delaware corporation that owns all of Denbury Operating Company. Denbury Operating Company has no employees or physical assets, but owns all the stock of two subsidiaries—Denbury Green Pipeline-Texas, LLC (Denbury Green) and Denbury Onshore, LLC. Denbury Resources and its affiliates (collectively Denbury) share corporate officers and are all located in the same offices in Plano, Texas.

Denbury is engaged in tertiary recovery operations that involve the injection of CO_2 into existing oil wells to increase production. Denbury owns a naturally occurring CO_2 reserve in Mississippi known as Jackson Dome, and desired to build a CO_2 pipeline from Jackson Dome to

Texas oil wells to facilitate tertiary operations on the wells. The record contains some evidence that, in the future, Denbury might purchase man-made or "anthropogenic" CO_2 from third parties and transport it in the pipeline.

In March 2008, Denbury Green applied with the Railroad Commission to operate a CO_2 pipeline in Texas. This pipeline would be a continuation of a pipeline originating at Jackson Dome in Mississippi and traversing Louisiana. Denbury Green's portion of the pipeline would extend from the Texas-Louisiana border to the Hastings Field in Brazoria and Galveston counties. The one-page permit application, designated a Form T-4, has two boxes for the applicant to indicate whether the pipeline will be operated as "a common carrier" or "a private line." Denbury Green placed an "x" in the common-carrier box. Separately and also relevant to common carrier status, applicants are directed to mark one of three boxes if the pipeline will not be transporting "only the gas and/or liquids produced by pipeline owner or operator." Of the three boxes, indicating the gas will be "[p]urchased from others," "[o]wned by others, but transported for a fee," or "[b]oth purchased and transported for others," Denbury Green marked the box for "[o]wned by others, but transported for a fee." Denbury Green also submitted a letter, pursuant to Section 111.002(6) of the Natural Resources Code,[5] stating that it "accepts the provisions of Chapter 111 of the Natural Resources Code and expressly agrees that it is a common carrier subject to duties and obligations conferred by Chapter 111."

[5] TEX. NAT. RES. CODE § 111.002(6). All statutory references are to the Natural Resources Code, Chapter 111 of which governs common carriers of CO_2 and other substances.

In April 2008, eight days after Denbury Green filed its application, the Commission granted the T-4 permit. In July 2008, the Commission furnished a letter to Denbury Green, stating:

> This letter is to confirm the fact that [Denbury Green] has been granted a permit to operate a pipeline (Permit No. 07737) and has made all of the currently necessary filings to be classified as a common carrier pipeline for transportation of carbon dioxide under the provisions of [Section 111.002(6)] and as otherwise required by the [Commission].

In November 2008, Denbury Green filed a tariff with the Commission setting out terms for the transportation of gas in the pipeline. The administrative process for granting the permit was conducted without a hearing and without notice to landowners along the proposed pipeline route.

Texas Rice Land Partners, Ltd. has an ownership interest in two tracts along the pipeline route. When Denbury Green came to survey the land in preparation for condemning a pipeline easement, Texas Rice Land Partners and a lessee, rice farmer Mike Latta (collectively Texas Rice), refused entry. Denbury Green sued Texas Rice for an injunction allowing access to the tracts.[6] On cross-motions for summary judgment, the trial court rendered judgment in favor of Denbury Green. The trial court found that Denbury Green "is a 'common carrier' pursuant to Section 111.002(6) of the Texas Natural Resources Code" and "has the power of eminent domain/authority to condemn/right-to-take pursuant to Section 111.019 of the Texas Natural Resources Code." The court permanently enjoined Texas Rice from (1) interfering with Denbury Green's "right to enter and survey" its proposed pipeline route across Texas Rice's land, and (2) harassing Denbury Green or its agents and contractors while conducting the surveys.

[6] Denbury Green filed a separate suit in county court to condemn a pipeline easement. The parties state in their briefing that the county court suit was stayed pending the outcome of the case before us, but Denbury Green stated at oral argument that the pipeline has been completed.

The court of appeals affirmed, concluding that Denbury Green had established as a matter of law its common-carrier status.[7] The court relied on the fact that the pipeline "will be available for public use from the outset of its operation."[8] One justice dissented, believing genuine issues of material fact precluded summary judgment.[9] The dissent reasoned that eminent-domain power cannot extend to the taking of property for private use and that "[m]erely offering a transportation service for a profit does not distinguish a private use from a public use."[10]

II. Discussion

A. Common Carriers and the Power of Eminent Domain

The Natural Resources Code regulates CO_2 pipelines serving as common carriers. Three Code provisions are particularly relevant.

Section 111.002(6) states a person is a common carrier if he:

> owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide . . . to or for the public for hire, but only if such person files with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter.

Section 111.003(a) states:

> The provisions of this chapter do not apply to pipelines that are limited in their use to the wells, stations, plants, and refineries of the owner and that are not a part of the pipeline transportation system of a common carrier as defined in Section 111.002 of this code.

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[7] 296 S.W.3d 877, 878, 881.

[8] *Id.* at 881.

[9] *Id.* at 881, 884 (Gaultney, J., dissenting).

[10] *Id.* at 883.

Section 111.019 states in part:

> (a) Common carriers have the right and power of eminent domain.
> (b) In the exercise of the power of eminent domain granted under the provisions of Subsection (a) of this section, a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.

While these provisions plainly give private pipeline companies the power of eminent domain, that authority is subject to special scrutiny by the courts. The power of eminent domain is substantial[11] but constitutionally circumscribed. Article 1, Section 17 of the Texas Constitution provides, "No person's property shall be taken . . . for or applied to public use without adequate compensation . . . ." This provision not only requires just compensation to the property owner, but also "prohibits the taking of property for *private* use."[12]

The legislative grant of eminent-domain power is strictly construed in two regards. First, strict compliance with all statutory requirements is required.[13] Second, in instances of doubt as to the scope of the power, the statute granting such power is "strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith."[14]

B. The T-4 Permit Granted By the Railroad Commission Does Not Conclusively Establish Eminent-Domain Power

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[11] *See Incorporated Town of Hempstead v. Gulf States Utils. Co.*, 206 S.W.2d 227, 229 (Tex. 1947) (noting "extraordinary power of eminent domain" granted to private utilities).

[12] *Maher v. Lasater*, 354 S.W.2d 923, 924 (Tex. 1962).

[13] *State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 640 (Tex. 2001) ("Proceedings to condemn land are special in character, and the party attempting to establish its right to condemn must show strict compliance with the law authorizing private property to be taken for public use.").

[14] *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (Tex. 1958).

The parties dispute whether Denbury Green was entitled to summary judgment on the issue of whether it is a common carrier. We hold at the outset that the T-4 permit alone did not conclusively establish Denbury Green's status as a common carrier and confer the power of eminent domain.

Nothing in the statutory scheme indicates that the Commission's decision to grant a common-carrier permit carries conclusive effect and thus bars landowners from disputing in court a pipeline company's naked assertion of public use. As stated above, the right to condemn property is constitutionally limited and turns in part on whether the use of the property is public or private. We have long held that "the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts."[15] We have also held in numerous contexts that the Commission does not have authority to determine property rights.[16] We presume the Legislature is aware of relevant caselaw when it enacts statutes.[17] Had the Legislature intended a T-4 permit to render a company's common-carrier status and eminent-domain power unchallengeable, it would

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[15] *Maher*, 354 S.W.2d at 925; *see also Housing Auth. of Dallas v. Higginbotham*, 143 S.W.2d 79, 84 (Tex. 1940) ("The question of what is public use is a question for the courts . . . ."); *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 722 (Tex. App.—Corpus Christi 2000, pet. denied) (holding that authority of pipeline company to condemn land was "an issue that was appropriately determined as a matter of law by the court").

[16] *See Amarillo Oil Co. v. Energy-Agri Prods., Inc.*, 794 S.W.2d 20, 26 (Tex. 1990) ("The cause is properly within the jurisdiction of the courts because the Railroad Commission has no authority to determine title to land or property rights."); *R.R. Comm'n v. City of Austin*, 524 S.W.2d 262, 267–68 (Tex. 1975) ("This Court has also held on several occasions that the Commission does not have power to determine title to land or property rights."); *Jones v. Killingsworth*, 403 S.W.2d 325, 328 (Tex. 1965) ("The Railroad Commission has no power to determine property rights."); *Nale v. Carroll*, 289 S.W.2d 743, 745 (Tex. 1956) ("Rules and regulations of the Railroad Commission cannot effect a change or transfer of property rights."); *Ryan Consol. Petroleum Corp. v. Pickens*, 285 S.W.2d 201, 207 (Tex. 1955) ("[The Commission] has not been given the power to determine property rights as between litigants.").

[17] *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 596 (Tex. 2001) ("[T]he Legislature is presumed to be aware of case law relevant to statutes it amends or enacts."); *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) ("A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it.").

have said so explicitly. "[W]hen an action is inherently judicial in nature, the courts retain jurisdiction to determine the controversy unless the legislature by valid statute has expressly granted exclusive jurisdiction to the administrative body."[18]

Further, the record, rules, and statutes before us indicate that the Commission's process for granting a T-4 permit undertakes no effort to confirm that the applicant's pipeline will be public rather than private. The Commission's website states that the Commission "does not have the authority to regulate any pipelines with respect to the exercise of their eminent domain powers."[19] A spokesperson for the Commission stated in 2008 that it had never denied a T-4 permit, and that the Commission grants them for "administrative purposes."[20] Apparently, in order to receive a common-carrier permit, the applicant need only place an "x" in a box indicating that the pipeline will be operated as a common carrier, and to agree under Section 111.002(6) to subject itself to "duties and obligations conferred or imposed" by Chapter 111. Under these minimal requirements, Denbury Green self-reported itself as a common carrier and obtained a permit a few days later. There was no investigation, and certainly no adversarial testing, of whether Denbury Green was indeed entitled to common-carrier status and the extraordinary power to condemn private property. Denbury Green concedes in its brief that the Commission "did not adjudicate anything." Private

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[18] *Amarillo Oil*, 794 S.W.2d at 26.

[19] Railroad Commission of Texas, *Pipeline Eminent Domain and Condemnation Frequently Asked Questions (FAQs)*, http://www.rrc.state.tx.us/about/faqs/eminentdomain.php (last visited Aug. 23, 2011).

[20] Amanda B. Niles, Comment, *Eminent Domain and Pipelines in Texas: It's As Easy As 1,2,3, — Common Carriers, Gas Utilities and Gas Corporations*, 16 TEX. WESLEYAN L. REV. 271, 288 (2010) (quoting Mike Lee, *Pipeline Builders May Face Quandary*, FORT WORTH STAR-TELEGRAM, June 22, 2008, at 1B, available at http://startelegram.typepad.com/files/pipeline-builders-may-face-quandary.htm).

property cannot be imperiled with such nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form. Our Constitution demands far more.

The Railroad Commission's process for handling T-4 permits appears to be one of registration, not of application. The record suggests that in accepting an entity's paperwork, the Commission performs a clerical rather than an adjudicative act. The registrant simply submits a form indicating its desire to be classified as a common (or private) carrier. No notice is given to affected parties. No hearing is held, no evidence is presented, no investigation is conducted. It is true that Commission regulations covering CO_2 pipelines (1) state that permit applications will be granted if the Commission is satisfied "from such application and the evidence in support thereof, and its own investigation" that the pipeline will "reduce to a minimum the possibility of waste, and will be operated in accordance with the conservation laws and conservation rules and regulations of the commission," and (2) require CO_2 pipelines to comply with certain safety requirements.[21] However, as for the core constitutional concern—the pipeline's public vs. private use—the parties point to no regulation or enabling legislation directing the Commission to investigate and determine whether a pipeline will in fact serve the public interest. Given this scant legislative and administrative scheme, we cannot conceive that the Legislature intended the granting of a T-4 permit alone to prohibit a landowner—who was not a party to the Commission permitting process and had no notice of it—from challenging in court the eminent-domain power of a permit holder.

C. The Test for Common-Carrier Status

[21] 16 TEX. ADMIN. CODE §§ 3.70(a), 8.1(a)(1)(C), 8.1(b)(2)–(3).

To qualify as a common carrier with the power of eminent domain, the pipeline must serve the public. As explained above, extending the power of eminent domain to the taking of property for a private use cannot survive constitutional scrutiny. The Denbury Green pipeline would not serve a public purpose if it were built and maintained only to transport gas belonging to Denbury from one Denbury site to another. As a constitutional matter, we can see no purpose other than a purely private one in such circumstances.[22]

The relevant statutes also confirm that a CO_2 pipeline owner is not a common carrier if the pipeline's only end user is the owner itself or an affiliate. Section 111.002(6) states a person is a common carrier if it owns or operates a pipeline "for the transportation of carbon dioxide . . . to or for the public for hire." If Denbury consumes all the pipeline product for itself, it is not transporting gas "to . . . the public for hire." Nor can such an arrangement be characterized as transportation of gas "for the public for hire." The term "for the public for hire" implies that the gas is being carried for another who retains ownership of the gas, and that the pipeline is merely a transportation conduit rather than the point where title is transferred.[23] Section 111.003(a) further confirms these notions, since it states that the common-carrier provisions "do not apply to pipelines that are limited in their

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[22] *See, e.g.*, *Mercier*, 28 S.W.3d at 718 (noting that pipeline indisputably "is not a common carrier" when it "does not transport gas or allow the dedication of its capacity to the public or anyone other than" the two corporate owners of the pipeline). We further note that the pipeline does not serve a public use if it only transports gas for a corporate parent or affiliate. Hence, we see no significance to the fact that Denbury Green Pipeline-Texas, LLC, the owner of the pipeline here, is a wholly owned subsidiary of the company engaged in the tertiary recovery operations. Transporting gas solely for the benefit of a corporate parent or other affiliate is not a public use of the pipeline.

[23] *See Thedford v. Cnty. of Jackson*, 502 S.W.2d 899, 901 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.) (holding that owner of interest in well who wished to construct pipeline to transport only his own gas was not a common carrier because a pipeline owner transporting his own gas was neither transporting gas "bought of others" under relevant common carrier statute nor transporting gas "for hire").

use to the wells, stations, plants, and refineries of the owner and that are not a part of the pipeline transportation system of a common carrier as defined in Section 111.002 of this code."

Denbury Green contends that merely making the pipeline available for public use is sufficient to confer common-carrier status. We disagree, for two reasons. First, this argument is inconsistent with the wording of Section 111.002(6). The statute provides that a common carrier owns or operates a CO_2 pipeline "to or for the public for hire, but only if such person files with the commission a written acceptance" agreeing to become "a common carrier subject to the duties and obligations conferred or imposed by this chapter." Denbury Green points out that Chapter 111 contains common-carrier requirements such as the obligation to publish a tariff in Section 111.014, and the obligation not to discriminate among shippers in Section 111.016. But Denbury Green's reading of Section 111.002(6) would confer common-carrier status and eminent-domain power even when the pipeline will never serve the public by transporting CO_2 "to or for the public for hire" under the statute—and indeed when there was never any reasonable possibility of such service—so long as the owner agrees to be subject to the Chapter 111 common-carrier regime. As we read the statute, the language that the pipeline be owned or operated "to or for the public for hire" is a separate requirement for common-carrier status, and the statute, *in addition*, requires the owner or operator to agree to subject itself to Chapter 111. Denbury Green's interpretation would read out of the statute the language that the pipeline be operated "to or for the public for hire." Such a reading contravenes two settled rules: (1) that every word in a statute is presumed to have a purpose

and should be given effect if reasonable and possible;[24] and (2) that strict compliance with all statutory requirements is required to exercise eminent domain.[25] Even absent these rules, the use of "but only if" in the statute suggests that a pipeline operator must meet two requirements to obtain common-carrier status under Chapter 111. It must first meet a broad requirement—that it operate "to or for the public for hire." But it can qualify as a Chapter 111 common carrier if and "only if" it meets an additional requirement—that it subject itself to Commission regulation under Chapter 111. Again, Denbury Green's reading ignores the first requirement and would confer common-carrier status when the second requirement alone is met.

Second, Denbury Green's construction leads to a result that we cannot believe the Legislature intended, namely a gaming of the permitting process to allow a private carrier to wield the power of eminent domain. Suppose an oil company has a well on one property and a refinery on another. A farmer's property lies between the oil company's two properties. The oil company wishes to build a pipeline for the exclusive purpose of transporting its production from its well to its refinery. Only about 50 feet of the proposed pipeline will traverse the farmer's property. The farmer refuses to allow construction of the pipeline across his property. The oil company knows that no party other than itself will ever desire to use the pipeline. In these circumstances, the application for a common-carrier permit is essentially a ruse to obtain eminent-domain power. The oil company should not be able to seize power over the farmer's property simply by applying for a crude oil

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[24] *See Tex. Workers' Comp. Ins. Fund v. DEL Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000); *see also Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 402 (Tex. 2000) ("[W]e give effect to all words of a statute, and, if possible, do not treat any statutory language as mere surplusage.").

[25] *See supra* note 13 and accompanying text.

pipeline permit with the Commission, agreeing to subject itself to the jurisdiction of the Commission and all requirements of Chapter 111, and offering the use of the pipeline to non-existent takers. "A sine qua non of lawful taking . . . for or on account of public use . . . is that the professed use be a public one in truth. Mere fiat, whether pronounced by the Legislature or by a subordinate agency, does not make that a public use which is not such in fact . . . ."[26] Hence, we conclude that Denbury Green is not entitled to common-carrier status simply because it obtained a common-carrier permit, filed a tariff, and agreed to make the pipeline available to any third party wishing to transport its gas in the pipeline and willing to pay the tariff. The statute does not allow such a result, particularly in light of the rule, stated above, that statutes granting eminent-domain power must be strictly construed in favor of the landowner.

We accordingly hold that to qualify as a common carrier of CO_2 under Chapter 111, a reasonable probability must exist, at or before the time common-carrier status is challenged, that the pipeline will serve the public by transporting gas for customers who will either retain ownership of their gas[27] or sell it to parties other than the carrier.[28]

Consistent with judicial review of Commission determinations generally, a permit granting common-carrier status is prima facie valid,[29] but once a landowner challenges that status, the burden

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[26] *Higginbotham*, 143 S.W.2d at 84 (quoting *Dallas Cotton Mills v. Indus. Co.*, 296 S.W. 503, 505 (Tex. Comm'n App. 1927, judgm't adopted)).

[27] We do not mean to suggest here that customers must trace the gas they placed in the pipeline or that ordinary business practices accommodating the commingling of gas in a pipeline cannot be employed.

[28] In this context, a reasonable probability is one that is more likely than not.

[29] *See* TEX. NAT. RES. CODE § 85.243 (providing generally that when party challenges Commission order, "the burden of proof shall be on the party complaining of the law or order, and the law or order is deemed prima facie valid"); *Cheesman v. Amerada Petroleum Corp.*, 227 S.W.2d 829, 831 (Tex. Civ. App.—Austin 1950, no writ) ("It must be

falls upon the pipeline company to establish its common-carrier bona fides if it wishes to exercise the power of eminent domain.

D. Denbury Green Was Not Entitled to Summary Judgment

Under our test, Denbury Green did not establish common-carrier status as a matter of law. A Denbury Green vice president attested that Denbury Green was negotiating with other parties to transport anthropogenic CO_2 in the pipeline, and that the pipeline "can transport carbon dioxide tendered by Denbury entities as well as carbon dioxide tendered from other entities and facilities not owned by Denbury." This affidavit does not indicate whether Denbury Green itself intended to use all of that gas for its own tertiary recovery operations. As discussed above, a carrier is not a common carrier if it transports gas only for its own consumption. The witness also stated in his deposition that the CO_2 carried in the pipeline would be owned by affiliate Denbury Onshore, but that there was "the possibility we'll be transporting other people's CO2 in the future." He did not identify any possible customers and was unaware of any other entity unaffiliated with Denbury Green that owned CO_2 near the pipeline route in Louisiana and Mississippi. This evidence does not establish a reasonable probability that such transportation would ever occur.

Further, the record includes portions of Denbury's own website that suggest the pipeline would be exclusively for private use. In describing the pipeline project, the site states:

> We like these tertiary operations because . . . to date, in our region of the United States, we have not encountered any industry competition. Generally, from the Texas Gulf Coast to Florida, there are no known significant natural sources of carbon

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remembered that the Commission granted the permit which Amerada attacked by filing suit in the court below. The permit carried a prima facie presumption of validity."). Texas Rice, in a letter brief, acknowledges that "the pipeline permit from the Railroad Commission could serve as prima facie proof of the right to condemn."

> dioxide except our own, and these large volumes of CO2 are the foundation for our entire tertiary program.
>
> . . . .
>
> We have entered into three agreements, and are having various levels of discussions with many others, to purchase (if the plants are built) all of the CO2 production from man-made (anthropogenic) sources of CO2 from planned solid carbon gasification projects.
>
> . . . .
>
> We see these sources as a possible expansion of our natural Jackson Dome source, assuming they are economical, and we believe that our potential ability to tie these sources together with pipelines will give us a significant advantage over our competitors, in our geographic area, in acquiring additional oil fields and these future potential man-made sources of CO2.
>
> . . . .
>
> We are also working on a 24" pipeline, named the Green Pipeline, to transport CO2 to Hastings Field and our 2007 Southeast Texas acquisitions . . . . Initially, we anticipate transporting CO2 from our natural source at Jackson Dome in this line, but ultimately we expect that it will be used to ship predominately man-made (anthropogenic) sources of CO2.
>
> . . . .
>
> During November 2006, we acquired an option to purchase . . . Hastings Field, a strategically significant potential tertiary flood candidate located near Houston, Texas.
>
> . . . .
>
> We believe that Hastings Field possesses . . . more reserve potential than any other single field in our inventory. Currently, we are working on the right-of-ways required to build a pipeline we have named our Green Pipeline to transport CO2 to this field . . . . [O]ur goal is to continue to pursue the acquisition of other fields in this area, which will help reduce the cost of CO2 for each field by fully utilizing the proposed pipeline and thereby reducing our transportation cost per Mcf.

As the dissent in the court of appeals noted, these statements are "some evidence Denbury intends to fully utilize the Green Pipeline as an essential part of its tertiary oil production operations. Denbury's description of the pipeline's purpose indicates the CO2 it transports in the pipeline will be its own . . . ."[30] Denbury Green's representations suggesting that it (1) owns most or all of the

[30] 296 S.W.3d at 882 (Gaultney, J., dissenting).

naturally occurring CO_2 in the region, (2) intends to purchase all the man-made CO_2 that might be produced under current and future agreements, (3) sees its access to CO_2 as giving it a significant advantage over its competitors, and (4) intends to fully utilize the pipeline for its own purposes, are all inconsistent with public use of the pipeline. As Denbury Green did not establish common-carrier status as a matter of law, it was not entitled to summary judgment.

III. Conclusion

Private property is constitutionally protected, and a private enterprise cannot acquire condemnation power merely by checking boxes on a one-page form. We reverse the court of appeals' judgment, and remand this case to the district court for further proceedings consistent with this opinion.

_____

Don R. Willett
Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0941

SERVICE CORPORATION INTERNATIONAL AND SCI TEXAS FUNERAL SERVICES, INC., D/B/A MONT META MEMORIAL PARK, PETITIONERS,

v.

JUANITA G. GUERRA, JULIE ANN RAMIREZ, GRACIE LITTLE AND MARY ESTHER MARTINEZ, RESPONDENTS

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

Argued December 19, 2010

JUSTICE JOHNSON delivered the opinion of the Court.

In this appeal we address whether the evidence was sufficient to support jury findings that (1) both the corporation that owned and operated a cemetery and its parent corporation were liable for actions of the cemetery's employees, and (2) the daughters and widow of a decedent suffered compensable mental anguish because the decedent's body was disinterred and moved to another grave without permission. We also address whether evidence of other lawsuits against the cemetery owner was properly admitted.

Marcos Guerra was buried at Mont Meta Memorial Park cemetery in a plot that had been sold to someone else. His family refused the cemetery's request that it be allowed to move the body to another burial plot, but the cemetery did so anyway. When family members discovered that Mr.

Guerra's body had been moved, his daughters and widow sued both SCI Texas Funeral Services, Inc. d/b/a Mont Meta Memorial Park (SCI Texas), the corporation that owned and operated the cemetery, and its parent corporation, Service Corporation International (SCI International). Pursuant to a jury verdict, the trial court rendered judgment against both corporations for actual and exemplary damages. The court of appeals modified the judgment as to exemplary damages and otherwise affirmed.

We hold that there was legally insufficient evidence to support either the liability findings against SCI International or the mental anguish findings in favor of Mr. Guerra's daughters. We further hold that the trial court erred by admitting evidence of other lawsuits, verdicts, and judgments against SCI Texas. We reverse and render in part and remand for a new trial in part.

I. Background

SCI Texas owns and operates several cemeteries in Texas, including Mont Meta Memorial Park in San Benito. Through an intermediary corporation not involved in this litigation, SCI Texas is wholly owned by SCI International.

When Mr. Guerra died unexpectedly on October 5, 2001, his family decided to have him buried at Mont Meta. Two of his three daughters, Julie Ann Ramirez and Gracie Little, went to Mont Meta and made funeral arrangements. Pursuant to the wishes of their mother, Juanita Guerra, Julie and Gracie arranged for Mrs. Guerra to purchase burial plots 5 and 5X at Mont Meta. One of the plots was to be used for Mr. Guerra and one was to eventually be used by Mrs. Guerra.

SCI Texas requires that before a burial takes place a "blind check" of the arrangements must be performed by an employee other than the employee who made the original arrangements. The

blind check is to verify (1) the location of the burial plot to be used, (2) that the plot has not been previously sold, and (3) that no one is already buried in the plot. A Mont Meta employee performed the blind check on the day of Mr. Guerra's burial as part of her duties at Mont Meta. She concluded that the cemetery's records showed plot 5, where Mr. Guerra was to be buried, had been previously sold to another family. She brought this to the attention of her supervisor, who concluded that the burial could proceed because plot 5 had been quitclaimed to the Guerras.

Another Mont Meta employee reviewed the paperwork after the funeral and discovered that the supervisor had not been correct: plot 5 had not been quitclaimed to the Guerras. A Mont Meta employee contacted the Guerras and told them that the plot where Mr. Guerra was buried belonged to someone else. The Guerras met with Mont Meta's general manager, Jaye Gaspard, and declined his request that the cemetery be allowed to move Mr. Guerra's body to another plot.

Sometime after the meeting with Gaspard, the Guerras noticed that grass on Mr. Guerra's grave appeared to have been disturbed. They contacted Mont Meta about the situation. Gaspard responded with a letter in which he indicated that resodding had taken place in the cemetery and a passageway next to where Mr. Guerra was buried had been converted to a plot to ensure that a place beside Mr. Guerra was available for Mrs. Guerra. When the family received deeds for the plots they had purchased, however, the deeds were for plots 5X and 5XX rather than 5 and 5X. The Guerras suspected that Mr. Guerra's body had been moved and they filed a complaint with the Texas Funeral Commission. Six months later, Vicky Trevino, who was by then general manager at Mont Meta,[1]

[1] Gaspard died after the meeting with the Guerra family.

disclosed to the Guerras that they were correct: Mr. Guerra's body had been moved about 12 to 18 inches laterally into plot 5X.

Mrs. Guerra and her daughters Julie, Gracie, and Mary Ester Martinez (collectively, the Guerras) sued SCI Texas and SCI International. They asserted causes of action for fraud, intentional infliction of emotional distress, negligence, and trespass. A jury found in favor of the Guerras on the three liability theories submitted—intentional infliction of emotional distress, negligence, and trespass—and awarded damages of $2 million for past mental anguish to Mrs. Guerra, $100,000 for past mental anguish to each daughter, and allocated responsibility 70% to SCI International and 30% to SCI Texas. The jury also awarded exemplary damages of $3 million against SCI International and $1 million against SCI Texas, allocated 70% to Mrs. Guerra and 10% to each daughter.

Both defendants appealed. The court of appeals modified the judgment and reduced the exemplary damages to $750,000 for each defendant in accordance with the statutory cap, *see* TEX. CIV. PRAC. & REM. CODE § 41.008(b), but otherwise affirmed. ___ S.W.3d ___ at ___. In this Court the SCI entities argue that (1) there is no evidence to support the finding of liability as to SCI International; (2) there is no evidence to support the award of, or the amounts awarded for, mental anguish damages; (3) the trial court erred by admitting evidence of suits against other SCI Texas cemeteries and of a suit against and settlement entered into in Florida by SCI International; (4) two of the liability theories in the jury charge were not legally viable and it is impossible to determine if the jury awarded damages based on an invalid theory of liability because the charge contained only one damages question conditioned on an affirmative finding to any of the three liability questions; (5) the trial court erred by admitting testimony that Mrs. Guerra would put any punitive

damages in a trust for use by people who cannot afford funerals; and (6) the jury's award of damages was influenced by an improper "Golden Rule" argument.

We begin by addressing the challenge to the legal sufficiency of the evidence as to SCI International.

II. SCI International

The charge submitted three liability questions to the jury: (1) Did either of the Defendants intentionally inflict severe emotional distress on the Plaintiffs; (2) Did the negligence of either Defendant proximately cause the occurrence in question; and (3) Did either Defendant commit a trespass upon the property of the Plaintiffs?[2] Each question required the jury to answer separately for SCI International and SCI Texas, and the jury answered "Yes" as to each defendant for each question.

The Guerras argue that the testimony of several cemetery employees who said that they worked for "SCI" and records in Jaye Gaspard's personnel file with the SCI logo and referencing "Service Corporation International" are evidence that SCI International employed the Mont Meta workers and was therefore liable for their actions. We disagree.

A. Standard of Review

A no-evidence 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

[2] The Guerras did not assert veil-piercing theories such as alter ego or use of the corporate form to perpetuate a fraud.

a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). Evidence is more than a scintilla if it "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Ford Mtr. Co. v. Ridgeway*, 135 S.W.3d 598, 601 (Tex. 2004). If, however, the evidence does no more than create a mere surmise or suspicion and is so slight as to necessarily make any inference a guess, then it is no evidence. *Id.* We presume that jurors made all inferences in favor of the verdict, but only if reasonable minds could do so. Jurors may not simply speculate that a particular inference arises from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 821 (Tex. 2005).

B. Liability Findings

Corporations are liable for the negligence of corporate employees acting within the scope of their employment. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 541 (Tex. 2002). But except for a few circumstances which the Guerras do not claim apply in this case, a corporation is not vicariously liable for the negligence of someone who is not its employee. *See id.* at 542-43 (noting that a person may be held liable for the actions of another if he has a certain degree of express or implied control over the actor).

SCI International first argues that because the jury charge did not contain a separate question asking if any of the actors were SCI International employees, the Guerras must have conclusively proved that they were employees because "all independent grounds of recovery . . . not conclusively established under the evidence and no element of which is submitted or requested are waived." *See* TEX. R. CIV. P. 279. We disagree.

Whether the actors involved in this case were SCI International employees was not an independent ground of recovery; the actors' status as employees was an *element* of the Guerras' negligence claim against SCI International. *See Diamond Offshore Mgmt. Co. v. Guidry*, 171 S.W.3d 840, 844 (Tex. 2005) (noting that when evidence is conflicting regarding whether an employee was acting in the scope of his employment at the time of an accident—a prerequisite for imposing vicarious liability—a jury finding is required); *see also* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE PJC 7.1 (Comment) (2006) (explaining that a question asking whether an actor is an employee of a defendant should be used "if there is a factual dispute about the employment element essential to a defendant's vicarious liability").

When an element of a claim is omitted from the jury charge without objection and no written findings are made by the trial court on that element then the omitted element is deemed to have been found by the court in such manner as to support the judgment. TEX. R. CIV. P. 279; *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002). Here there was no objection to the charge on the basis that it omitted the element nor did the trial court make findings on it, so there is a deemed finding in support of the judgment. But just as with any other finding, there must be evidence to support a deemed finding. Thus, we next address whether legally sufficient evidence supports the finding here. *See In re J.F.C.*, 96 S.W.3d at 276; *Ramos v. Frito Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990).

C. The Evidence

The Guerras assert that testimony from persons working at Mont Meta supports a finding that they were employed by SCI International. The Guerras point to testimony from several cemetery

employees to the effect that they worked for "SCI." For example, the Guerras reference testimony by a foreman at Mont Meta who testified he was employed "[w]ith the SCI company," and testimony by the employee who worked with the Guerras to pick the burial plots that she was employed by "SCI." The Guerras also point out that Raymond McManness, who identified himself as "area vice-president," was asked by the Guerras' attorney about his employment with "SCI" and "SCI" having buried Mr. Guerra in the wrong spot, yet McManness did not clarify what "SCI" meant. Further, the Guerras reference testimony of Mont Meta's former general manager, Vicky Trevino.

We first address Trevino's testimony. At trial she affirmatively answered a question from the Guerras' attorney inquiring whether she stated in her deposition that she worked for "Service Corporation International, SCI." Although she made the acknowledgment in her trial testimony, her deposition testimony, which was shown to the jury in a video, was actually that Trevino was employed by "SCI." And during her trial cross examination about her deposition testimony, she did not waiver in maintaining that she worked for SCI Texas, SCI Texas operates Mont Meta, and SCI Texas employed the people who worked at Mont Meta. Taking her testimony in context, as we must, it is no evidence that Trevino or any of the other cemetery employees were employed by SCI International. *See City of Keller*, 168 S.W.3d at 812 ("[E]vidence cannot be taken out of context in a way that makes it seem to support a verdict when it in fact never did."); *Bastrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681, 684 (Tex. 2004) (holding that comments from deposition read out of context at trial were not evidence of a product defect when the comments were considered in context and clarified by the expert who made them).

Apart from Trevino's testimony, which we have determined was no evidence when properly considered in context, the testimony that the Guerras claim supports a finding that the cemetery workers were employed by SCI International were statements about "SCI." Both SCI entities had the initials SCI in their name and were referred to as SCI by witnesses and the attorneys throughout the trial. Statements that the workers were employed by "SCI" only allow for speculation that they were employed by SCI International. And findings based on evidence that allows for no more than speculation—a guess—are based on legally insufficient evidence. *See City of Keller*, 168 S.W.3d at 827 ("[L]egal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not."). Thus, under this record, testimony that "SCI" employed the cemetery workers is no evidence they were employed by SCI International.

The Guerras also point to testimony from a former family service counselor supervisor at Highland Memorial Park in Weslaco that he was employed by "Service Corporation International." According to the testimony, Highland Memorial Park was owned by "SCI." But there was no evidence that the Mont Meta workers had the same employer as the Highland Memorial Park workers, even assuming the Highland workers were employed by SCI International. The former Highland Memorial Park employee's testimony is no evidence that Service Corporation International employed the Mont Meta workers.

The court of appeals referenced the presence of the SCI logo on Jaye Gaspard's personnel paperwork as evidence that he was employed by SCI International. But in contrast to the Guerras' assertions as to SCI International's relationship to the cemetery employees, the President of SCI

Texas, William O'Brien, testified that SCI Texas is a wholly owned subsidiary of SCI International; SCI Texas contracted with Mrs. Guerra; SCI International does not have any employees; SCI International does not own or operate any funeral homes or cemeteries; and SCI International's only assets are shares of stock in subsidiary companies. O'Brien also testified that all SCI-related businesses were authorized to use the SCI logo. Thus, the presence of the SCI logo on Gaspard's personnel documents was as consistent with employment by SCI Texas as it was with employment by SCI International, and the inference that SCI International employed Gaspard was no greater than the inference that SCI Texas employed him. Accordingly, the inferences were equal and the presence of the logo on the documents was legally insufficient to support a finding that Gaspard was employed by SCI International. *See id.* at 813 ("When the circumstances are equally consistent with either of two facts, neither fact may be inferred."); *All Star Enters., Inc. v. Buchanan*, 298 S.W.3d 404, 423-24 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (noting that under the equal inference rule, where the names of a number of affiliated companies began with "Antero Resources," invoices addressed to "Antero Resources" were no evidence that the vendors were referring to one particular company); *see also BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002) (finding that use of letterhead containing "BMC Software" by two corporations was not evidence that those corporations failed to observe corporate formalities where both corporations had "BMC Software" as part of their names).

The Guerras also assert that an "employee requisition" form in Jaye Gaspard's personnel file is evidence that Mont Meta's funeral director was employed by SCI International because the top of the form states "Service Corporation International." But the form also contained a blank space

for "Location or Department Name" which stated "Mont Meta/Restlawn/Cox Funeral Home." William O'Brien explained that the form was supplied by SCI International but Mont Meta was making a requisition request for Mont Meta. He explicitly denied that the request was for someone to be employed by SCI International. Under this record, the "Service Corporation International" heading on the form was legally insufficient to support a finding that SCI International employed any of the Mont Meta workers.

Citing *Wal-mart Stores, Inc. v. Middleton*, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied), the Guerras also claim that SCI's failure to produce evidence that would show the Mont Meta workers did not work for SCI International is itself evidence that they worked for SCI International. But *Middleton* is a spoliation case, and the Guerras have not asserted that spoliation of evidence was at issue here. *See id.* ("[T]he deliberate spoliation of evidence relevant to a case raises a presumption that the evidence would have been unfavorable to the cause of the spoliator."). Further, SCI presented direct evidence through the testimony of O'Brien, the President of SCI Texas, that the Mont Meta workers were not employed by SCI International.

In sum, we agree with SCI International that there was legally insufficient evidence to support liability findings against it. That determination requires judgment to be rendered in its favor. Therefore, we will not address SCI International further except as necessary to resolve the issues asserted by SCI Texas. For ease of reference SCI Texas generally will be referred to from now on as "SCI."

III. Mental Anguish Damages

SCI claims there was legally insufficient evidence to support the jury's findings that the Guerras suffered compensable mental anguish, or in any event, to support the amount of damages awarded. We disagree in part. As to Mrs. Guerra, the evidence was sufficient to support some damages for mental anguish. As to Julie, Gracie, and Mary Ester, the evidence was legally insufficient to support any mental anguish damages.

A. Nature of Evidence Required

Generally, an award of mental anguish damages must be supported by direct evidence that the nature, duration, and severity of mental anguish was sufficient to cause, and caused, either a substantial disruption in the plaintiff's daily routine or a high degree of mental pain and distress. *Bentley v. Bunton*, 94 S.W.3d 561, 606 (Tex. 2002). Citing *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995), the court of appeals stated that such direct evidence is not necessarily required in cases involving particularly shocking or disturbing events or injuries because those events or injuries in and of themselves support an inference that mental anguish accompanied them. ___ S.W.3d at ___. The court noted that one such disturbing event we recognized in *Parkway* is the mishandling of a corpse. *Id.* The Guerras also assert that this is such a case—the events were particularly disturbing and upsetting, permitting the jury to infer mental anguish. They point to our citation in *Parkway* of *Pat H. Foley & Co. v. Wyatt*, 442 S.W.2d 904, 907 (Tex. Civ. App.—Houston 1969, writ ref'd n.r.e.), where we noted that the mishandling of a corpse involves disturbing events. *Parkway*, 901 S.W.2d at 443. But we cited *Wyatt* as an example of a case involving events that justified mental anguish damages; we did not cite *Wyatt* as a case in which the actions of the

defendant or the occurrence itself constituted evidence of mental anguish that, absent other evidence, will support mental anguish damages. *Id.*; *see City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997) (citing *Wyatt* as an example of a contract case dealing with an intensely emotional subject and in which mental anguish is compensable and foreseeable if a duty is breached). Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required. *See Bentley*, 94 S.W.3d at 606 (citing *Parkway*, 901 S.W.2d at 444); *Likes*, 962 S.W.2d at 495.

B. The Daughters

There was little evidence from the daughters about how the events specifically affected them. Julie testified that "[t]his has been the hardest thing that I have had to go through with my family and myself. I have had lots of nights that I don't sleep just thinking" and that it had been "very difficult." In her complaint letter to the funeral commission she stated "I cannot begin to express the frustration and agony we have all gone through." She testified that she had continued to work, travel, and participate in volunteer and other activities.

Mary Ester's testimony about how the events affected her was briefer than Julie's. Mary Ester stated that "it's not part of my life. I didn't have to accept that and I do not accept it and I won't accept it."

Gracie's testimony about how she was affected was likewise cursory. She testified "[w]e're not at peace. We're always wondering. You know, we were always wondering where our father was. It was hard to hear how this company stole our father from his grave and moved him. That was hard. And I pray that none of you have to go through this."

The Guerras argue that evidence of the impact on the family also came from third parties. For example, the Mont Meta employee who helped the Guerras select the plots, testified that she believed the family was still bothered by the situation and having to move a body that was buried in the wrong place is devastating to any family that has just gone through the mourning process. The president of SCI Texas testified that the Guerras were "really hurt by this" and that there "certainly is a level of devastation within their family for this." The former manager of Mont Meta agreed that a family that had gone through what the Guerras had would suffer "devastation."

These witnesses generally acknowledged that the Guerra family members experienced very strong emotional reactions that would be expected from the unauthorized moving of a loved one's body. But none of the witnesses, including the daughters themselves, identified a specific "high degree of mental pain and distress" experienced by particular family members, or a substantial disruption of any particular family member's daily routine. The witnesses agreed with the Guerras' attorney that the family generally suffered "devastation," but generalized, conclusory descriptions of how an event affected a person are insufficient evidence on which to base mental anguish damages. *See Likes*, 962 S.W.2d at 495 ("The invasion of the same legal right may lead to extreme anguish in one person while causing essentially no emotional damage to another."); *Parkway*, 901 S.W.2d at 444 (noting that a factfinder should be provided with adequate details to assess mental anguish claims). The daughters' statements about their emotions, even combined with the statements of the other witnesses, did not support the jury finding that the events caused any of the daughters to suffer a substantial disruption of their daily routine or a high degree of mental pain and distress. *See Gunn Infinity v. O'Byrne*, 996 S.W.2d 854, 860-61 (Tex. 1999) (finding no evidence

supported mental anguish damages where claimant testified he had a lot of anguish, grief, severe disappointment, and embarrassment because those did not rise to a level of a high degree of mental pain and distress nor was there evidence of a substantial disruption of his daily routine).

In sum, the evidence was legally insufficient to support findings that any of the daughters suffered compensable mental anguish.

C. Mrs. Juanita Guerra

Mrs. Guerra testified that when she found out her late husband's grave had been tampered with she could not sleep at night and went through a lot of stress. She testified that she suffered burning in her stomach due to the stress and sought medical treatment for the symptoms. She continued to have headaches and take medication for anxiety and depression. She indicated that she had been worrying and having fear and anxiety about what might be done to her at Mont Meta for nearly six years since Mr. Guerra's casket was moved. We conclude that there is some evidence to support the jury's finding that Mrs. Guerra suffered the degree of mental pain and distress that will support damages for mental anguish.

SCI argues that Mrs. Guerra's daily routine was not substantially disrupted because she volunteers at a nursing home, participates in visitation with her church, works in the church kitchen, and travels occasionally. But even assuming there was no evidence her routine was disrupted, that lack of evidence did not negate the evidence that she *did* suffer compensable mental anguish. *See Wackenhut Corr. Corp. v. De La Rosa*, 305 S.W.3d 594, 640 (Tex. App.—Corpus Christi 2009, no pet.) (rejecting a claim that because children who had been awarded mental anguish damages were making good grades in school, they were not suffering mental anguish).

SCI asserts that there was confusion at trial regarding whether Mrs. Guerra's mental anguish concerned future anxiety for which the jury awarded no damages. It points to the Guerras' attorney's statements such as "Mrs. Guerra's main anxiety concern is what is this company going to do to her once she is buried." SCI asserts that this apprehension concerns future anxiety for which damages were not awarded by the jury. But Mrs. Guerra's testimony was that she had worried and anguished in the past about what would happen to her and her husband when she is buried. To the extent the testimony supports mental anguish damages, it supports damages for anguish in the past and the jury's answers reflect that.

SCI urges that if the evidence is legally sufficient to support some damages, it is legally insufficient to support the entire amount of damages awarded to Mrs. Guerra by the jury. *See Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996) ("Not only must there be evidence of the existence of compensable mental anguish, there must also be some evidence to justify the amount awarded."). We do not address the argument because even if we sustained it, the result would be a remand to the court of appeals to consider a remittitur. *See Bentley*, 94 S.W.3d at 607-08. As we explain below, our determination of other issues requires the case to be remanded for a new trial.

IV. Evidentiary Issues

A. Other Lawsuits, Verdicts, and Judgments

SCI challenges the trial court's admission of evidence about other lawsuits, verdicts, and judgments against it.[3] SCI asserts that the evidence was irrelevant.[4]

1. Preservation of Error

The Guerras claim that SCI waived error because although SCI first raised objections to evidence of other suits, verdicts, and judgments by a motion in limine and objected when the evidence was introduced, SCI did not object when the Guerras' attorney referred to the matters during jury selection and opening statement. They cite *Texas Employers Insurance Ass'n v. Schanen*, 263 S.W.2d 614, 615 (Tex. Civ. App.—San Antonio 1953, no writ), in support of their assertion that attorney's statements made during jury selection must be objected to on pain of waiving error to the introduction of evidence during trial.

But in *Schanen* the trial court overruled a motion for mistrial based on questions propounded to and statements made by a potential juror during voir dire, even though the party moving for

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[3] The SCI entities also challenge admission of evidence of other lawsuits and allegations of wrongdoing against SCI International. That evidence, involving cemeteries outside Texas, was similar to the type of evidence of other suits that was admitted against SCI Texas—but more inflammatory. It included allegations made in class-action pleadings, settlements, allegations of criminal wrongdoing, newspaper articles involving various allegations, reports of interviews with persons involved, and facts that for the most part were not similar to those involving the Guerras, and did not involve any of the Mont Meta employees who dealt with the Guerras, nor the decisions and actions taken to move Mr. Guerra's body. And at least some of the events described took place before SCI Florida, an SCI International subsidiary, owned one of the cemeteries involved in the other suits.

Our failure to address the admission of that evidence should not be taken as approval of its admission. We do not address it in depth because SCI International will not be part of the trial on remand and the evidence was not connected with SCI Texas except through SCI Texas's relationship to SCI International.

[4] SCI also asserts that the admission of this evidence unconstitutionally impacted punitive damages. We do not address this constitutional issue because we only decide constitutional questions when we cannot resolve issues on other grounds. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003).

mistrial did not object to the questions or answers at the time they occurred. The court of appeals analogized the situation to one in which evidence is received during trial without objection. *See id.* at 614-15. It held that in the absence of a timely objection, the trial court did not err in denying the motion for mistrial. *Id.*

Schanen is inapposite. SCI is not seeking a mistrial or complaining about matters that occurred during the jury selection process and to which it did not object; it is complaining about the admission of evidence during trial, to which it timely objected. Error is preserved with regard to a ruling that admits evidence if the opponent of the evidence makes a timely, specific objection and obtains a ruling. TEX. R. APP. P. 33.1; TEX. R. EVID. 103; *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007). The failure to object to an attorney's statements during voir dire of the jury panel, without more, does not waive a later objection to evidence offered during trial, because statements by lawyers during the jury selection process are not evidence. SCI timely objected when evidence of other lawsuits was introduced and the Guerras do not argue otherwise. SCI preserved error. *See McShane*, 239 S.W.3d at 235.

The Guerras also assert that SCI waived error by referring to the other lawsuits in its own opening statement. This reference, the Guerras argue, "opened the door" to the evidence because if a party or the party's attorney references a matter first, thereby "opening the door" by effectively inviting a response, then the opposing party is entitled to make an appropriate response. *See Sw. Elec. Power Co. v. Burlington N. R.R.*, 966 S.W.2d 467, 473 (Tex. 1998) (noting that a party may not complain on appeal of the admission of improper evidence if the party "opened the door" by introducing evidence that is the same or similar in character). But here the Guerras' attorney, not

SCI's attorney, was the first to allude to other lawsuits in opening statements. The response of SCI's attorney was not inappropriate in manner or substance: he acknowledged that other suits had taken place, but maintained that the trial should be about the Guerra family's claims and the facts underlying those claims. SCI's attorney did not exceed the boundaries of the Guerras' attorney's statements or introduce new matters into the proceedings so that he invited a response. SCI did not open the door or waive error.

2. Relevance of the Evidence

We review a trial court's decision to admit evidence for an abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). Evidence of other wrongs or acts is not admissible to prove character in order to show "action in conformity therewith." TEX. R. EVID. 404. But it is admissible to show a party's intent, if material, provided the prior acts are "so connected with the transaction at issue that they may all be parts of a system, scheme or plan." *Oakwood Mobile Homes, Inc. v. Cabler*, 73 S.W.3d 363, 375 (Tex. App.—El Paso 2002, pet. denied); *see* TEX. R. EVID. 404. This can be shown through evidence of similar acts temporally relevant and of the same substantive basis. *See Durbin v. Dal-Briar Corp.*, 871 S.W.2d 263, 268-69 (Tex. App.—El Paso 1994, writ denied), *overruled, in part, on other grounds by Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362 (Tex. 2000). We agree with SCI that the Guerras failed to demonstrate sufficient connection between the events in this case and the alleged actions in other lawsuits to show the other suits were admissible.

For most of the other suits referenced by the Guerras, only the plaintiffs' petitions were admitted and testimony encompassed generalizations as to the different suits. The Guerras assert

such evidence was admissible because the other suits involved similar facts to those underlying their claim—double sale of a plot or moving a body without the family's permission.[5]

As for the suits involving allegations that plots that had already been purchased and were sold a second time to someone else, the Guerras presented no evidence that those events were so connected to the events here that they were all part of a system, scheme, or plan. For example, the Guerras provided the most details about a case involving Rudy Garza, who was buried at Highland Memorial Park in Weslaco in 1977. Another family—the Rogers—purchased four side-by-side plots at Highland Memorial in 1982. One of the plots was the plot where Garza was buried. When a member of the Rogers family died in 2002 and was to be buried, a Memorial Park employee discovered that Garza was buried in a plot that had been sold to the Rogers. The cemetery employees tried to conceal the mistake, then asked Garza's family for permission to move his body. The family denied permission and the body was not moved.

The resale of Garza's plot occurred in a different cemetery before it was owned by SCI Texas and nearly twenty years before the events in this case. There was no evidence that any of the same employees were involved in both the Garza case and the Guerras' case, that the events were somehow connected, or that circumstances surrounding the sales were similar.

The Guerras presented few details about the other cases they alleged involved sales of plots that already belonged to someone else. To the extent details were provided, they showed that the

[5] The Guerras also claim that other suits involving burial of a body in the wrong space were similar to the facts of this case. But this case did not involve burial of a body in the wrong space. Mr. Guerra was buried in the space his family selected and purchased for him. Therefore, evidence of those suits was not admissible to show part of a system, scheme, or plan.

sales were at different cemeteries and each took place at least two years before the events underlying the Guerras' case. The area vice-president over Mont Meta at the time of Mr. Guerra's burial was in charge of some of the other cemeteries when plots were sold twice, but there was no evidence he had any involvement in the sales or that anyone involved in the Guerra events was involved in the other sales.

The Guerras claim that the other cases were relevant to show a pattern of indifference amounting to a common scheme and show that SCI took no action to avoid recurrences of misconduct. But without evidence of the actual facts and circumstances involved, the evidence does not show a sufficient connection to the events at issue to support their being relevant. *See Durbin*, 871 S.W.2d at 268-69 (finding that a trial court abused its discretion in a workers' compensation wrongful discharge case by excluding evidence of other retaliatory acts by a corporation involving the same supervisory personnel, the same workplace, and the same pattern of conduct).

In regard to suits with claims allegedly similar to the Guerras' claim for moving Mr. Guerra's body without permission, the trial court admitted evidence of one suit in which a body was moved without permission. The evidence in that case showed that when Estella Cooper's husband was buried in 2003 at Sunset Memorial Gardens in Odessa, a cemetery owned by SCI Texas, he was buried in the wrong plot. Cooper knew on the day of her husband's burial that he was not being buried in the plot she had purchased, but she did not say anything. When she later went to visit the grave, his body had been moved to the plot she had purchased. Cooper testified that she sued "SCI" and a jury awarded her and her family $3.5 million.

Although both the Guerras' case and the Cooper case involved cemetery employees moving a body without permission, that is where the similarities end. The events occurred at different cemeteries and there was no evidence that any of the same employees were involved or that they occurred under similar circumstances. The events also occurred more than a year apart. There is no evidence that the events were part of a system, scheme, or plan.

We conclude that the trial court erred by admitting irrelevant evidence of other lawsuits, verdicts, and judgments. We next consider whether the errors were harmful.

3. Harm

An error in admitting evidence requires reversal if it probably caused the rendition of an improper judgment. TEX. R. APP. P. 61.1; *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004). In determining whether the error was harmful we evaluate the entire case from voir dire to closing argument, considering the evidence, strengths and weaknesses of the case, and the verdict. *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871 (Tex. 2008). We also consider whether counsel emphasized the erroneous evidence and whether the admission of the evidence was calculated or inadvertent. *Id.* at 874; *Nissan Motor Co.*, 145 S.W.3d at 144 ("[W]hether erroneous admission is harmful is more a matter of judgment than precise measurement.").

The Guerras' attorney colorfully and skillfully emphasized the evidence of suits, verdicts, and judgments against other cemeteries from voir dire through closing argument. For example, during voir dire he asked some venire members who had family buried in Buena Vista cemetery which was owned by "SCI," questions such as "have they ever from Buena Vista told you that they

also had allegations and lawsuits filed against them in this county for selling plots when people were still -- were already buried in them?" He commented in his opening statement about evidence that SCI illegally dug up bodies "not just in this case but you'll hear others" and "[w]e'll also be showing you again they have been involved in other lawsuits." During trial the Guerras' attorney questioned SCI representatives about the suits, sometimes reading allegations from the pleadings which had been admitted as evidence. And during closing argument, the Guerras' attorney continued to emphasize the other lawsuits, verdicts, and judgments. For example, he argued that "Odessa awarded $3.5 [million] to that lady who they did the same thing to in Midland." Manifestly, the Guerras' attorney intended the evidence to be a significant and pervasive part of the trial. *See Reliance Steel*, 267 S.W.3d at 874 ("[A] party's insistence on introducing inadmissible testimony 'indicates how important he thought it was to his case.'" (quoting *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 917 (Tex. 2002))).

In this case there was no evidence three of the four plaintiffs suffered compensable mental anguish, yet the jury awarded each of the three mental anguish damages of $100,000. Because there was no evidence to support a finding of compensable mental anguish, the jury's findings must have been based on something other than properly admitted evidence, and we have no doubt that the extensive evidence of other suits, allegations in the suits, and similar evidence was a significant factor in the jury's damages findings, both actual and punitive. *See id.* at 872. We conclude that the erroneous admission of evidence of other lawsuits, verdicts, and judgments was harmful and requires the case to be remanded for a new trial.

B. Punitive Damages in a Trust

Although we have concluded that the case should be remanded for a new trial, in order to provide guidance to the trial court on retrial we next address SCI's claim that the trial court improperly admitted evidence that Mrs. Guerra would put any punitive damages she received into a trust to pay for funerals for persons who could not afford them.[6] *See MCI Sales & Serv. v. Hinton*, 329 S.W.3d 475, 495 n.19 (Tex. 2010). The questions and answers of which SCI complains are as follows:

> Q. You're also asking the jury to award punitive damages for this criminal behavior of theirs, correct?
> A. Of course.
> Q. But you don't want a dime of that yourself do you?
> A. No.
> Q. In fact, you want that put in a trust to pay for people who are not able to afford their own funeral?
> A. That's right.
> Q. That's where any monies they award will go and you've got a trust set up to do that, correct?
> A. Yes, sir.

SCI claims that this evidence is irrelevant.

Evidence is relevant, and therefore admissible, if it has any tendency to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401, 402. The purposes of punitive damages are to deter and punish culpable conduct. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887,

[6] SCI also asserts that the admission of this evidence violates due process. We do not address the constitutional question. *See In re B.L.D.*,113 S.W.3d at 349.

896 (Tex. 2000); *see* TEX. CIV. PRAC. & REM. CODE § 41.001(5) (providing that exemplary damages, including punitive damages, are "damages awarded as a penalty or by way of punishment"). The Legislature has set out several factors to be considered when determining the amount of exemplary damages. These include the nature of the wrong, the character of the conduct involved, the wrongdoer's degree of culpability, and the situation and sensibilities of the parties. *Id.* § 41.011. Evidence about what Mrs. Guerra planned to do with any punitive damages was not relevant to proving any of these factors or to penalizing or punishing SCI. *See* TEX. R. EVID. 401; *see also Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1021 (Or. 1990) ("[I]nstructing a jury that a portion of any punitive damage award will be used to pay the plaintiff's attorney or to contribute to a worthy cause, such as help for victims of crime, does nothing to further or even to inform the jury as to the proper goals of punitive damage awards. Instead, the instruction distracts the jury from the appropriate line of analysis that this Court has said a jury should follow in cases involving potential awards of punitive damages . . . .").

The Guerras argue that the evidence was relevant to their claim for injunctive relief in which they requested SCI be required to fund a program to study and monitor their cemeteries and implement procedures to ensure proper record keeping. But Mrs. Guerra's plans to set up a trust to pay for funerals for people who could not afford them were simply not relevant to the issue of whether she was entitled to an injunction regarding monitoring of SCI cemeteries.

The Guerras also assert that the evidence was relevant to rebut SCI's attorney's statement during voir dire that the case was about the amount of damages. We disagree. During voir dire SCI's attorney stated "[w]e are not fighting about the circumstances of what happened because we

admit that it's wrong, but how much money." That was simply a statement focusing the jury's attention on the damages issues that would be submitted to them. The statement did not change the focus of the jury to what the Guerras would do with any money they received.

The Guerras claim that SCI waived its complaint by offering similar evidence—evidence that SCI accommodates families who are needy—because a party may not complain on appeal of the improper admission of evidence if the complaining party introduced the same evidence or evidence of a similar character. *See Sw. Elec. Power Co.*, 966 S.W.2d 467 at 473. After Mrs. Guerra testified that she would put any punitive damages into a trust, SCI presented evidence that it has a program to help families who cannot afford funeral services. SCI's evidence was not exactly the same as Mrs. Guerra's testimony, but in context it seems to have been an attempt to blunt the effect of her testimony about how she planned to use any exemplary damages. Because the case will be remanded for a new trial for other reasons, we need not decide whether Mrs. Guerra's testimony was harmful or whether SCI waived its complaint. But for the trial court's benefit on retrial we note that Mrs. Guerra's testimony about what she planned to do with any punitive damages award was not relevant and was not admissible.

V. Other Issues

SCI also claims that (1) the jury was improperly influenced by an improper "Golden Rule" argument in which it claims the Guerras' attorney asked the jury to put themselves in the Guerras' place and award what they would want to be awarded, and (2) because there was only one damages question based on three theories of liability, it cannot be determined whether the damages were supported by the one cause of action that SCI asserts was viable. These issues may not recur during

the new trial on remand and we do not address them. *See Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 865 (Tex. 2009).

VI. Conclusion

We reverse the judgment of the court of appeals. We render judgment that (1) Julie, Gracie, and Mary Ester take nothing from SCI International and SCI Texas and (2) Mrs. Guerra take nothing from SCI International. Mrs. Guerra's claim against SCI Texas is remanded for a new trial.

_____

Phil Johnson
Justice

OPINION DELIVERED: June 17, 2011

IN THE SUPREME COURT OF TEXAS

NO. 09-0955

ALLEN KELLER COMPANY, PETITIONER,

v.

BARBARA JEAN FOREMAN, ET AL., RESPONDENTS

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

Argued December 7, 2010

JUSTICE LEHRMANN delivered the opinion of the Court.

In this case we are called upon to decide whether a general contractor owed a duty to a motorist who was killed as a result of an allegedly dangerous condition created by the contractor's work. Because Allen Keller Company was working under a contract that required strict compliance and had no discretion to vary from its terms, we conclude that it had no duty to rectify the condition. In addition, because the premises were not under Allen Keller Company's control at the time of the accident and the condition was known by the property owner, we conclude that Allen Keller Company owed no duty to warn either the public or the property owner. We reverse the judgment of the court of appeals and render judgment in favor of Keller.

I. BACKGROUND

Gillespie County hired Allen Keller Company to work on a number of road construction projects in the County. The projects were intended to address a variety of problems related to significant flooding that occurred in the area. The particular project germane to this case required Keller to excavate an embankment[1] and to erect a concrete pilot channel next to a one-lane bridge spanning the Pedernales River. The project was designed and engineered by O'Malley Engineers, a San Antonio-based engineering firm.

The contract between Keller and the County contained a number of provisions relevant to our analysis. The contract required Keller to adhere to the engineering specifications produced by O'Malley and provided that Keller's "obligation to perform and complete the Work in accordance with the Contract Documents [was] absolute." The contract further provided that any changes to the contract would be made by the County and O'Malley, not Keller. It also specified that representatives of both the County and O'Malley would periodically visit the work site to assess Keller's progress and its adherence to the design, and there is evidence that the County's representative visited the site nearly every day. It is undisputed that when O'Malley had a representative on the job site, it was acting on behalf of the County as its agent. Finally, the contract provided that upon completion of the project, a representative of O'Malley would inspect the site and certify that Keller had completed the work according to specifications.

[1] As we note below, the design appended to the Foremans' response to Keller's motions for summary judgment depicts a five-foot-wide channel buttressed on either side by five-foot-wide footprints constructed of cement stabilized earthfill.

The design specifications required Keller to excavate an embankment and pour a concrete pilot channel to drain water from the roadway away from the foundation of the bridge. The County was concerned that water flow around the bridge's foundation would cause it to weaken, thus compromising its integrity. Prior to excavation, there was a space of approximately ten feet between the bridge and the embankment, most of which was spanned by a guardrail that was connected to the bridge. After Keller excavated a portion of the embankment to erect the pilot channel, as called for by the engineering plans,[2] the gap between the end of the guardrail and the embankment was widened by at least ten feet. The contract specifications did not include extending the guardrail. A local resident compared the gap and the concrete pilot channel running into the river to a boat ramp.

In June 2003, at the conclusion of Keller's work on the span, and after a representative of O'Malley certified that it was complete according to specifications, the County accepted Keller's work. Some seven months later, Courtney Foreman and two of her friends were traveling towards the one-lane span on Old San Antonio Road before tragedy struck. It was night and the road surface was slick from rain. Although Courtney was the vehicle's registered owner, she sat in the front passenger seat while one of her friends drove. Although the driver was not speeding, he lost control of the vehicle as it rounded a sharp curve leading down to the bridge. Before the driver could regain control of the vehicle, it passed through the gap between the guardrail and the embankment. The vehicle almost stopped at the river's edge, but it slowly rolled into the Pedernales River. Courtney's

[2] The Foremans contend that the design specifications did not call for excavation of the embankment. We disagree. In their response to Keller's summary judgment motions, the Foremans appended two documents created by O'Malley depicting, in detail, the location, grade, and other specifications for the concrete channel. The document depicting a cross-section of the concrete channel clearly shows that in addition to the five-foot-wide concrete channel, Keller was also required to construct five-foot- wide concrete stabilized earthfill footprints on either side of the channel.

friends escaped the vehicle as it became immersed. They tried to rescue Courtney, but the vehicle sank and Courtney drowned before they could extract her. The guardrail has since been extended so that it spans the entire width of the gap.

The Foremans filed a wrongful death action against Gillespie County, O'Malley Engineers, Keller, the driver of the vehicle, and Rodriguez Engineering Bridge Inspections.[3] The Foremans settled with the County, O'Malley, and the driver. The Foremans asserted a premises defect theory of liability against Keller based on the fifteen-foot gap between the guardrail and the embankment. Keller moved for summary judgment under Rule 166a(b) and (i) of the Texas Rules of Civil Procedure, arguing that it owed no duty to Courtney Foreman and that its actions were not the proximate cause of her death. The trial court granted summary judgment without specifying which of Keller's motions it was granting.

The court of appeals reversed the trial court's summary judgment on several grounds. ___ S.W.3d ___, ___. The court held that Keller was not entitled to summary judgment on the ground that it owed no duty because its Rule 166a(b) motion for summary judgment failed to "address whether it created a dangerous condition." *Id.* at ___. It further held that Keller was not entitled to a Rule 166a(i) summary judgment because it was foreseeable that a motorist might "deviate[] from the roadway in the ordinary course of travel and while driving with reasonable care." *Id.* at ___. The court of appeals then held that the Foremans presented sufficient evidence to raise a question of fact to support their claim that Keller created a dangerous condition at the job site. *Id.* at ___. Finally,

[3] The Texas Department of Transportation and the City of Fredericksburg were initially included as defendants in the Foremans' suit; however, both were dropped prior to summary judgment.

the court of appeals held that Keller had not established as a matter of law that it did not proximately cause the accident that led to Courtney's death. *Id.* at ___. We granted Keller's petition for review. 53 Tex. Sup. Ct. J. 1173, 1174 (September 20, 2010).

II. DUTY

A. The court of appeals' rationale

The sole issue before us is whether, under the circumstances presented, Keller owed a duty of care to prospective motorists in the area, including Courtney Foreman.[4] The court of appeals held that the mere completion of work according to plans, coupled with acceptance of that work by the County, did not relieve Keller of its duty to protect the public from unreasonably dangerous conditions resulting from its work. ____ S.W.3d at ____. The court noted that a contractor who creates a dangerous condition may be liable to members of the public. *Id.* at ____. It held that Keller was not entitled to summary judgment under Rule 166a(b) of the Texas Rules of Civil Procedure because Keller's summary judgment motion did not address whether Keller had created a dangerous condition, implicitly assuming that Keller would owe a duty if it had done so.[5]

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[4] Comment a to section 7 of the Restatement (Third) of Torts: Liability for Physical Harm (Proposed Final Draft No. 1, 2005) discusses a distinction between broad, policy-laden questions of duty and more particularized scope-of-liability inquiries such as proximate cause. The former present questions of law to be decided by courts, while the latter present more individualized issues "regarding the reasonableness of defendants' conduct" to be decided by juries. *Nabors Drilling U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 410 n.5 (Tex. 2009); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM, Chapter 3, § 7 cmt. a (Proposed Final Draft No. 1, 2005). The sole issue presented by the parties here is whether Allen Keller owed a duty to the public. Therefore, we focus on the issue of duty. *See Nabors*, 288 S.W.3d at 410 n 5.

[5] Keller's summary judgment motion posed a purely legal question, assuming that it owed no duty even if its work resulted in a dangerous condition on the premises.

In concluding that Keller was not entitled to summary judgment, the court of appeals relied primarily on our decision in *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962). The court read *Strakos* to stand for the proposition that a contractor who creates any dangerous condition owes a duty of care to the general public, regardless of the circumstances. ___ S.W.3d at ___. It is true that in *Strakos*, we rejected the accepted-work doctrine. *Strakos*, 360 S.W.2d at 791. Under that doctrine, an independent contractor who has created a dangerous condition on real property is relieved of any duty of care to the public merely because the contractor's work is accepted by the property owner or because the contract did not specifically call for the contractor to make the premises safe. *Id.* at 791–92.

But our decision did not recognize the existence of a duty in all circumstances. To the contrary, we explicitly stated that

> [o]ur rejection of the "accepted work" doctrine is not an imposition of absolute liability on contractors. We simply reject the notion that although a contractor is found to have performed negligent work or left premises in an unsafe condition and such action or negligence is found to be a proximate cause of injury, he must nevertheless be held immune from liability *solely* because his work has been completed and accepted in an unsafe condition.

Id. at 790 (emphasis added). While we rejected the owners' acceptance of completed work as an absolute defense, we signaled that general negligence principles apply. *Id.* at 791.

Keller maintains that our decision in *Glade v. Dietert*, 295 S.W.2d 642, 644 (Tex. 1956), should control the outcome of this case. While *Glade* is not inconsistent with our decision today, its facts differ significantly and it is not determinative. In *Glade*, a contractor working to construct a sewer line in a residential area bulldozed three trees that were rooted on private property.

Unbeknownst to the contractor, the City had neglected to extend its right-of-way to cover the area in which the trees were located. The contractor was sued for trespass. We held that the contractor could not be held liable because it was the City's responsibility to obtain the necessary right-of-way, not the contractor's. *Glade*, 295 S.W.2d at 645. Our holding in *Glade* stands for the limited proposition that, to the extent it operates within the parameters of the governing contract, a contractor is justified in assuming that the government entity has procured the necessary right-of-way. *Glade*, 295 S.W.2d at 645. Accordingly, we consider whether Keller owed a duty in this case.

Whether a duty exists is a question of law that is to be decided by the Court. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010) (citing *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 217 (Tex. 2008)). Any such determination involves the balancing of a variety of factors, "including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant." *Id.* (citing *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005)).

B. Duty to rectify

In determining the existence of a duty in this case, we assume, as the parties do, that Keller's work created an unreasonably dangerous condition at the site — a fifteen-foot-gap between the end of the guardrail and the embankment wide enough for a car to pass through. We first consider whether Keller owed a duty to rectify the condition.[6] The presence of an unreasonably dangerous condition, of course, weighs in favor of recognizing a duty. *See id.* The consequences of placing

[6] The duty the Foremans envision is not entirely clear, but we believe that they have suggested that Keller could have extended the guardrail. By "rectify the condition," we mean a duty to go beyond or otherwise alter the work called for by the construction documents, as opposed to warning the owner or the public, an alternate theory that we discuss below.

a duty on Keller to rectify the condition in these circumstances, however, lead us to conclude that Keller owed no such duty. Keller's contract with the County required absolute compliance with the contract specifications, and there is summary judgment evidence that any deviation from the specifications could have jeopardized federal funding for the project. Further, it is undisputed that O'Malley certified Keller's compliance with the contract specifications and the County accepted and paid Keller for the work. While certainly every construction contract implicitly assumes that the contractor will conform to contract specifications, we distinguished in *Strakos* between the duties that may be imposed upon a contractor that has some discretion in performing the contract and a contractor that is left none:

> [T]he contractual provisions . . . are not couched in directory wording of that certainty which would require a conclusion that the act of leaving the hole was at the time of its origin and thereafter the act of Harris County and not that of the contractor, as is sometimes the case where a builder merely follows plans and specifications which have been handed to him by the other contracting party with instructions that the same be literally followed.

Strakos, 360 S.W.2d at 803 (Suppl. Op. on rehearing). Because the contract in *Strakos* neither required nor forbade the contractor from filling in or marking holes that comprised the dangerous condition, but instead left the choice to the contractor's discretion, the contractor bore a duty to rectify it. *Id.* at 791. In this case, any decision that Keller would have made to rectify the dangerous condition would have had the effect of altering the terms of the contract. Moreover, because Keller did not own the property, it was not in a position to make decisions about how to make the premises safe.

Amicus curiae the Associated General Contractors of Texas, Inc. maintains that imposing liability upon contractors in Keller's position for what is ultimately a faulty design would substantially increase the costs of construction. The AGC argues that contractors currently rely on the expertise of engineers who design and prepare construction plans and specifications to ensure that the completed work will be safe. They further contend that the imposition of a duty when a contract requires absolute compliance with plans and specifications would require contractors to hire their own professionals to ensure that a completed project will not be unduly dangerous. The AGC's concerns further illustrate the difficulties inherent in imposing the type of duty on a contractor that has been advanced by the Foremans. Given the consequences of recognizing a duty under the circumstances this case presents, we hold that Keller had no duty to rectify the gap contemplated by the designs and specifications.

C. Duty to warn

We next consider whether Keller owed a duty to make the premises safe by warning of the dangerous condition. The Foremans initially suggested that Keller had a duty to warn the public of the dangers posed by the gap. As a general rule, "a plaintiff must prove that the defendant possessed—that is, owned, occupied, or controlled—the premises where injury occurred." *Wilson v. Tex. Parks and Wildlife Dept.*, 8 S.W.3d 634, 635 (Tex. 1999) (per curiam) (citing *City of Denton v. Page*, 701 S.W.2d 831, 835 (Tex. 1986)). So long as a general contractor maintains control over the construction site, it is "charged with the same duty as an owner or occupier." *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex. 1985) (internal citations omitted). While Keller was in control of the property during construction, Keller did not own the property or the highway right-of-way, and

was not in a position to erect permanent signs or other devices to warn the public of the gap. *See*, *e.g., Allen v. Va. Hill Water Supply, Corp.*, 609 S.W.2d 633, 635–36 (Tex. Civ. App.—Tyler 1980, no writ) (placing a structure on another's property without permission may constitute trespass).

At oral argument, however, the Foremans' counsel urged us to recognize a duty on Keller's part to warn the County of the condition. We have never held that a contractor may owe a duty to warn a premises owner of a danger on the premises owner's own property. In this case, the County had a representative on the site nearly every day, and representatives of the engineer also frequently visited it. Consequently, the County was aware of conditions at the site. Keller was a contractor, not an engineer, and its work was certified by the engineer before it left the project site. Keller had vacated the premises more than four months before the accident occurred. Accordingly, Keller had no duty to warn of the danger presented by conditions at the site.

III. CONCLUSION

Under the circumstances presented, Keller owed no duty to rectify the site conditions or to warn of them. Accordingly, we reverse the judgment of the court of appeals and render judgment in favor of Keller.

_____
Debra H. Lehrmann
Justice

OPINION DELIVERED: April 15, 2011

IN THE SUPREME COURT OF TEXAS

No. 09-0999

TEXAS A&M UNIVERSITY - KINGSVILLE, PETITIONER,

v.

MELODY YARBROUGH, RESPONDENT

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

Argued January 4, 2011

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE MEDINA, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE LEHRMANN.

JUSTICE WILLETT delivered a dissenting opinion, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE JOHNSON.

An associate professor contends that her application for tenure was undermined by a department chair's summary of a performance evaluation in which the professor received an "exceptional" numerical rating. Although she was given the opportunity to rebut the summary, the professor asserts that the university prevented her from filing an official grievance. The professor was granted tenure before she filed the present suit requesting a declaration that the university's action violated Government Code section 617.005. We must decide whether her complaint about the university's grievance process survives her status as a tenured professor. Because we conclude

that this case presents no live controversy, we reverse the court of appeals' judgment and render judgment dismissing the case.

After receiving a performance narrative that she believed contradicted her exceptional numerical score, Melody Yarbrough, an associate professor at Texas A&M University-Kingsville (TAMUK), sought to contest it. She complained to the faculty grievance committee that the narrative would be prejudicial to her upcoming tenure application. While the committee initially indicated it would implement formal grievance procedures, TAMUK ultimately quashed the grievance because procedures set out in the TAMUK Faculty Handbook and Texas A&M University System Regulations do not address complaints based upon an allegedly negative performance review. These procedures, formally adopted by either the Texas A&M University System Board of Regents under section 85.21(a) of the Education Code or by TAMUK under authority delegated by the board, are at the heart of Yarbrough's complaint. Yarbrough contends that the procedures violate section 617.005 of the Government Code[1] because they do not provide a minimally adequate opportunity to present her grievance. She sought a declaratory judgment to that effect.

TAMUK moved for summary judgment arguing, among other things, that Yarbrough's complaint about her negative evaluation was mooted when TAMUK gave her tenure. Yarbrough disagreed, contending that because TAMUK had not changed its policy, TAMUK continued to violate her right to present grievances. The trial court granted TAMUK's motion without stating

[1] *See* TEX. GOV'T CODE § 617.005 ("This chapter does not impair the right of public employees to present grievances concerning their wages, hours of employment, or conditions of work either individually or through a representative that does not claim the right to strike.").

the grounds therefor. Yarbrough appealed but did not mention the mootness issue. *See* TEX. R. APP. P. 38.1(f) ("The brief must state concisely all issues or points presented for review."). Nonetheless, the court of appeals held that the case was not moot because "a repetition of events in this case is likely." 298 S.W.3d at 370.

"Capable of repetition yet evading review" is a rare exception to the mootness doctrine. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). It applies only when "the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot." *Gen. Land Office v. Oxy U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990) (quoting *Spring Branch I.S.D. v. Reynolds*, 764 S.W.2d 16, 18 (Tex. App.—Houston [1st Dist.] 1988, no writ)). There must also be a reasonable expectation that the same action will occur again if the issue is not considered. *Blum v. Lanier*, 997 S.W.2d 259, 264 (Tex. 1999); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) ("[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality.").

Here, Yarbrough complained that TAMUK's policy prevented her from grieving portions of the narrative that were less than flattering and were, she contended, a "setup for not getting tenure." But TAMUK then awarded her tenure.[2] Yarbrough argues that TAMUK continues to enforce its policy, violating her right to present future grievances. While Yarbrough may wish to grieve some future action, there is no evidence that she would be precluded from seeking review of TAMUK's policy when (and if) those grievances arise—that is, there has been no showing that

[2] The department chair who wrote the narrative approved Yarbrough for tenure.

TAMUK's enforcement of its policy was "of such short duration" that she would be unable to obtain review before the issue becomes moot. *Gen. Land Office*, 789 S.W.2d at 571. Nor is there evidence that Yarbrough will receive subsequent negative evaluations that she may wish to grieve. *Cf. Williams*, 52 S.W.3d at 184-85 (holding that inmates did not satisfy the capable-of-repetition requirement because "[w]hether and when [they] may be charged with a crime that would lead to their incarceration . . . is speculative"). Although the parties continue to dispute the lawfulness of TAMUK's grievance procedures, "that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) (holding that plaintiffs' claims challenging state's forfeiture procedures were mooted by resolution of underlying property disputes).

The dissent, seizing upon an argument Yarbrough raised for the first time in this Court, contends that the controversy survives because the evaluation remains part of Yarbrough's file and may be used against her in future employment decisions. This reasoning appears to be based on the collateral consequences exception to mootness–that even though Yarbrough's primary injury has been resolved, she continues to suffer collateral legal consequences from negative aspects of the narrative. *See Gen. Land Office*, 789 S.W.2d at 571. But the possibility that the "taint" of a negative evaluation could lead to unspecified future harm does not present a "substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (emphasis added); *Governor Wentworth Reg. Sch. Dist. v. Hendrickson*, 201 F. App'x 7, *9 (1st Cir. 2006) (holding that case seeking declaration regarding constitutionality of student

suspension was moot after student graduated; potential bearing on student's prospective employment possibilities lacked immediacy and reality required to support declaratory judgment); *Pilate v. Burrell (In re Burrell)*, 415 F.3d 994, 999 (9th Cir. 2005) (holding that controversy was moot despite alleged enduring "taint" of lower court judgments); *Sandidge v. Washington*, 813 F.2d 1025, 1026 (9th Cir. 1987) (concluding that suit seeking declaration regarding legality of poor performance evaluation of National Guard member was moot after plaintiff left the military, despite his contention that the negative evaluation remained part of his record and could adversely affect his future employment prospects).

We reverse the court of appeals' judgment and render judgment dismissing the case. TEX. R. APP. P. 60.2(c).

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

No. 09-0999

TEXAS A&M UNIVERSITY - KINGSVILLE, PETITIONER,

v.

MELODY YARBROUGH, RESPONDENT

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

JUSTICE WILLETT, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE JOHNSON, dissenting.

I would not treat this case as moot merely because Yarbrough received tenure. Her suit challenging the lawfulness of TAMUK's grievance system, filed *after* she obtained tenure, may (or may not) in substance be an invalid *ultra vires* claim. But *that* is the fateful unresolved question that dominates the parties' briefing and deserves our substantive focus. If Yarbrough's claim is jurisdictionally barred, it is because of immunity, not mootness.

Tenure is an important milestone in an academic career, but it does not solely determine the arc of that career. Yarbrough's alleged injury lies in the negative evaluation itself and its ongoing consequences. The evaluation creates a permanent record—a record revisited annually. According to the Faculty Handbook:

> Each faculty member, whether tenured, probationary, or non-tenure track, is evaluated yearly for purposes of reappointment (in the cases of probationary and non-tenure track faculty), promotion in rank, possible reassignment, and

> discretionary salary increases. . . . Written narratives are part of the evaluation process and are used when advising faculty of the outcomes of their yearly performance evaluations. . . .
>
> . . . The results of such evaluation may be used along with other information in decisions regarding retention, promotion, and discretionary salary increases.

These provisions indicate that the narrative of which Yarbrough complains could impact decisions other than tenure, and long after tenure has been granted. Given these ongoing effects, Yarbrough continues to maintain "a justiciable interest in the subject matter in litigation."[1] The negative narrative is a mark on her personnel record that, as far as this record indicates, lasts forever.[2] TAMUK's own handbook states that the unflattering narrative remains in her personnel file and may be considered in making future decisions regarding retention, reassignment, promotion, and salary.

The United States Supreme Court has generally recognized that a claim is not moot if the plaintiff is subject to "further penalties or disabilities" or "collateral legal disadvantages" in the future.[3] In *Carrillo v. State*,[4] we held that a stigmatic injury that threatened to cause another future injury was sufficient to demonstrate a live controversy.[5] Yarbrough's controversy remains live

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[1] *Yett v. Cook*, 281 S.W. 837, 841 (Tex. 1926); *see also Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).

[2] Even if receiving tenure *were* Yarbrough's primary concern, she would maintain a claim for relief because the evaluation's ramifications persist. *Powell v. McCormack*, 395 U.S. 486, 499 (1969) (rejecting theory that "mootness of a 'primary' claim requires a conclusion that all 'secondary' claims are moot").

[3] *See Sibron v. New York*, 392 U.S. 40, 53–58 (1968) (finding that a criminal case is moot, even after the sentence has been served, only if there is "no possibility" of collateral consequences).

[4] 480 S.W.2d 612, 616–17 (Tex. 1972).

[5] In *Carrillo*, we held that a juvenile could maintain an appeal in a delinquency proceeding—even though he had served his sentence, the matter was confidential, and statutes provided that "no adjudication should impose any civil disability, that the child shall not be deemed a criminal by reason of being adjudicated a juvenile delinquent, and that the adjudication should not be deemed to be a conviction." *Id.* at 617. Despite these protections, the Court noted that the statutes did not specifically address whether such an adjudication could affect the minor's ability to enter into a profession or serve in the military, and that it was possible that the conviction could later be publicized if the minor committed a crime after reaching majority. *Id.*

because, under general mootness principles, she retains a "legally cognizable interest in the outcome"[6] and suffers "continuing, present adverse effects,"[7] namely the ongoing impact of the narrative itself. It is the continuing role of the narrative, not Yarbrough's difficult road in obtaining tenure or abstract objection to one day being resubjected to TAMUK's grievance policy, that makes this case non-moot.

Mootness doctrine does not always lend itself to precise line drawing,[8] and I would not apply it here. Today's decision is especially unsatisfying because this case raises important immunity issues worthy of Supreme Court clarification; it merits reaching the merits. Dismissal for want of jurisdiction may well be the correct disposition, but if so, it should be immunity-based at the end of the day, not mootness-based at the beginning.

_____

Don R. Willett
Justice

OPINION DELIVERED: August 26, 2011

[6] *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) ("In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.") (citations and quotation marks omitted).

[7] *See O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects.").

[8] *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980) (recognizing the "flexible character" of the Court's mootness jurisprudence).

IN THE SUPREME COURT OF TEXAS

NO. 09-1007

MARIA ALEJANDRO REYES, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF KAREN REYES, A/K/A KAREN VAQUERA, DECEASED, PETITIONER,

v.

THE CITY OF LAREDO, RESPONDENT

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

PER CURIAM

Maria Reyes sued the City of Laredo for the wrongful death of her fourteen-year-old daughter, who drowned when the van in which she and her family were riding late one night was swept away in flash flood waters where Chacon Creek had overflowed Century Boulevard during a torrential rainstorm. The City asserted governmental immunity and moved to dismiss for want of jurisdiction. *See Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 639 (Tex. 1999) ("[I]mmunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction."). The trial court denied the motion, and the City appealed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) ("A person may appeal from an interlocutory order . . . that . . . grants or denies a plea to the jurisdiction by a governmental unit . . . ."); *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004) ("The reference to 'plea to the jurisdiction' is not to a

particular procedural vehicle but to the substance of the issue raised. Thus, an interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle, such as a motion for summary judgment.").

With exceptions not relevant here, section 101.022(a) of the Texas Tort Claims Act limits the government's duty to prevent injury from premise defects to those of which it has actual knowledge. See TEX. CIV. PRAC. & REM. CODE § 101.022(a) ("Except as provided in Subsection (c) [pertaining to toll roads], if a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises."); *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992) ("[A] licensee must prove that the premises owner actually knew of the dangerous condition, while an invitee need only prove that the owner knew or reasonably should have known."). But the limitation does not apply to "special defects such as excavations or obstructions on highways, roads, or streets." TEX. CIV. PRAC. & REM. CODE § 101.022(b); *Denton Cnty. v. Beynon*, 283 S.W.3d 329, 331 (Tex. 2009) ("Where a special defect exists, the State owes the same duty to warn as a private landowner owes to an invitee, one that requires the State 'to use ordinary care to protect an invitee from a dangerous condition of which the owner is or reasonably should be aware.'" (quoting *Payne*, 838 S.W.2d at 237) (footnotes omitted)). The court of appeals held that a rain-flooded street is not a special defect, ___ S.W.3d ___, ___ (Tex. App.–San Antonio 2009), and we agree. But the court of appeals also held, by a divided vote, that the evidence supports

an inference that the City had actual knowledge of the flooded crossing before the incident, *id*. at ___, and with this we disagree. Accordingly, we reverse and render judgment for the City.

"Whether a condition is a premise defect or a special defect is a question of duty involving statutory interpretation and thus an issue of law for the court to decide." *Payne*, 838 S.W.2d at 238. The Act does not define "special defect," and so, "[u]nder the ejusdem generis rule, we are to construe 'special defect' to include those defects of the same kind or class as the ones expressly mentioned" — that is, excavations and obstructions on roadways. *Cnty. of Harris v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978). *Webster's* defines an excavation as a cavity and an obstruction as an impediment or a hindrance, WEBSTER'S THIRD NEW INT'L DICTIONARY 791, 1559 (1981), but not every hole or hindrance is special; otherwise, the statutory limitation on the government's duty would amount to little. We have described the class of conditions intended by the statute as those which, because of their size or "some unusual quality outside the ordinary course of events," *City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex. 2008) (per curiam), pose "'an unexpected and unusual danger to ordinary users of roadways.'" *Texas Dep't of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009) (per curiam) (quoting *Payne*, 838 S.W.2d at 238). Thus, for example, a layer of loose gravel on the roadway surface, while a hindrance, is not a special defect because it does not "physically block the road," *York*, 284 S.W.3d at 847, or "present the same type of 'unexpected and unusual danger to ordinary users of roadways'" intended by the statute, *id*. at 848 (quoting *Payne*, 838 S.W.2d at 238). But "a sizeable mound of gravel . . . left on the roadway" could be a special defect. *Id*. A two- to three-inch difference in elevation between lanes is not a special defect, *Reed*, 258 S.W.3d at 622 ("[T]here is nothing unusually dangerous about a slight drop-off between traffic lanes

in the roadway. Ordinary drivers, in the normal course of driving, should expect these slight variations on the road caused by normal deterioration." (citation omitted)), nor is a sharp turn in a road construction detour, *State v. Rodriguez*, 985 S.W.2d 83, 86 (Tex. 1999) (per curiam) ("This detour's sharp turn and other alleged design flaws did not unexpectedly and physically impair a vehicle's ability to travel on the roadway in the same way as a ditch in the road or a ten-inch drop along the shoulder."), nor is a stopped car, *State v. Burris*, 877 S.W.2d 298, 299 (Tex. 1994) (per curiam) ("A fully operational motor vehicle, making an illegal movement or momentarily stopped on a highway, is neither a defect in the highway premises nor an excavation or obstruction or similar condition."). But "a ditch across the highway" is a special defect, *Eaton*, 573 S.W.2d at 178-79 ("Witnesses described the hole as oval shaped, varying at places from six to ten inches in depth and extending over ninety percent of the width of the highway. The hole was four feet wide at some points and nine feet wide at others."), as is a large sign lying face down in the middle of the road, *State v. Williams*, 940 S.W.2d 583, 585 (Tex. 1996) (per curiam).

Ice on the road is an obstruction of sorts in that it impedes travel, but in *State Department of Highways and Public Transportation v. Kitchen*, we held that ice on a bridge during freezing, wet weather was not a special defect:

> Special defects are excavations or obstructions . . . or other conditions which "present an unexpected and unusual danger to ordinary users of roadways." An icy bridge, under the circumstances of this case, is not such a condition. When there is precipitation accompanied by near-freezing temperatures, as in this case, an icy bridge is neither unexpected nor unusual, but rather, entirely predictable. Unlike an excavation or obstruction, an icy bridge is something motorists can and should anticipate when the weather is conducive to such a condition.

867 S.W.2d 784, 786 (Tex. 1993) (per curiam); *see also Beynon*, 283 S.W.3d at 332 n.14 (clarifying that conditions *unlike* excavations and obstructions are not special defects merely because they are unexpected or unusual). A storm-flooded street is no different. Such a condition is not a special defect, and all the courts of appeals that have considered the matter, save one, have agreed. *See City of Austin v. Leggett*, 257 S.W.3d 456, 475 (Tex. App.–Austin 2008, pet. denied); *Tex. Dept. of Transp. v. Fontenot*, 151 S.W.3d 753, 761-62 (Tex. App.–Beaumont 2004, pet. denied); *Villegas v. Tex. Dept. of Transp.*, 120 S.W.3d 26, 32-33 (Tex. App.–San Antonio 2003, pet. denied); *Corbin v. City of Keller*, 1 S.W.3d 743, 747-48 (Tex. App.–Fort Worth 1999, pet. denied). *But see Miranda v. State*, 591 S.W.2d 568, 570 (Tex. App.–El Paso 1978, no pet.) (flood waters constituted obstruction and therefore special defect).

Therefore, under section 101.022 of the Act, the City had no duty to warn motorists of flooding on Century Boulevard at Chacon Creek unless it actually knew of the flooding. The City knew that the crossing had flooded before during heavy rains, but "the actual knowledge required for liability is of the dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition can develop over time." *City of Dallas v. Thompson*, 210 S.W.3d 601, 603 (Tex. 2006) (per curiam).

The City acknowledges that it learned of the flooding at the accident site from a 911 caller at 3:04 a.m., but by then, Reyes tells us in her brief,

> all parties agree that the incident had already occurred. The exact time of the Reyes van being swept away is not clear from the record. What is clear, is that sometime before 3:04 a.m. the water was high enough that the Reyes van was swept into the Chacon Creek Tributary.

Brief for Respondent, at 4. Reyes alleges in her petition that the accident occurred between 3:00 and 3:30 a.m., but we accept her statement of agreement in her brief that the accident occurred before 3:04 a.m. Reyes argues that there is evidence the City knew of the flooding as early as 12:30 a.m.

Reyes submitted an affidavit by a homeowner with a clear view of the accident site, Jose Sanchez, who stated:

> I began calling 911 at approximately 12:30 a.m. to advise the police that the water in Chacon Creek was rising and that there was going to be a problem with cars getting swept away if something was not done. I continued to place four or five calls to 911 as the night progressed but the police never showed up. The water level was approximately three and one half feet high over the roadway which I could tell by the debris line the next day.

The court of appeals concluded that "Sanchez's statements, and the reasonable inferences from those statements, were sufficient to raise a fact issue on whether the City had actual knowledge of the dangerous condition at the time of the accident." ___ S.W.3d at ___.

But from Sanchez's statements, the most one can reasonably infer about what the City knew is that at 12:30 a.m., Chacon Creek was rising, that "there was going to be a problem" at some point, and that the danger persisted throughout the night. From Sanchez's statements one cannot infer that the City ever actually knew Century Boulevard had flooded, or more especially, that it was flooding when the accident occurred. Indeed, since the same crossing had flooded before, Sanchez's affidavit does not suggest that the City knew any more the night of the accident than it would have known in any heavy, protracted rainstorm. Awareness of a potential problem is not actual knowledge of an existing danger. Had there been testimony that a 911 operator received a credible report at about the

time of the accident that the crossing had actually flooded and was imperiling motorists, there would have been evidence the City had actual knowledge of a dangerous condition.

We were presented with an almost identical situation in *City of Corsicana v. Stewart*, 249 S.W.3d 412 (Tex. 2008) (per curiam). There, two children drowned late one night in a rainstorm when the car in which they were riding was swept away by flood waters where the road crossed a creek. *Id*. at 413. The City of Corsicana knew, of course, that it had been raining heavily and that the crossing flooded in such weather, and it had received many calls throughout the night from stranded motorists and flooded homeowners. *Id.* at 414. We concluded that "[n]either this evidence nor the inferences arising therefrom raise a fact question on the City's actual knowledge that a dangerous condition existed at or near the crossing at the time of the accident." *Id*. at 415 (citing *State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 330 (Tex. 2002) (knowledge that signs were often vandalized was not actual knowledge that signs were currently missing)).

We distinguished *City of San Antonio v. Rodriguez*, 931 S.W.2d 535, 537 (Tex. 1996) (per curiam). There, the plaintiff, while playing basketball in a recreation center, had slipped in water that had dripped onto the floor from a leak in the roof. *Id*. at 536. Given the "evidence that the person in charge of the recreation center knew of the leaks in the roof and knew that it had been raining," we concluded that, "[d]epending on the position of the leaks above the floor and the amount of rain, the jury might have inferred that the person in charge knew that there would be water on the floor." *Id*. at 537. In other words, evidence of the nature of the leaks and the amount of rain on the roof could make the presence of water on the floor a virtual certainty. In *Stewart*, the evidence of flooding at the low-water crossing did not rise to this level. 249 S.W.3d at 415-16.

Nor does it in this case. The City of Laredo knew Chacon Creek might flood, but the record does not show that it knew the creek had flooded at the time of the accident. One can certainly argue that as a policy matter, the government should be obliged to do more to protect against dangerous conditions on its roadways. But that choice belongs to the Legislature.

Accordingly, we grant the City's petition for review, and without oral argument, TEX. R. APP. P. 59.1, reverse the judgment of the court of appeals and render judgment dismissing Reyes's action with prejudice. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 640-41 (Tex. 2004).

Opinion delivered: December 3, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-1010

FPL FARMING LTD.,
PETITIONER,

v.

ENVIRONMENTAL PROCESSING SYSTEMS, L.C.,
RESPONDENT

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

Argued March 1, 2011

JUSTICE WAINWRIGHT delivered the opinion of the Court.

In this case we consider whether a regulatory permit to drill an injection well absolves the holder from civil tort liability for conduct authorized by the permit. Environmental Processing Systems, L.C. (EPS) obtained permits from the Texas Natural Resource Conservation Commission (now the Texas Commission on Environmental Quality) to construct and operate two deep wastewater injection wells on a tract next to land FPL Farming Ltd. (FPL) owns in Liberty County. FPL sued EPS for, among other things, tort damages for physical trespass based on alleged subsurface migration of water injected in the permitted well. Specifically, FPL alleged that the injected wastewater likely migrated onto its property and contaminated its water supply. After the jury failed to find a trespass, FPL appealed. Among other issues, FPL contended that it was entitled

to a directed verdict on a consent defense, the allocation of the burden of proof in the jury charge was erroneous, and factually sufficient evidence supported its trespass claim. The court of appeals did not address the merits of the trespass claim or the jury charge but held FPL could not recover in tort for trespass damages because the wells were authorized by the permit EPS secured from the Texas Commission on Environmental Quality (TCEQ). The Injection Well Act provides that holders of wastewater injection well permits issued by the TCEQ are not immune from civil liability and our previous case law has not held that such permit holders are immune from tort liability. We therefore reverse the judgment of the court of appeals and remand for consideration of issues related to the trespass claim.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

FPL owns two tracts of land in Liberty County used primarily for rice farming. It owns all of the surface and subsurface rights to its two parcels, except for the mineral rights. EPS operates a wastewater injection well on land adjoining one of FPL's tracts. EPS obtained a permit to drill and operate the well from TCEQ's predecessor agency, Texas Natural Resource Conservation Commission (TNRCC), in 1996.[2] The wastewater injection wells are "non-hazardous,"[3] but are used to inject wastewater-containing substances such as acetone and

[1] No rendition issues were raised in this Court.

[2] TNRCC's name was changed to TCEQ as part of the agency's 2001 sunset review, effective January 1, 2004. *See* Act of April 20, 2001, 77th Leg., R.S., ch. 965, § 18.01, 2001 Tex. Gen. Laws 1985. The agency began doing business as the TCEQ on September 1, 2002. Texas Commission on Environmental Quality, "TNRCC is Now the TCEQ," http://www.txeq.texas.gov/about/name_change.html (all Internet materials as visited August 19, 2011 and available in clerk of Court's file).

[3] Non-hazardous waste streams are those not specifically designated as "hazardous." Texas' Solid Waste Disposal Act classifies hazardous wastes as those wastes identified or listed by the administrator of the United States Environmental Protection Agency. TEX. HEALTH & SAFETY CODE § 361.003(12) (incorporating the waste-classification

naphthalene into salt water approximately a mile and a half below the surface, below any drinking water, which is commonly found at a few hundred feet. Although FPL originally requested a contested case hearing to object to the issuance of the permits, FPL and EPS reached a settlement agreement in September 1996, with EPS paying FPL $185,000 to avoid the delay and the expense of a hearing, and the permits were issued two days later.

Three years later, EPS sought to amend the permits to increase the allowed injection rate, and FPL once again requested a contested case hearing. After the hearing, the presiding administrative law judge recommended that the agency grant the amendments, finding that the waste plume would radiate 3,021 feet from the well facility after ten years (a plume that would naturally extend into FPL's subsurface land) and concluding that FPL had no right to exclude others from the deep subsurface; FPL's rights would not be impaired by the amended permits; and that operation of the wells would not amount to an unconstitutional taking. The TCEQ approved the permits. FPL appealed to the district court, which affirmed the agency's decision, and then to the Austin Court of Appeals, which also affirmed. *FPL Farming, Ltd. v. Tex. Nat. Res. Comm'n*, 2003 WL 247183, at *1–2 (Tex. App.—Austin 2003, no pet.). The Austin Court of Appeals assumed without deciding that FPL had property rights in the subsurface land and would have standing to sue for damages if the wastewater migrated into FPL's land. *Id.* at *3, 5.

FPL filed suit against EPS in Liberty County in 2006, alleging various causes of action, including trespass, negligence, and unjust enrichment, and requesting a permanent injunction and

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scheme of the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6901 et seq.).

damages. The jury found for EPS, failing to find that a trespass had occurred, and the judge entered a take-nothing judgment against FPL. The trial court denied FPL's motion for new trial. FPL appealed, arguing that the trial court should have granted FPL a directed verdict on the consent defense to the trespass claim; the jury charge erroneously shifted the burden of proof on consent to FPL; the jury instruction erroneously failed to instruct the jury that injury is not a required element of trespass; and the jury's findings were against the great weight and preponderance of the evidence on the trespass, negligence, and unjust enrichment claims. The Beaumont Court of Appeals overruled FPL's factual-sufficiency contention. 305 S.W.3d 739, 746. Rather than addressing the jury charge and other trespass issues, the court of appeals considered as a threshold matter whether FPL may pursue a trespass claim when the TCEQ approved an amended permit allowing EPS to inject the wastewater and "the information before the Commission showed that EPS's waste plume was projected to migrate into the deep subsurface of the formation underlying FPL's property." *Id.* at 742. In other words, the court of appeals considered whether EPS was shielded from civil tort liability merely because it received a permit to operate its deep subsurface wastewater injection well. The court of appeals concluded that EPS was shielded, reasoning: ". . . [W]hen a state agency authorized deep subsurface injections, no trespass occurs when fluids that were injected at deep levels are then alleged to have later migrated at those deep levels into the deep subsurface of nearby tracts." *Id.* at 744–45. It therefore affirmed the trial court's judgment. We granted the petition for review. 54 Tex. Sup. Ct. J. 538.[4]

II. JURISDICTION AND STANDARD OF REVIEW

[4] The Underground Injection Technology Council submitted a brief of amicus curiae in support of EPS.

This Court has jurisdiction under Texas Government Code section 22.001(a)(2) and (3). The issue in this case concerns the interpretation of Texas Water Code and Texas Administrative Code provisions. TEX. WATER CODE § 27.104; 30 TEX. ADMIN. CODE § 305.122(c). We review issues of statutory construction de novo. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003); *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Additionally, there is a current conflict among Texas courts of appeals over whether state-issued permits immunize the permit holder from civil liability. *Compare FPL Farming, Ltd. v. Tex. Natural Res. Conservation Comm'n*, 2003 WL 247183 at *5, *Berkley v. R.R. Comm'n of Tex.*, 282 S.W.3d 240, 243 (Tex. App.—Amarillo 2009), *with FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 305 S.W.3d at 744–45.

The Austin Court of Appeals upheld the agency's grant of amendments to EPS' permits in 2003. *FPL Farming, Ltd. v. Tex. Nat. Res. Conservation Comm'n*, 2003 WL 247183 at *1–2. In so doing, the Austin Court of Appeals assumed without deciding that FPL had existing rights to the subsurface of its land, but held that the amended permits did not impair FPL's rights. *Id.* at *3–4. The court held that the TCEQ had acted within its statutory authority in approving the amendments; FPL had failed to produce evidence of possible uses of the subsurface that would be impacted in the future by the injections; and had not refuted EPS' evidence that the injections would adversely affect FPL's existing rights. *Id.* at *4–5. The court also held that FPL failed to prove a permanent physical occupation and thus its unconstitutional taking claim failed. *Id.* at *5. However, the court stated that "should the waste plume migrate to the subsurface of FPL Farming's property and cause harm, FPL Farming may seek damages from EPS." *Id.* The Amarillo Court of Appeals applied that

reasoning to a permit issued by the Railroad Commission in *Berkley*, holding that "securing a permit does not immunize the recipient from the consequences of its actions if those actions affect the rights of third parties." 282 S.W.3d at 243 (relying on *FPL Farming, Ltd. v. Tex. Nat. Res. Conservation Comm'n*, 2003 WL 247183). The *Berkley* court compared agency permits to drivers' licenses; a driver's license permits the driver to drive legally, but not on his neighbor's lawn. *Id.*

The court of appeals opinion we consider today conflicts with those opinions. FPL followed the Austin Court of Appeals in the aforementioned *FPL Farming, L.P. v. Texas Natural Resource Conservation Commission* and filed suit in tort against EPS once FPL concluded the waste plume had entered or was about to enter the subsurface of its property. 305 S.W.3d at 741. The jury found for EPS on all of FPL's claims and FPL appealed, alleging several errors related to the trespass claim as well as lack of evidence supporting the jury's verdict. The court of appeals concluded that, "under the common law, when a state agency has authorized deep subsurface injections, no trespass occurs when fluids that were injected at deep levels are then alleged to have later migrated at those deep levels into the deep subsurface of nearby tracts." *Id.* at 744–45. Thus, under the court of appeals' opinion, a permit holder would be immunized from trespass liability by virtue of receiving a permit. As the court of appeals determined there could be no actionable trespass, it overruled FPL's issues concerning trespass.

III. TCEQ PERMITS AND CIVIL LIABILITY

The crux of the court of appeals' holding, determined "as an initial matter" before deciding FPL's jury charge, directed verdict, and evidence points on FPL's trespass tort claim, is that FPL had no common law cause of action for trespass because the TCEQ approved "an amended permit

allowing EPS to inject wastewater into the Frio formation and when information before the Commission showed that EPS's waste plume was projected to migrate into the deep subsurface of the formation underlying FPL's property." *Id.* at 742. The court of appeals' reasoning is inconsistent with our general view of the legal effect of an agency's permitting process, the specific statute authorizing the TCEQ's process in this case, and our precedent regarding court review of agency actions.

As a general rule, a permit granted by an agency does not act to immunize the permit holder from civil tort liability from private parties for actions arising out of the use of the permit. This is because a permit is a "negative pronouncement" that "grants no affirmative rights to the permittee." *Magnolia Petroleum Co. v. R.R. Comm'n*, 170 S.W.2d 189, 191 (1943). A permit removes the government imposed barrier to the particular activity requiring a permit. As the Amarillo Court of Appeals aptly stated: "[O]btaining a permit simply means that the government's concerns and interests, at the time, have been addressed; so, it, as a regulatory body, will not stop the applicant from proceeding under the conditions imposed, if any." *Berkley*, 282 S.W.3d at 243. Similarly, when the Board of Law Examiners grants an attorney a license to practice law in this state, even after undertaking a significant background check on the candidate's character and fitness to practice, the license does not preclude a private party from seeking damages for the attorney's malpractice. *See* Tex. R. Govern. Bar Adm'n IV, X. When the Austin health authority issues a permit after inspection for a person to operate a restaurant, and a patron gets sick from eating at the restaurant, the fact that the restaurant was licensed (and may have been in compliance with health regulations)

does not, in and of itself, preclude the ill patron from recovering in a negligence action against the restaurant. *See* Austin City Code § 10-3-61.

An example of this situation arose in *Magnolia Petroleum*, 170 S.W.2d 189. A person applied for a permit to drill an oil well, which was opposed before the Railroad Commission on the grounds that another entity, Magnolia Petroleum, actually had title to the land at issue in the permit. The Railroad Commission granted the permit, and Magnolia filed a district court action challenging the permit, introducing its chain of title and arguing that because it had proved superior title, the permit should not have been granted. *Id.* at 190. The trial court cancelled the permit and the court of appeals reversed, but suspended the permit, remanding with instructions to suspend the suit for a separate lawsuit in which title was being determined. We reversed because, even though the Railroad Commission could consider whether an applicant "appears" to have title, the mere fact that the applicant received the permit did not provide the applicant with any authority to drill on land that was not his, or shield him from tort liability or an injunction action should it be determined that he is not the rightful owner of the parcel. *Id.* at 190–91. We noted that, if the permit were granted,

> the permittee may still have no such title as will authorize him to drill on the land. . . . In short, . . . [the permit] merely removes the conservation laws and regulations as a bar to drilling the well, and leaves the permittee to his rights at common law. Where there is a dispute as to those rights, it must be settled in court. The permit may thus be perfectly valid, so far as the conservation laws are concerned, and yet the permittee's right to drill under it may depend upon his establishing title in a suit at law.

Id. at 191. While we noted that the Railroad Commission "should not do the useless thing of granting a permit to one who does not claim the property in good faith," the Railroad Commission's

determination of the propriety of the permit has no effect on the propriety of the permittee's potentially tortious actions. *Id.*

Of course, statutory remedies may preempt common law actions or other standards that may set the bar for liability in tort, but a permit is not a get out of tort free card. *Cf. MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 494, 499 (Tex. 2010) (holding the federal motor vehicle safety standards do not preempt jury findings that a bus manufacturer's buses were defectively designed). But in this case, the statute authorizing the TCEQ to provide EPS the permit is consonant with the general rule, rather than the exception.

The Injection Well Act (the Act), Chapter 27 of the Texas Water Code, governs the drilling and use of deep subsurface injection wells such as the one at issue in this case. TEX. WATER CODE §§ 27.001–27.105. The Act's policy and purpose is to "maintain the quality of fresh water in the state to the extent consistent with the public health and welfare and the operation of existing industries, taking into consideration the economic development of the state, to prevent underground injection that may pollute fresh water, and to require the use of all reasonable methods to implement this policy." *Id.* § 27.003. Absent from this policy determination is any intent, if permissible, to authorize an agency to determine ownership of the deep subsurface or determine whether authorized migration invades private property rights. The Act states that no person may drill, use, continue using, or convert a well into an injection well without first obtaining a permit from the TCEQ, unless the well comes under the jurisdiction of the Railroad Commission. *Id.* § 27.011. Chapter 27 lays out a method for applying for permits; lists general considerations the TCEQ may review in determining whether to grant a permit; provides the TCEQ with rule making authority as required

for the performance of its duties; and establishes administrative, civil, and criminal penalties for disobedience. *Id.* §§ 27.012, 27.016, 27.018-19, 27.101-03, 27.105, 27.1012, 27.1013, 27.1014.[5]

The Act does not preempt any civil actions. In fact, the text states just the opposite. Section 27.104 of the Act provides that "[t]he fact that a person has a permit issued under this chapter does not relieve him from any civil liability." *Id*. § 27.104.

When construing statutes, we first look to the language used by the Legislature, which is the best indication of the Legislature's intent. *Carreras v. Marroquin*, 339 S.W.3d 68, 71 (Tex. 2011) (citing *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003)). The "plain and common meaning of the statute's words" directly contradicts the court of appeals' holding in this case. *See State ex. rel. State Dept. of Highways and Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). The statute does not deny FPL a cause of action for trespass merely because the injection well owner had obtained a TCEQ permit. The court of appeals cited section 27.104 early in its opinion, but neglected to consider it in the determination that a permit could eradicate a trespass claim against a permit holder. *FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 305 S.W.3d at 742 n.2.

In addition, the section of the Texas Administrative Code governing TCEQ permits is in discord with the court of appeals' opinion. Section 305.122(c) states that:

> The issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations.

[5] The Act creates a similar structure for injection wells that are under the jurisdiction of the Railroad Commission. *See id.* subch. C.

30 TEX. ADMIN. CODE § 305.122(c). The holding of the court of appeals conflicts with the clear language of this provision. The statute specifically states that a permit does not authorize invasion of property rights, which is where the tort of trespass falls. The situation is analogous to the licensing of lawyers, regulation of restaurants, or the drilling of oil wells in *Magnolia Petroleum.* EPS may have permission from the TCEQ to inject authorized wastewater, but the consequences of acting under the permit have not been immunized.[6]

Instead of relying on the basic rule and the text of the Injection Water Act, the court of appeals based its ruling on two of this Court's opinions, *Manziel* and *Garza*. In *Manziel* we addressed a permit granted by the Railroad Commission to inject water to flood a reservoir and recover oil. *R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 562 (Tex. 1962). The Manziels sought to set aside and cancel the permit issued by the Railroad Commission to the Whelans, who owned land adjoining the Manziels' tract, arguing that the injected water would constitute a trespass and would result in destruction of their own well. *Id.* at 561, 565. In the case before us, the court of appeals interpreted the holding of *Manziel* to provide that "a secondary recovery operation involving the subsurface injection of salt water did not cause a trespass when the water migrated across property lines, in light of the Railroad Commission's approval of the operation," which led to the court's conclusion that when a state agency authorizes injections, no trespass could occur

[6] FPL argued before this Court that should a government permit immunize a permit holder from trespass liability, the Injection Well Act would become a condemnation statute and the subsurface migration would be a government taking. Because we determine that a permit holder is not shielded from liability because he or she holds a permit, we do not reach FPL's constitutional concern.

when the injected substance migrates across property lines underground. *FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 305 S.W.3d at 743–44.

The court of appeals misinterpreted this Court's holding in *Manziel.* We stated there that we were "not confronted with the tort aspects" of subsurface injected water migration, nor did we decide "whether the [Railroad] Commission's authorization of such operations throws a protective cloak around the injecting operator who might otherwise be subjected to the risks of liability . . .." *Manziel*, 361 S.W.2d at 566. Instead, we held that Railroad Commission authorizations of secondary recovery projects are not subject to injunctive relief based on trespass claims. *Id*. at 568. Consistent with our suggestion in *Magnolia Petroleum* that the Railroad Commission has the authority and obligation to look to the parties' legal status in determining whether a permit should be issued, we noted that "[t]he technical rules of trespass have no place in the consideration of the validity of the orders of the [Railroad] Commission." *Id.* at 569-70. We made the point in *Manziel* that we were not deciding whether a permit holder is immunized from trespass liability by virtue of the permit. *Id*. at 566. The case is inapposite.

Our opinion in *Garza*, another opinion relied upon by the court of appeals, likewise did not hold that agency authorization or permission resulted in blanket immunity from trespass liability. *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 4 (Tex. 2008). Although *Garza* dealt with a subsurface trespass issue, it also was a different case than the one before us. In *Garza*, the Salinases, mineral owners of one tract, sued Coastal Oil & Gas Corporation, the entity leasing their mineral interest and the mineral interest in an adjoining tract, for trespass based on the underground

invasion of the Salinases' reservoir by injected proppant[7] used by Coastal Oil in fracturing[8] to recover minerals from the adjoining tract that it also leased. *Id.* at 6-7. Because the Salinases were mineral owners and had leased the minerals to Coastal Oil, they merely had a royalty interest and possibility of reverter but did not possess the minerals. *Id.* at 9. Although the Salinases had standing to sue for a form of trespass, we held that, because they were not in possession of the mineral rights, they were not entitled to sue for trespass based on nominal damages but had to prove actual injury. *Id.* at 10–11. We held that the rule of capture precluded damages for drainage by fracturing, and thus the Salinases could not recover. *Id.* at 17.

The issues in *Manziel* and *Garza* were factually similar. They dealt with injected substances per agency authorization that had possibly migrated underground across property lines. The case before us is distinguishable on several grounds. Both of those cases dealt with the extraction of minerals in the oil and gas industry, and thus the rule of capture. *Garza*, 268 S.W.3d at 13, *Manziel*, 361 S.W.2d at 568. The rule of capture, and administrative deference to agency interpretations, was critical to our holding in *Garza.* And although the Act contains provisions governing both Railroad Commission and TCEQ permits, injecting substances to aid in the extraction of minerals serves a different purpose than does injecting wastewater. TEX. WATER CODE § 27.011. We have recognized that "[i]t cannot be disputed that [secondary operations to recover oil and gas] should be encouraged" to "increase the ultimate recovery of oil and gas." *Manziel*, 361 S.W.2d at 568. Under

[7] Proppants are defined as "[s]mall granules contained in a slurry mix injected as a part of a hydraulic fracturing operation . . .." 8 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law, Manual of Terms* 836 (Patrick H. Martin & Bruce M. Kramer eds., 2010).

[8] Hydraulic fracturing or "fracturing" is a method which "employs hydraulic pressure to fracture . . . rock," thereby "increasing the permeability of rock, and thus increasing the amount of oil or gas produced from it." *Id.* at 479.

the rule of capture, a "cornerstone of the oil and gas industry . . . fundamental both to property rights and to state regulation," a mineral rights owner owns the oil and gas produced from his or her well even if the oil and gas migrated underground from a tract owned by someone else. *Garza*, 268 S.W.3d at 13. *Manziel* and *Garza* considered the justification for the rule of capture — greater oil and gas recovery — in their analyses. However, the rule of capture is not applicable to wastewater injection. *Id.* at 17; *see also Manziel*, 361 S.W.2d at 568. Mineral owners can protect their interests from drainage through means such as pooling or drilling their own wells. *Garza*, 268 S.W.3d at 14. That is not necessarily the case when a landowner is trying to protect his or her subsurface from migrating wastewater. *Manziel* and *Garza* did not decide the issues in this case, and because of the oil and gas interests at issue in *Manziel* and *Garza*, their reasoning does not dictate our analysis in this wastewater injection trespass case.

IV. CONCLUSION

The language of the Injection Well Act and the portions of the Texas Administrative Code governing the TCEQ do not shield permit holders from civil tort liability that may result from actions governed by the permit. This is consistent with our common law rule that the mere fact that an administrative agency issues a permit to undertake an activity does not shield the permittee from third party tort liability stemming from consequences of the permitted activity. Accordingly, the court of appeals erred in determining that because the TCEQ permitted EPS' injection wells, there was no trespass. We do not decide today whether subsurface wastewater migration can constitute a trespass, or whether it did so in this case. We remand to the court of appeals for determination of the issues originally presented by FPL at the court of appeals, including whether FPL was entitled

to a directed verdict on the issue of its consent, whether the burden of proof on consent was erroneously shifted to FPL in the jury charge, and whether the jury charge should have included an instruction that injury is not a necessary element of trespass. Accordingly, we reverse the court of appeals' judgment and remand to that court for further proceedings consistent with this opinion.

Dale Wainwright
Justice

OPINION DELIVERED**:** August 26, 2011

IN THE SUPREME COURT OF TEXAS

No. 09-1025

IN RE 24R, INC., D/B/A THE BOOT JACK, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this employment discrimination case, we must decide whether the trial court abused its discretion by refusing to compel arbitration pursuant to a written arbitration agreement signed by the employer and an at-will employee. Because the arbitration agreement is not illusory, we hold that the trial court erred by refusing to compel arbitration. For the reasons expressed below, we conditionally grant mandamus relief and direct the trial court to vacate its order denying the motion to compel.

Frances Cabrera worked for 24R, Inc., d/b/a "The Boot Jack," as an at-will employee for approximately fifteen years. While Cabrera worked at The Boot Jack, The Boot Jack presented her with three separate arbitration agreements—in 2003, 2004, and 2005—which employees were required to sign as a condition of continued employment. Cabrera signed all three. In January 2007, she developed a medical condition for which her doctor ordered her to eat all meals before six o'clock at night. The Boot Jack terminated Cabrera approximately four months later. She alleges

The Boot Jack terminated her because she requested accommodations to eat meals as directed by her doctor.

After exhausting her remedies with the Texas Workforce Commission, Cabrera sued The Boot Jack for age and disability discrimination in April 2008. The Boot Jack filed a motion to abate and compel arbitration pursuant to the 2005 agreement. The trial court denied the request. The Boot Jack then sought mandamus relief from the court of appeals, and the court of appeals denied relief. *In re 24R, Inc.*, ___ S.W.3d ___ (Tex. App.—Corpus Christi-Edinburg, orig. proceeding [mand. pending]). The Boot Jack now seeks mandamus relief from this Court, requesting that we vacate the trial court's order denying its motion to compel arbitration.

We once again apply the well-known rules applicable to mandamus review of a trial court's order granting or denying a motion to compel arbitration. "Mandamus will issue if the relator establishes a clear abuse of discretion for which there is no adequate remedy by appeal." *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 422 (Tex. 2010) (orig. proceeding) (per curiam) (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)).[1] "A trial court that refuses to compel arbitration under a valid and enforceable arbitration agreement has clearly abused its discretion." *Id.* (citing *In re Halliburton Co.*, 80 S.W.3d 566, 573 (Tex. 2002) (orig. proceeding)). A party seeking to compel arbitration must establish that a valid arbitration agreement exists between the parties. *Id.* (citing *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944

[1] The Legislature amended section 51.016 of the Texas Civil Practice and Remedies Code effective September 1, 2009 to allow interlocutory appeal of an order denying a motion to compel arbitration under the Federal Arbitration Act. TEX. CIV. PRAC. & REM. CODE § 51.016. Because the trial court denied the motion to compel arbitration before the amendment took effect, section 51.016 does not apply.

(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." *Id.* (citing *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001) (orig. proceeding)).

Cabrera does not dispute that her discrimination claims are covered by the arbitration agreement and subject to arbitration if the agreement is enforceable. Instead, she argues that the arbitration agreement is unenforceable on the grounds that it lacks consideration and is illusory because The Boot Jack retained the right to amend the agreement and was not mutually bound.[2] We disagree.

The enforceability of an arbitration agreement is a question of law. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). Mutual agreement to arbitrate claims provides sufficient consideration to support an arbitration agreement. *In re U.S. Home Corp.*, 236 S.W.3d 761, 764 (Tex. 2007) (per curiam). At-will employment does not preclude employers and employees from forming subsequent contracts, "so long as neither party relies on continued employment as consideration for the contract." *J.M. Davidson, Inc.*, 128 S.W.3d at 228 (citations omitted). "In the context of stand-alone arbitration agreements, binding promises are required on both sides as they are the only consideration rendered to create a contract." *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 607 (Tex. 2005) (per curiam); *see also Odyssey Healthcare*, 310 S.W.3d at 424. A promise is illusory if it does not bind the promisor, such as when the promisor retains the option to discontinue performance. *Man Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844,

[2] In its petition for writ of mandamus, The Boot Jack also preemptively addressed other defenses that Cabrera may have raised in the court of appeals. We address only the arguments raised by Cabrera in this Court.

849 (Tex. 2009). When illusory promises are all that support a purported bilateral contract, there is no mutuality of obligation, and therefore, no contract. *Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 301–02 (Tex. 2009) (citations and quotations omitted).

An arbitration clause is not illusory unless one party can avoid its promise to arbitrate by amending the provision or terminating it altogether. *Odyssey Healthcare,* 310 S.W.3d at 424 (citing *Halliburton*, 80 S.W.3d at 570). Cabrera argues that The Boot Jack's employee manual gives The Boot Jack the right to modify or abolish any personnel policy—including the arbitration agreement. The manual states that "The Boot Jack reserves the right to revoke, change or supplement guidelines at any time without notice," and that "[t]here are a number of The Boot Jack policies an applicant needs to understand and agree to before being employed, such as the Arbitration Policy." The arbitration agreement "applies to all types of claims and disputes relating to employment and to termination of employment," and the "arbitrator's award was final and binding." Both Cabrera and The Boot Jack signed the agreement.

Though the employee manual may express that The Boot Jack retains the right to unilaterally change personnel policies, the arbitration agreement makes no mention of the right to change its terms, nor does it mention or incorporate by reference the employee manual. Documents incorporated into a contract by reference become part of that contract. *In re Bank One, N.A.*, 216 S.W.3d 825, 826 (Tex. 2007) (orig. proceeding) (per curiam). The employee policy manual is not a contract. In fact, it contains an express disclaimer that "[t]he policies and procedures in this manual are not intended to be contractual commitments by The Boot Jack . . . ." Express disclaimers in employee handbooks "negate[] any implication that a personnel procedures manual places a

restriction on the employment at will relationship." *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (per curiam). Therefore, Cabrera's argument must rest on whether the validity of the arbitration agreement is affected by language from a non-contractual employee policy manual.

Cabrera primarily relies on *Halliburton* and a court of appeals case, *In re C & H News Co.*, 133 S.W.3d 642, 647 (Tex. App.—Corpus Christi-Edinburg 2003, orig. proceeding), to argue that the arbitration agreement is illusory because The Boot Jack retains the right to unilaterally amend or abolish the arbitration contract without including a savings clause. In *Halliburton*, an employer explicitly reserved the right to unilaterally modify or discontinue the dispute resolution program. *Halliburton*, 80 S.W.3d at 569–70. However, this Court held that because the policy contained a "savings clause"—including a ten-day notice provision and a provision that any amendments would only apply prospectively—that prevented the employer from avoiding its promise, the arbitration agreement was not illusory. *Id.* at 570. In *C & H News*, the real party in interest similarly argued the one-page arbitration document was illusory and unenforceable. 133 S.W.3d at 646. The court held that because the agreement required arbitration "as provided in the Handbook," it incorporated the handbook by reference, and because the employer retained the right to unilaterally change the handbook at anytime without prior notice to employees, the arbitration agreement was illusory and unenforceable. *Id.* at 646–47.

Cabrera incorrectly applies both cases. The Boot Jack does not retain any right within the arbitration agreement to modify or abolish its terms; in fact, it states that the "agreement to arbitrate . . . continues beyond, and is not affected by, a termination of employment." Cabrera's argument rests on language from the employee policy manual, an entirely separate document that

does not impose any contractual obligations between The Boot Jack and its employees. The arbitration agreement is a stand-alone contract that, unlike *C & H News*, does not incorporate the employee policy manual. Although language in the employee manual recognizes the existence of the arbitration agreement, this does not diminish the validity of the arbitration agreement as a stand-alone contract. Therefore, the contract is not illusory and does not require a *Halliburton*-type savings clause.

The trial court abused its discretion in denying the motion. Mandamus relief is appropriate because The Boot Jack has no adequate remedy by appeal. *See Odyssey Healthcare*, 310 S.W.3d at 424.

Cabrera also argues that The Boot Jack waived its right to mandamus relief because it did not file a complete transcript from proceedings in the trial court. This argument is without merit because The Boot Jack was only required to file "relevant" transcripts of testimony with its petition for mandamus relief. *See* TEX. R. APP. P. 52.7(a)(2). The only issue in this case is whether the arbitration agreement is illusory. The Boot Jack provided us with the arbitration agreement at issue. Because the arbitration agreement is not ambiguous, no parol evidence is necessary, and we decide its validity on the face of the agreement. *See J.M. Davidson, Inc.*, 128 S.W.3d at 229.

Accordingly, without hearing oral argument, we conditionally grant mandamus relief to The Boot Jack and direct the trial court to vacate its prior order denying The Boot Jack's motion to compel arbitration. TEX. R. APP. P. 52.8(c). We are confident the trial court will comply, and the writ will issue only if it fails to do so.

OPINION DELIVERED: October 22, 2010

IN THE SUPREME COURT OF TEXAS

No. 09-1072

IN RE RICHARD SCHELLER, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this grandparent-access suit, the trial court issued temporary orders that included granting a grandfather temporary access to and possession of his grandchildren. However, the trial court abused its discretion in issuing the order because the grandfather did not establish by a preponderance of the evidence that denial of access to or possession of the grandchildren would significantly impair their physical health or emotional well-being. For the reasons expressed below, we conditionally grant mandamus relief and direct the trial court to vacate its temporary order for access and possession.

Amanda Scheller passed away in September 2007. She was survived by her two young daughters and husband, Richard Scheller ("Scheller"). Both before and after Amanda passed away, her daughters visited Amanda's father and step-mother, William Pemberton ("Pemberton") and Judy Pemberton ("Judy"), every four to six weeks in Crockett, Texas. During the year after Amanda's

death, Scheller relied on the Pembertons for assistance taking care of his two daughters. The girls currently live in Austin with Scheller and his new wife, Sylvia.

The Schellers' relationship with the Pembertons began to deteriorate in December 2008. Scheller alleges the conflict began when he took the children to visit the Pembertons in Crockett on Christmas Day, rather than Christmas Eve. The Pembertons blame the conflict, in part, on a decreased frequency of visits, which they attribute to Scheller's relationship with Sylvia. But Scheller claims the decreased visits were a result, in part, from the Pembertons admitted refusal to follow set conditions he laid out for his children's visits, such as avoiding certain topics of conversation and adhering to a particular bedtime. Conflict over the time and manner of the Pembertons' visits with the girls continued throughout 2009. Verbal confrontations about the girls arose on the telephone, in public, and at the Schellers' home in Austin.

Pemberton filed suit for grandparent access in August 2009. *See* TEX. FAM. CODE § 153.432 (providing for suits by grandparents for possession or access to grandchildren). He petitioned for temporary access to the girls and for the court to appoint an expert to evaluate whether denying Pemberton access to the girls would significantly affect their physical health or emotional well-being. The trial court rendered temporary orders awarding Pemberton the following access rights: (1) weekly telephone or webcam access to the girls for up to ten minutes, (2) possession and access one weekend of every even-numbered month, (3) possession and access from December 28th through December 30th, and (4) possession and access for either the second week of July or the week during which a particular Vacation Bible School is held. The orders contain general conditions and restrictions that the Pembertons must follow while the children are with them. The court also

appointed an expert to serve both as the children's guardian ad litem and as a psychological expert to evaluate the relationship between the children and the parties in conflict and make recommendations regarding whether denying Pemberton access to his granddaughters would significantly impair their physical health or emotional well-being.

Scheller sought mandamus relief in the court of appeals. The court granted temporary relief and stayed the trial court's temporary order, but subsequently lifted the stay and denied mandamus relief. Scheller now seeks mandamus relief from this Court. He argues that the temporary orders for access to and possession of the children and appointment of an expert violated his fundamental liberty interest as a parent to have control and autonomy in making child-rearing decisions. Scheller requests that we reverse the trial court's order for temporary access and render judgment denying Pemberton's petition for access and appointment of an expert. We address each contention.

Trial courts have considerable discretion in making temporary orders for a child's safety and welfare in suits affecting the parent-child relationship. *See* TEX. FAM. CODE § 105.001. However, a trial court cannot "infringe on the fundamental right of parents to make child rearing decisions simply because [it] believes a better decision could be made." *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (plurality op.) (internal quotations omitted); *see also In re Chambless*, 257 S.W.3d 698, 700 (Tex. 2008) (per curiam) ("Parents enjoy a fundamental right to make decisions concerning the care, custody, and control of their children." (quotation omitted)). We have held that "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family." *In re Derzapf*, 219 S.W.3d 327, 333

(Tex. 2007) (per curiam) (quoting *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (per curiam) (quoting *Troxel*, 530 U.S. at 68)).

Scheller first argues that the trial court improperly issued the temporary orders for access to and possession of the children. A trial court abuses its discretion if it grants temporary access to grandchildren when a grandparent does not "overcome the presumption that a parent acts in his or her child's best interest by proving that 'denial . . . of access to the child would significantly impair the child's physical health or emotional well-being.'" *Derzapf*, 219 S.W.3d at 333 (quoting TEX. FAM. CODE § 153.433(2) (current version at TEX. FAM. CODE § 153.433(a)(2))).

We have granted conditional mandamus relief in similar cases when a grandparent does not overcome his "high threshold" burden. *Derzapf*, 219 S.W.3d at 335; *Mays-Hooper*, 189 S.W.3d at 778. In *Derzapf*, we held that the grandchildren's "lingering sadness" from lack of contact with the grandparents did not sufficiently demonstrate significant harm to the children because the court-appointed psychologist testified that the sadness did not "manifest[] as depression or behavioral problems or acting out" so as to "rise to a level of significant emotional impairment." 219 S.W.3d at 330, 332–33. And in *Mays-Hooper*, we held the trial court erred because it "did not indicate any reason why" it should interfere with the parent-child relationship, and the mother "articulated several reasons for not wanting to turn her son over to her mother-in-law[,]" including "differences about church attendance, what to say about [the father's] death, and alleged inattention by her mother-in-law." 189 S.W.3d at 778.

The United States Supreme Court addressed the issue of grandparent access in *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality op.). The Court held that a trial court's order for

grandparent access unconstitutionally infringed on the parent's fundamental liberty interest where there was no evidence that the parent was unfit, that the children's health and well-being would suffer, or that the parent intended to exclude grandparent access entirely. *Id.* at 68–71. Accordingly, the Court affirmed the Washington Supreme Court's holding that "'[p]arents have a right to limit visitation of their children with third persons,' and between parents and judges, 'the parents should be the ones to choose whether to expose their children to certain people or ideas.'" *Id.* at 63 (quoting *In re Custody of Smith*, 969 P.2d 21, 31 (Wash. 1998)).

Similar to *Derzapf* and *Mays-Hooper*, the trial court abused its discretion in this case because Pemberton did not satisfy his burden to be granted access rights. Pemberton argues that he met the statutory burden to prove that his granddaughters' mental and physical health would suffer if he did not have access to them. He presented evidence about behavior exhibited by the girls and circumstances influencing their mental and physical health including: (1) the girls displaying anger; (2) one of the girls experiencing instances of isolated bed wetting and nightmares; (3) witnesses who have seen Pemberton with the children testifying that, from their experiences, denying Pemberton access to his granddaughters would impair the children's physical or emotional development; and (4) the significant impact of loss of maternal family members on the girls, leaving Pemberton the only remaining maternal familial connection.

However, that evidence is not enough to satisfy Pemberton's hefty statutory burden, and we hold that the trial court abused its discretion in issuing a temporary order for access to and possession of the children. Like the children in *Derzapf*, there is nothing in the record here to indicate anything more substantial than the children's understandable sadness resulting from losing a family member

and, according to the Pembertons, missing their grandparents. 219 S.W.3d at 330. In fact, the record shows that Scheller has taken responsible, precautionary measures to ensure that his daughters are able to cope with their grief, such as sending his older daughter to counseling and grief groups. As in *Troxel*, Scheller appears to be willing to allow Pemberton to see the girls as long as he comes to Austin and does not bring Judy.[1] Scheller concedes he has not spoken with Pemberton since this litigation began, but explains that his attorney advised him against it.

We hold that the trial court abused its discretion in granting a temporary order for access to and possession of the Scheller girls because Pemberton did not meet the hefty statutory burden required to prove that he is entitled to grandparent access rights. If evidence is presented as the litigation develops that overcomes the hefty presumption, the trial court may reconsider the issue. However, there was insufficient evidence at this stage of the litigation for the trial court to issue the temporary order granting Pemberton access to and possession of his granddaughters.

Next, Scheller challenges the trial court's order appointing an expert to serve both as guardian ad litem to the children and as an expert psychologist to examine the parties and children to make recommendations to the court. He argues that the trial court's appointment violates his constitutional right to make child rearing decisions and is effectively more invasive than the temporary access orders because it requires Scheller to follow recommendations made by the expert.

Despite considerable discretion vested in courts to issue temporary orders "for the safety and welfare of the child," a court cannot act to infringe on a party's constitutional rights. TEX. FAM.

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[1] Step-grandparents do not have standing to seek access to their step-grandchildren. *See Derzapf*, 219 S.W.3d at 331–33.

CODE § 105.001, *see also Grigsby v. Coker*, 904 S.W.2d 619, 621 (Tex. 1995) (per curiam) (holding that a trial court abused its discretion by entering a temporary gag order in a child custody modification proceeding that violated the parties' constitutional rights to free speech and due process). Parental control and autonomy is a "fundamental liberty interest." *Derzapf*, 219 S.W.3d at 335 (quoting *Troxel*, 530 U.S. at 65). And as we previously explained, there is no reason to inject the State into the family realm when a parent adequately cares for his children. *Id.* at 333 (citations and quotations omitted). However, the trial court's appointment of an evaluative expert does not infringe on Scheller's rights because such an appointment is allowed by law; the order entered by the Court does not interfere with the parental relationship, but rather seeks to determine the best interests of the children; and no conflict exists between appointing the evaluating psychologist as guardian ad litem.

The Family Code specifically provides for this type of appointment. A suit for access to a child is a suit affecting the parent-child relationship (SAPCR) in which the principal consideration is the child's best interest. *See* TEX. FAM. CODE § 101.032(a) (defining a SAPCR); *id.* § 153.002 (explaining that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of . . . possession of and access to the child"). In SAPCRs, a trial court may appoint a psychologist or psychiatrist to conduct a mental examination of the parties and children subject to the suit. TEX. R. CIV. P. 204.4(a). A trial court additionally has discretion to appoint a guardian ad litem in a suit for access to a child if it "finds that the appointment is necessary to ensure the determination of the best interests of the child . . . ." TEX. FAM. CODE § 107.021(a)(3), (b)(2). Psychologists are one class of professionals qualified under the Family Code to serve as a

guardians ad litem. *See id.* § 107.001(5)(B), (5)(C). In using these finite resources at the trial court's disposal to determine the best interests of the children, the trial court did not abuse its discretion.

Also, nothing on the face of the order indicates that the trial court erred in appointing the same person to serve as expert psychologist and guardian ad litem. The role of the psychologist in evaluating the children and parties is consistent with the role of a guardian ad litem because the psychologist gives the court recommendations about the children's best interests. *See* TEX. FAM. CODE § 107.002(a), (b), (e) (detailing a guardian ad litem's duties, which include reviewing relevant records, interviewing the parties and children subject to the suit to determine the child's best interest, reporting to the court, testifying during hearings, and performing any other relevant tasks the court orders).

Scheller argues that this specific order violates his constitutional rights. Generally, a trial court would commit error by requiring a party to adhere to expert recommendations in violation of a party's constitutional rights. However, in this case, the trial court did not abuse its discretion or commit an error of law by appointing an expert to evaluate the parties and children, represent the children's best interests, and make recommendations to the court as to whether depriving Pemberton access would significantly harm the girls' emotional well-being or physical health. Scheller argues this order violates his constitutional rights because it orders his children to participate in counseling. Trial courts may order parties to participate in counseling with a mental health professional if they have a "history of conflict in resolving an issue of . . . access to the child." TEX. FAM. CODE § 153.010(a)(1). But it is clear from the order that the trial court did not intend to require counseling, but instead intended to have an expert psychologist assist the court in making factual determinations

regarding whether depriving Pemberton of access to and possession of his grandchildren would significantly impair their physical health or emotional well-being.

Scheller's argument is unpersuasive given the content of the temporary order appointing the expert, whose dual role as guardian ad litem and evaluative psychologist facilitates the court's factual inquiry into the children's best interest and physical and emotional welfare. The trial court appointed the expert "to evaluate the circumstances surrounding the relationship between the Petitioner, Respondent, and the children, and to make recommendations to the court regarding whether denial of possession and access to the children by Petitioner would significantly impair their physical health or emotional well-being." The parties are only ordered to "follow the recommendations of [the expert] and otherwise cooperate in her evaluation of the circumstances surrounding the basis of th[e] suit, including but not limited to, making the children available for any interviews, joint sessions, individual sessions, or other contact deemed necessary by [the expert] in performance of her duties . . . ." Further, the court will hold a hearing if party objects to the recommendations relating to whether an evaluation should be performed on a party or child. Accordingly, the expert's role as demonstrated by the trial court's order does not interfere with Scheller's constitutional rights.

Scheller is entitled to mandamus relief because the trial court abused its discretion in issuing temporary orders for grandparent access. Pemberton did not meet the burden required to divest a a parent of control and autonomy in making parenting decisions. This is irremediable error that warrants mandamus relief. *See Derzapf*, 219 S.W.3d at 334–35. However, the trial court did not err in appointing an expert to serve as guardian ad litem to the children and as a psychologist to evaluate the case and make recommendations to the court regarding the children's best interests.

Accordingly, without hearing oral argument, we conditionally grant mandamus relief and direct the trial court to lift the temporary order permitting grandparent access. *See* TEX. R. APP. P. 52.8(c), 59.1. We are confident that the court will comply, and the writ will issue only if it does not.

OPINION DELIVERED: November 5, 2010

IN THE SUPREME COURT OF TEXAS

NO. 10-0002

SAMUEL T. JACKSON, PETITIONER,

v.

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND SHELIA BAILEY TAYLOR IN HER OFFICIAL CAPACITY AS CHIEF ADMINISTRATIVE LAW JUDGE, STATE OFFICE OF ADMINISTRATIVE HEARINGS, RESPONDENTS

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

Argued December 18, 2010

JUSTICE JOHNSON delivered the opinion of the Court.

In order to withhold public information requested pursuant to the Texas Public Information Act (TPIA) a governmental entity must demonstrate that the requested information is not within the scope of the TPIA or that it falls within one of TPIA's specific exceptions to the disclosures requested. *See* TEX. GOV'T CODE §§ 552.101-.148; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 355-56 (Tex. 2000). In this case, the State Office of Administrative Hearings (SOAH) refused to disclose certain decisions and orders in license suspension cases related to delinquent child support. The trial court and court of appeals agreed with SOAH that the information is expressly excepted from disclosure by the Texas Government Code provisions.

We hold that the decisions and orders must be disclosed after redaction of information expressly excepted from disclosure and not already in a public record or otherwise in the public domain. We reverse and remand to the trial court for further proceedings.

I. Background

Title IV-D of the Social Security Act requires states to designate a "Title-IV" agency to administer child support services. *See* 42 U.S.C. § 654(3); 45 C.F.R. § 303.101. The Office of the Attorney General (OAG) is the designated Title-IV agency in Texas. TEX. FAM. CODE § 231.001. The Child Support Division (Division) of the OAG uses license-suspension proceedings, among other methods, to aid it in collecting delinquent child support. *Id.* § 232.003; *see id.* § 231.001-.309. The Division may issue orders suspending an obligor's license if the obligor (1) owes child support exceeding three times the monthly support set by a child support order; (2) has been given an opportunity to make payments toward the overdue child support under a repayment schedule; and (3) has not complied with the repayment schedule. *Id.* § 232.003(a). The Division refers administrative license-revocation proceedings to SOAH pursuant to an interagency contract. SOAH administrative law judges conduct contested hearings and enter final orders concerning suspension of obligors' licenses. *See* 1 TEX. ADMIN. CODE §§ 55.208, .212.

In 2006, Samuel T. Jackson requested copies of "each decision, opinion[1] or order issued by SOAH during the months of November of 2005, December 2005, and January 2006 for the Title IV-D Agency of the Office of the Attorney General." He made the request pursuant to Texas

[1] SOAH asserts that SOAH administrative law judges do not issue opinions and Jackson does not argue otherwise. Therefore we will limit our discussion to decisions and orders.

Government Code section 552.022(a), which establishes categories of public information that must be disclosed unless an express exception renders the requested information confidential. At SOAH's request, the Attorney General issued an informal letter ruling and concluded that under section 552.101 of the Texas Government Code, together with section 231.108 of the Texas Family Code, the Division must withhold the information.

Jackson sought a writ of mandamus from the trial court directing SOAH to provide the requested information. To support its position, SOAH submitted copies of ten representative decisions and orders for the trial court's *in camera* review. The decisions and orders, which we will refer to as "Orders" for convenience, are for the greatest part standardized documents reciting that the statutory requirements for suspending a license have been met. Nine of the ten contain no information personal to the respondent other than the respondent's name, the number of the license being suspended, and references to the underlying cases in which the trial court issued child support orders or judgments for past due support. The Orders include findings of fact and conclusions of law, but no information identifiable to a particular person beyond that referenced above is included. For example, none of the Orders contain the respondent's social security number, address, telephone number, age, birthdate, or place of employment. One of the ten Orders contains additional information about the respondent. That Order suspends the respondent's driver's license, but also suspends the suspension based on findings that the respondent is totally disabled and receives a specified amount of social security; lives with his girlfriend; borrows her car on occasion; and assists in caring for his grandchildren. The Orders do not contain information about anyone other than the respondents.

The trial court denied relief and Jackson appealed. The court of appeals concluded that construed together, Texas Government Code section 552.101, Texas Family Code section 231.108, and 42 U.S.C. § 654(26) make the information confidential. ___ S.W.3d ___, ___. It affirmed. *Id.* We granted Jackson's petition for review. 54 TEX. SUP. CT. J. 3 (Oct. 4, 2010).

Jackson argues that (1) section 552.101, which establishes exceptions to disclosure, does not apply to the categories of information requested here, but rather the stricter standard established by section 552.022(a) governs; (2) neither Texas Family Code section 231.108 nor 42 U.S.C. § 654(26) meets the requirements of Texas Government Code section 552.022(a) and therefore neither provides an exception to public disclosure; (3) Texas Family Code section 231.108 does not mandate that SOAH's decisions, orders, and opinions are excepted from public disclosure; and (4) pursuant to the TPIA and the Declaratory Judgments Act (DJA), he is entitled to attorney's fees even though he is a pro se litigant.

SOAH does not dispute Jackson's contention that section 552.022 is the proper section of law under which his request should be considered. Nevertheless, it argues that laws recognized under section 552.101 qualify as "other law" under section 552.022, and that (1) section 231.208 of the Family Code and 42 U.S.C. § 654(26) meet the test set forth by section 552.101, section 552.022, and *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); (2) SOAH's Title IV-D decisions and orders are within a category of information that is expressly made confidential; and (3) Jackson is not entitled to attorney's fees because he did not hire an attorney to represent him and has not "incurred" any attorney's fees.

II. Discussion

A. Public Information

The Texas Legislature promulgated the TPIA with the express purpose of providing the public "complete information about the affairs of government and the official acts of public officials and employees." TEX. GOV'T CODE § 552.001(a); *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 355-56 (Tex. 2000). The Act is aimed at preserving a fundamental tenet of representative democracy: "that the government is the servant and not the master of the people." TEX. GOV'T CODE § 552.001(a). At its core, the TPIA reflects the public policy that the people of Texas "insist on remaining informed so that they may retain control over the instruments they have created." *Id.*; *see Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, ___ S.W.3d ___, ___ (2010). To that end, the TPIA directs that it be liberally construed in favor of disclosure of requested information. TEX. GOV'T CODE § 552.001; *see Dallas Morning News,* 22 S.W.3d at 356.

Public information is "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." TEX. GOV'T CODE § 552.002. Public information is available upon request unless it falls into an exception provided for in the TPIA. *See id.* §§ 552.021(a), 552.101-.148 (providing multiple exceptions to disclosure); *In re Georgetown,* 53 S.W.3d at 331.

B. Exceptions to Disclosure

Texas Government Code section 552.101 provides that information is excepted from disclosure requirements "if it is information considered to be confidential by law, either

constitutional, statutory or by judicial decision." TEX. GOV'T CODE § 552.101. In section 552.022, however, the TPIA sets out eighteen categories of public information that are "not excepted from required disclosure under [chapter 522] unless they are *expressly* confidential under other law." *Id.* § 552.022 (emphasis added). That is, requested information falling within the scope of the eighteen categories must be disclosed unless there is some express basis in "other law" found outside of the TPIA that not only makes the information confidential, but does so expressly. *Id.*; *see In re Georgetown*, 53 S.W.3d at 334 (noting, in considering whether certain attorney work product is confidential, that "[a] law does not have to use the word 'confidential' to expressly impose confidentiality").

Section 552.022(12) lists, as a category of public information required to be disclosed, "final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases." TEX. GOV'T CODE § 552.022(12). Jackson argues that no "other law" expressly makes SOAH's decisions and orders confidential. SOAH urges that federal law and the Texas Family Code are "other law" providing a basis for nondisclosure. We will address each statute referenced by SOAH in turn, beginning with federal law.

C. Federal Law

The Social Security Act sets out requirements for a "state plan for child and spousal support." 42 U.S.C. § 654. As prerequisites for federal funding, these programs must provide child support establishment, enforcement, and modification services, medical support enforcement, and parent locator services. Doretha Smith Henderson, *Title IV-D and Child Support Enforcement: Confusion and Misinformation Abound*, 65 TEX. B.J. 504, 506 (2002). The Texas Legislature has

ensured Texas's compliance with these requirements through various statutes governing child support. *Id.*; *see, e.g.*, TEX. FAM. CODE chs. 158, 231. The federal legislation also requires that a State plan for child support must

> have in effect safeguards, applicable to all confidential information handled by the State agency, that are designed to protect the privacy rights of the parties, including--
>
> (A) safeguards against unauthorized use or disclosure of information relating to proceedings . . . used to . . . enforce support.

42 U.S.C. § 654(26). SOAH argues that the language "relating to proceedings . . . to . . . enforce support" in the federal statute encompasses the information Jackson seeks. SOAH contends that 42 U.S.C. § 654(26) is express "other law" that entirely excepts its decisions and orders from disclosure. We disagree. Neither the language of 42 U.S.C. § 654(26) nor that of Texas Government Code section 552.022 cuts as broadly as SOAH contends.

Title 42 U.S.C. § 654 directs states to implement safeguards designed to protect the privacy rights of parties and confidential information related to child support. But the statute does not specify what information is confidential, nor does it expressly preclude disclosure of all information related to child support and child support proceedings. Nor do the relevant federal regulations expressly except non-confidential parts of SOAH's decisions and orders from the TPIA's mandate to disclose. *See* 45 C.F.R. § 303.21.

The TPIA directs courts to strictly construe its language in order to promote open government unless the information sought is "expressly made confidential under other law." TEX. GOV'T CODE § 552.022(a); *see id.* § 552.001. We disagree with SOAH and the court of appeals

insofar as they conclude that 42 U.S.C. § 654(26) provides an express exception to disclosure for SOAH's decisions and orders in their entirety.

D. The Texas Family Code

Section 231.108(a) of the Family Code provides, in relevant part, "[e]xcept as [otherwise] provided . . . all files and records of services provided under this chapter, including information concerning a custodial parent, noncustodial parent, child, and an alleged or presumed father, are confidential." TEX. FAM. CODE § 231.108. SOAH argues, and the court of appeals agreed, that this directive provides "other law" as described in Texas Government Code section 552.022 and makes all the information Jackson seeks expressly confidential. ___ S.W.3d ___. The court of appeals reasoned that the information contained in the files and records is made expressly confidential under Texas Family Code section 231.108(a), "and it would undo federal and state legislative intent to require the disclosure of confidential information merely because the statutes do not use the words 'opinion,' 'decision,' or 'order' in their clear directives to keep the information from public disclosure." *Id.* at ___. SOAH argues that the language "information concerning" is broad enough to include the entirety of the Orders Jackson requested. Again, we disagree.

Jackson does not seek disclosure of "files and records of services," provided under chapter 231 as they are referenced in Family Code section 231.108. Rather, he requested decisions and orders relating to license suspension proceedings. Family Code chapter 232, not 231, governs license suspension proceedings. *See* TEX. FAM. CODE ch. 232. And chapter 232 does not expressly except an agency's decisions, orders relating to the proceedings, or information in them, from public disclosure. *See id.*

But we conclude that while section 231.108 does not provide a basis to withhold the decisions and orders in their entirety, the statute expressly provides that information obtained during provision of services under Chapter 231 is confidential, "including information concerning a custodial parent, noncustodial parent, child, and an alleged or presumed father."[2] To the extent that such information appears within the decisions and orders requested by Jackson, it must be redacted. *See id.* § 231.108(a) (excepting from public disclosure "all files and records of services provided *under this Chapter*") (emphasis added). This is, of course, unless the information is already part of the public domain because it appears in public documents.[3]

Looking to its plain language, section 231.108 does not provide an exception for information obtained in the course of a Chapter 232 license-suspension proceeding. *Compare id.* § 231.108, *with id.* ch. 232. Therefore, any information obtained during chapter 232 proceedings that appears in the decisions and orders is public information unless "other law" beyond the TPIA expressly makes such information confidential. *See* TEX. GOV'T CODE § 552.022. SOAH does not argue that any such exception applies to the specific information contained in the decisions and orders Jackson requested, other than the provisions of Chapter 231.[4] If there are other laws excepting the

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[2] Chapter 231 services concern (A) administration of the Title IV-D program; (B) services provided by the Title IV-D program, such as, for example, child support services relating to eligibility, assignment of payments, and paternity establishment; (C) payment of fees and costs to the Title IV-D agency; (D) location of parents and resources. *See* TEX. FAM. CODE ch. 231 subsecs. (A)-(D).

[3] Construing section 231.108(a) to require redaction of information already available in the public domain would be nonsensical. *See id.* Indeed, a well established canon of construction dictates that "the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, ___ S.W.3d ___, ___ (Tex. 2011).

[4] Because SOAH does not argue that any such exception applies other than those considered here, we do not address whether existing "other law" would expressly except information in the Orders. *See In re Georgetown*, 53 S.W.3d at 332 (explaining that under section 552.022, "other law" includes statutes and judicially promulgated rules,

information from required disclosure under the TPIA, SOAH must disclose the decisions and orders after redacting that information, which includes information obtained during provision of Chapter 231 services and not contained in public records other than the SOAH decisions and orders.

Considering the overarching principle of open government that has long been the public policy of this State, requiring release of SOAH's Orders after redaction of such information is more faithful to the language of the statute and Texas public policy than a blanket withholding of the Orders altogether. *See id.* at 552.001. Thus, we disagree with SOAH and the court of appeals insofar as they conclude that Texas Family Code section 231.108(a) provides an exception to disclosure for SOAH's Orders in their entirety.

We take at face value SOAH's argument that deleting or redacting confidential information from its decisions and orders will take time, but the ten representative Orders submitted in this case do not demonstrate that redacting confidential information will be overly burdensome, because relatively few redactions will have to be made.

To begin, the Orders are not lengthy: five of the ten are one page long, four are three pages long, and one is four pages long. The one-page Orders deny a motion for rehearing, dismiss the proceedings, stay a license suspension, vacate a license suspension, and grant proposed consent Orders. Three of those Orders do not contain any information about the respondent other than his name; they do not even include the number of the suspended license. The respondent's license

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such as rules of evidence and procedure). This Court has recognized "other law" that operates as an express exception to public disclosure under section 552.022. *See, e.g.*, *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers*, ___ S.W.3d ___, ___ (Tex. 2011) (holding that the common law right to be free from physical harm excepts core public information from disclosure if disclosure "would pose a substantial threat of physical harm"); *In re Georgetown*, 53 S.W.3d at 336 (concluding that Texas Rules of Civil Procedure 192.3(e) and 192.5 and Texas Rule of Evidence 503(a)(5), (b)(1) provide express exceptions to public disclosure of core public information).

number appears in six of the seven remaining orders. In only one order does information about the respondent appear that goes beyond the respondent's name and the number of the suspended license. Assuming the information was disclosed during provision of Chapter 231 services, including information concerning a custodial parent, noncustodial parent, child, and an alleged or presumed father, and is not a part of public documents, that information should be protected from disclosure. *See* TEX. FAM. CODE § 231.108(a). It is gathered into one paragraph so it would take minimal time to redact.

E. Court Orders and Court Records

The parties dispute whether SOAH's orders constitute "court orders" and thus they dispute the applicability of Government Code section 552.022(17), which lists as a category of public information "information that is also contained in a public court record." TEX. GOV'T CODE § 552.022(17). Assuming without deciding that SOAH's decisions and orders fall under section 552.022(17), the result in this case is the same. However, our analysis in regard to section 552.022(12) applies: redactions must be made of information obtained during the provision of Chapter 231 services that is not in a public record and of any other information expressly made confidential by other law.

Jackson also argues that Texas Government Code section 2001.004(3) creates a right of access to SOAH's decisions and orders. In relevant part, the Administrative Procedure Act (APA) provides, "In addition to other requirements under law, a state agency shall . . . make available for public inspection all final orders, decisions, and opinions." TEX. GOV'T CODE § 2001.004(3). But this general requirement of disclosure conflicts with the more specific provisions in the Texas

Family Code pertaining to Title IV-D information. *See, e.g.*, TEX. FAM. CODE § 231.108. We have recently reiterated the rule that "a specific statutory provision prevails as an exception over a conflicting general provision." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010); *see* TEX. GOV'T CODE § 311.026(b). Moreover, as a matter of statutory construction, "if statutes are irreconcilable, the statute latest in date of enactment prevails." *First State of Bank DeQueen*, 325 S.W.3d at 637; *see* TEX. GOV'T CODE § 311.025(a).

The Texas Legislature enacted the APA in 1975. *See* Act of Apr. 8, 1975, 64th Leg., R.S., ch. 61, § 4, 1975 Tex. Gen. Laws 136, 137 (amended 1991).[5] The requirement that certain Title IV-D information remain confidential first appeared in 1985 in the Human Resources Code. *See* Act of May 27, 1985, 69th Leg., R.S., ch. 232, § 15, 1985 Tex. Gen. Laws 1158, 1171. The statute was reworded to its current version in 1989 and reenacted in 1993. *See* Act of July 14, 1989, 71st Leg., 1st C.S., ch. 25, § 39, 1989 Tex. Gen. Laws 74, 89-90; Act of May 13, 1993, 73rd Leg., R.S., ch. 261, § 3, 1993 Tex. Gen. Laws 567, 568. Because section 231.108 of the Family Code is both the more specific and the later-enacted statute, we agree with SOAH that the Family Code prevails to the extent it conflicts with 2001.004 of the APA. *See First State Bank of DeQueen*, 325 S.W.3d at 637.

Jackson also asserts that section 155.31(m)(3) (now section 155.423) and section 155.47 (now section 155.409) of the Texas Administrative Code compel disclosure of the documents he seeks. Section 155.423 makes SOAH records open to the public unless sealed by the court and

[5] The Legislature recodified the APA in 1993, and section 2001.004 was added to the Government Code at that time. *See* Act of May 4, 1993, 73rd Leg., R.S. ch. 261, §§ 1, 47, 1993 Tex. Gen. Laws 583, 735. The Legislature did not make any substantive changes to section 2001.004. *Id.*

section 155.409 makes SOAH proceedings open to the public. *See* 1 TEX. ADMIN. CODE §§ 155.409, 155.423. Because Texas Family Code section 231.108 is the more specific statute, and for the reasons set forth above, we agree with SOAH that the Family Code prevails over the provisions referenced by Jackson to the extent of any conflict. The referenced sections of the Administrative Code do not require greater disclosure of information than that we have already determined is required by the TPIA. *See First State Bank of DeQueen*, 325 S.W.3d at 637.

Finally, Jackson argues that Texas Rule of Civil Procedure 76a, regarding the sealing of district court records, would compel disclosure in this case. The rule provides that

> Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following
>
> (a) a specific, serious and substantial interest which clearly outweighs:
> (1) this presumption of openness;
> (2) any probable adverse effect that sealing will have upon the general public health or safety;
> (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

TEX. R. CIV. P. 76a.[6] SOAH responds that Rule 76a does not apply to the documents Jackson seeks because SOAH is not a court and hence SOAH records are not "court records" under Rule 76a. SOAH also points out even if the rule did apply to SOAH, it is trumped by the TPIA to the extent of inconsistent provisions. We agree.

[6] SOAH's own rule of procedure concerning sealing of documents in a contested case tracks the language of Rule 76a. *See* 1 TEX. ADMIN. CODE § 155.31(m)(3) (now section 155.423).

We need not decide whether Rule 76a applies to SOAH, nor whether the documents Jackson requested are court orders. If they were, Rule 76a would conflict with Texas Family Code section 231.108 to the extent Rule 76a would require disclosure of information in SOAH's decisions and orders that we have already determined must be redacted. "[W]hen a rule of procedure conflicts with a statute, the statute prevails unless the rule has been passed subsequent to the statute and repeals the statute as provided by Texas Government Code § 22.004." *Johnstone v. State*, 22 S.W.3d 408, 409 (Tex. 2000); *see* TEX. GOV'T CODE § 22.004; *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 425 (Tex. 1971) ("[Where a] rule of the court conflicts with a legislative enactment, the rule must yield."). Jackson does not argue that Rule 76a was passed subsequent to the TPIA or the Texas Family Code.[7] Further, as explained above, a more specific statute will prevail over a conflicting general provision. *See* TEX. GOV'T CODE § 311.026; *First State Bank of DeQueen*, 325 S.W.3d at 637. Here, the TPIA and Family Code provisions directly address the confidentiality of certain information Jackson requested. Therefore, even assuming Rule 76a applies, it is trumped by the TPIA and Texas Family Code to the extent of any conflicts and does not affect our conclusion as to what information is excepted from disclosure.

[7] Texas Rule of Civil Procedure 76a was not passed subsequent to Texas Government Code section 552.022. Rule 76a became effective September 1, 1990. *See* TEX. R. CIV. P. 76a. The Legislature passed Texas Government Code section 552.022 in 1999. *See* Act of May 23, 1999, 76th Leg., R.S., ch. 1319, § 5, 1999 Tex. Gen. Laws 4501, 4501-02 (current version at TEX. GOV'T CODE § 552.022).

E. Conclusion

The decisions and orders Jackson requested must be disclosed. *See* TEX. GOV'T CODE § 552.002. The Legislature has clearly expressed its intent that exceptions to disclosure be construed narrowly. *See* TEX. GOV'T CODE § 552.001; *In re Georgetown*, 53 S.W.3d at 340 ("'When the Legislature has intended to make information confidential, it has not hesitated to so provide in express terms.'" (quoting *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied)); *see also Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) ("[E]very word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose.") (citations omitted). We decline to read the language of the statute broader than it is written and we conclude that the purpose and intent of the TPIA can be fulfilled by disclosing the requested documents with redactions. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 326 (Tex. App.—Austin 2002, no pet.) ("To find otherwise would also be inconsistent with the Legislature's directive to liberally construe the Act in favor of disclosure."). We therefore hold that SOAH must disclose the requested decisions and orders after redaction of any information obtained during provision of Chapter 231 services, such as information concerning a custodial parent, noncustodial parent, child, and an alleged or presumed father, that was not already in the public domain.

III. Attorney's Fees

Jackson argues that he is entitled to attorney's fees under section 552.323 of the TPIA and section 37.009 of the Declaratory Judgments Act (DJA). He concedes case law is "fairly uniform"

that a pro se litigant is not entitled to attorney's fees, but argues that his case is distinguishable because he is a licensed attorney. He also urges that public policy supports awarding his costs for challenging the unreasonable denial of his right of access to judicial documents. We disagree.

A. The TPIA

The TPIA provides that a party may recover attorney's fees "incurred." The statute specifies, in relevant part:

> (a) In an action brought under Section 552.321 or 552.3215, the court shall assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails, except that the court may not assess those costs and fees against a governmental body if the court finds that the governmental body acted in reasonable reliance on:
> (1) a judgment or an order of a court applicable to the governmental body;
> (2) the published opinion of an appellate court; or
> (3) a written decision of the attorney general, including a decision issued under Subchapter G or an opinion issued under Section 402.042.

TEX. GOV'T CODE § 552.323(a).

In *Garcia v. Gomez*, a case brought under the Texas Medical Liability Act, we explained that the word "incurred," as it relates to an award of attorney's fees, "act[s] to limit the amount of attorney's fees the trial court may award." 319 S.W.3d 638, 642 (Tex. 2010). We have also said that "[a] fee is incurred when one becomes liable for it." *Id.*; *see also Aviles v. Aguirre*, 292 S.W.3d 648, 649 (Tex. 2009). Jackson represented himself, so he did not incur attorney's fees as that term is used in its ordinary meaning because he did not at any time become liable for attorney's fees. *See Aviles*, 292 S.W.3d at 649; *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 399 (Tex. 2000) ("[W]e may presume the Legislature intended the plain meaning of its words.").

Jackson cites *Cazalas v. U.S. Dep't of Justice*, 709 F.2d 1051 (5th Cir. 1983), to support his contention that pro se attorney-litigants can recover attorney's fees. While it is true that in *Cazalas* the Fifth Circuit allowed such a recovery, subsequent decisions seem to indicate that *Cazalas* is no longer the prevailing law. *See Kay v. Ehrler*, 499 U.S. 432, 435 (1991); *Burka v. U.S. Dep't of Health & Human Servs.*, 142 F.3d 1286, 1287-89 (D.C. Cir. 1998). In *Kay* the United States Supreme Court clarified that an attorney representing himself in a civil rights case was not eligible for the award. *See* 499 U.S. at 437. The Supreme Court reasoned that the word "attorney" "assumes an agency relationship" and that Congress's objective was to "enable potential plaintiffs to obtain the assistance of competent counsel." *Id.* at 435-36; *see Burka*, 142 F.3d at 1289 (refusing to award attorney's fees to a pro se attorney-litigant who prevailed on a Federal Freedom of Information Act claim). A pro se attorney-litigant, the Court opined, is bereft of the benefits an independent third party brings "in framing the theory of the case . . . and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom." *Kay*, 499 U.S. at 437. The Supreme Court concluded that an award of attorney's fees to a successful pro se attorney-litigant would not serve "[t]he statutory policy of furthering the successful prosecution of meritorious claims" because it would disincentivize attorneys "to retain counsel in every such case." *Id.* at 438; *Burka*, 142 F.3d at 1289.

After the Supreme Court's decision in *Kay*, the majority view in federal courts turned against the award of attorney's fees to pro se attorney-litigants.[8] *Burka*, 142 F.3d at 1288-89 ("Virtually all

[8] We note that the Fifth Circuit's opinion in *Interstate Commerce Commission* was issued three months after the Supreme Court's opinion in *Kay*. *See* 935 F.2d 728 (5th Cir. 1991). But, as *Burka* points out, *Interstate Commerce Commission* does not mention *Kay* at all in its analysis of awarding attorney's fees to pro se attorney-litigants. *Burka*,

other courts that have considered the issue since *Kay* have reached a similar conclusion."). And we find the reasoning in *Burka* persuasive in light of the similarities between the Federal Freedom of Information Act and the TPIA. *Compare* 5 U.S.C. § 552(a)(4)(E)(I) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under [the Freedom of Information Act] in which the complainant has substantially prevailed."), *with* TEX. GOV'T CODE § 552.323 ("In an action brought under [the TPIA], the court shall assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails . . . .").

In light of the foregoing, we hold that Jackson cannot recover fees from SOAH under the TPIA.

B. The DJA

Jackson also claims entitlement to attorney's fees under section 37.009 of the Texas Civil Practice and Remedies Code. That section provides, "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009.

In *MBM Financial Corp. v. Woodlands Operating Co.*, we considered whether a breach of contract claimant who could not recover attorney's fees under Chapter 38 of the Civil Practice and Remedies Code could nevertheless recover fees under the DJA. 292 S.W.3d 660, 668 (Tex. 2009). We noted that regardless of whether declaratory judgments are available in tandem with all other

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142 F.3d at 1290. *See generally Interstate Commerce Comm'n*, 935 F.2d 728. *Interstate Commerce Commission* is now considered an outlier on the issue in the federal courts. *See Burka*, 142 F.3d at 1290.

claims, the same is not necessarily true of claims for attorney's fees under the DJA. *Id.* at 669 ("If repleading a claim as a declaratory judgment could justify a fee award, attorney's fees would be available for all parties in all cases."). We further explained that allowing fees under the DJA would frustrate the limits imposed by the specific provisions governing attorney's fees for breach of contract claims. *Id.* at 670.

The same reasoning applies here: allowing Jackson to recover attorney's fees under the DJA when he cannot meet the requirements for their recovery under the TPIA would frustrate the limits established by the TPIA. Furthermore, we have explained that an award of attorney's fees under the DJA is unavailable if the claim for declaratory relief is merely incidental to other claims for relief. *John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 289 (Tex. 2002). Here, Jackson's claim against SOAH arises specifically under the TPIA, yet he argues that because he also sought disclosure under other statutes and rules he should not be limited to the TPIA to recover fees.[9] We hold that his claims for attorney's fees are incidental to his central theory of relief which arises squarely under the TPIA. *See MBM Fin. Corp.*, 292 S.W.3d at 660 ("While the Legislature intended the Act to be remedial, it did not intend to supplant all other statutes and remedies."). Thus, we hold that Jackson cannot recover attorney's fees under the DJA.

IV. Conclusion

We reverse the court of appeals' judgment. We remand the cause to the trial court for further proceedings consistent with this opinion.

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[9] We do not reach SOAH's argument that section 552.3215 of the TPIA, which authorizes the attorney general and local prosecutors to bring actions for injunctive and declaratory judgment, forecloses declaratory relief for private individuals seeking information under the TPIA.

Phil Johnson
Justice

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0013

RITA LACKEY FILLINGIM PEARSON, PETITIONER,

v.

WILLIS DAN FILLINGIM, RESPONDENT

ON PETITION FOR REVIEW FROM THE
SEVENTH COURT OF APPEALS AT AMARILLO, TEXAS

PER CURIAM

In this dispute over the division of property in a divorce decree, we must decide whether the trial court impermissibly reclassified an asset originally divided in a 1981 divorce decree. For the reasons expressed below, we hold that it did.

Rita Lackey Fillingim Pearson (Rita) and Willis Dan Fillingim (Dan) married on August 1, 1970. During the marriage, Dan's parents conveyed to Dan four deeds for mineral rights, which Dan and Rita jointly leased to third parties. Dan and Rita divorced on June 9, 1981.

The divorce decree states that "the estate of the parties be divided as follows" and divides property in the community estate into two schedules, one for Rita and one for Dan. The decree does not specifically mention the mineral rights that originally belonged to Dan's parents in its division, but does include residuary clauses in each schedule awarding both parties a "one-half interest in all other property or assets not otherwise disposed of or divided herein." Although there is no dispute

that Dan was properly served in connection with the divorce proceedings, Dan neither appeared at the final divorce decree hearing nor hired an attorney to represent him at any point in the divorce proceedings. Dan has not made any other collateral attacks on the validity of the 1981 judgment. After the divorce, both Rita and Dan received royalties from the mineral rights.

At trial, Dan claimed that he assumed the royalties he was receiving amounted to 100% of the royalties, and that he did not find out that Rita was receiving royalties until March 2002. In April 2006, nearly twenty-five years after the divorce was entered, Dan filed a petition in the original divorce cause to clarify the decree with respect to the mineral rights he alleged were gifts to him from his parents during the marriage. Dan also filed a separate suit for declaratory judgment that the four mineral rights deeds were his separate property at the time of divorce. The trial court consolidated these two matters. Dan requested that the trial court clarify that the mineral rights were his separate property, as they were gifts from his parents and not divided by the divorce decree.[1] After hearing testimony from both parties and admitting the deeds into evidence, the trial court determined that the deeds were gifts from Dan's parents and thus Dan's separate property, and that the divorce decree did not partition the separate property of the parties. Judgment was entered, and Rita appealed.

The court of appeals initially reversed and rendered judgment for Rita. However, on rehearing, the court of appeals reasoned that the clause "the estate of the parties" from the original divorce decree only included community property. ___ S.W.3d ___. Because the trial court

[1] Rita counterclaimed for unpaid child support, attorneys fees and costs. Dan filed a plea to the jurisdiction to dismiss Rita's claim, as over ten years had passed since their youngest child turned 18. The trial court granted his plea to the jurisdiction, and Rita's counterclaims are not before us.

concluded that the mineral deeds were Dan's separate property, the court of appeals held that the residuary clauses in the divorce decree did not divide the mineral rights. The court of appeals also held that the trial court's judgment was a clarification of the earlier divorce decree, rather than a substantive change, and thus the trial court had jurisdiction. *Id.* at ___.

We must decide whether the trial court had jurisdiction to "clarify" the decree through Dan's suit and whether the mineral leases in question were included in the 1981 decree. Under the Family Code, the court that renders a divorce decree retains jurisdiction to clarify and enforce the property division within that decree. TEX. FAM. CODE §§ 9.002, .008. If a decree is ambiguous, that court can enter a clarification order. *Id.* at §§ 9.006, .008. However, it is beyond the power of the court to "amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment." *Id.* at § 9.007(a). A judgment finalizing a divorce and dividing marital property bars relitigation of the property division, even if the decree incorrectly characterizes or divides the property. *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003); *Baxter v. Ruddle*, 794 S.W.2d 761, 762–63 (Tex. 1990).

"[T]he estate of the parties" was to be divided as stated in the divorce decree's two schedules. Trial courts can only divide community property, and the phrase "estate of the parties" encompasses the community property of a marriage, but does not reach separate property. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139 (Tex. 1977) (citations omitted). Thus, "estate of the parties" in the Fillingim's divorce decree refers to community property only.

The issue, then, is whether the mineral rights were characterized as community property at the time of the 1981 divorce decree. Dan claims the mineral rights were a gift from his parents. The

Family Code provides that gifts to a spouse during marriage are that spouse's separate property. TEX. FAM. CODE § 3.001. However, section 3.003 also codified the common-law proposition that "[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property." *Id.* § 3.003(a); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965); *Wilson v. Wilson*, 201 S.W.2d 226, 227 (Tex. 1947). Parties claiming certain property as their separate property have the burden of rebutting the presumption of community property. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973). To do so, they must trace and clearly identify the property in question as separate by clear and convincing evidence. *Id.* (citing *Tarver*, 394 S.W.2d at 783); TEX. FAM. CODE § 3.003. Dan did not attend the final hearing, much less offer proof that the deeds were his separate property. Thus, the deeds must be characterized as community property, even if the characterization was mistaken in 1981. *Reiss*, 118 S.W.3d at 443 ("[A] court has jurisdiction to characterize community property—even if it does so incorrectly.") (citation omitted).

The divorce decree did not specifically divide the mineral deeds, but the schedules included residuary clauses that awarded each party "[a] one-half interest in all other property or assets not otherwise disposed of or divided herein." Such residuary clauses, as opposed to more limited clauses that divide only the property "in possession" of the former spouses, have been held to effectively divide property not explicitly mentioned in the decree. *See Buys v. Buys*, 924 S.W.2d 369, 372 (Tex. 1996) (citations omitted). In *Buys*, this Court construed a residuary clause in a divorce decree that conveyed "all of the other properties, financial assets and belongings of the parties hereto, whether separate or community" to the wife. We held that the clause clearly and unambiguously included community property assets that the trial court could have divided but did not specifically divide in

the original divorce decree. *Id.* at 370, 372. Because Dan did not provide any evidence that the deeds were separate property, they were encompassed in the "estate of the parties" and were divided by the divorce decree's residuary clauses.

Certainly, a court cannot divest an owner of separate property. *Eggemeyer*, 554 S.W.2d at 140–41 (concluding that taking separate property from one spouse and giving it to the other violates Article I, section 19 of the Texas Constitution). But whether the mineral deeds were originally Dan's separate property or not, they were properly deemed community property when he failed to rebut the Family Code's presumption of community property in the original hearing. *See Tarver*, 394 S.W.2d at 783. This is not a divestiture of separate property, but a necessary classification of property as set by the community presumption. Even further, as this Court stressed in *Reiss v. Reiss*, "a court has jurisdiction to characterize community property—even if it does so incorrectly." 118 S.W.3d at 443. Dan did nothing to prove that the mineral rights were gifts in the original hearing, and there is no presumption they were his separate property. To hold otherwise would undermine the finality of divorce decrees by opening them up to collateral attacks (notwithstanding the state of the record in the original divorce proceeding), undermine the Family Code's presumption that all property in the parties' possession is community, and turn residuary clauses in existing decrees into invitations to relitigate property divisions that former spouses now dislike.

A final, unambiguous divorce decree that disposes of all marital property bars relitigation. *Shanks v. Treadway*, 110 S.W.3d 444, 449 (Tex. 2003). All property acquired during a marriage is presumed to be community property, and the burden is placed on the party claiming separate property to prove otherwise, which Dan failed to do in the original proceeding. Because the mineral rights

were not divided elsewhere in the decree and were treated as community property for the reasons discussed above, the residuary clauses in the decree clearly and unambiguously included and divided the mineral rights between Dan and Rita. Therefore, the deeds were divided by the original decree, and there is no jurisdiction to modify that division.

The trial court lacked jurisdiction to alter the original divorce decree, and the court of appeals erred in affirming the trial court's declaration that the deeds were Dan's separate property. Accordingly, and without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and render judgment dismissing Dan's claims for want of jurisdiction.

OPINION DELIVERED: January 14, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0048

IN RE BILLY JAMES SMITH, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued November 10, 2010

JUSTICE MEDINA delivered the opinion of the Court.

Under the Texas Wrongful Imprisonment Act, which is now known as the Tim Cole[1] Act, a wrongfully-imprisoned person may seek compensation from the state for the period of wrongful imprisonment. TEX. CIV. PRAC. & REM. CODE § 103.001(a). Application is made to the Texas Comptroller of Public Accounts, who is authorized to determine eligibility and the amount owed to the claimant. *Id.* § 103.051(b). The amount owed is determined by multiplying a fixed amount, currently set at $80,000 per year, by the period of wrongful imprisonment. *Id.* § 103.052(a)(1). In calculating the wrongful-imprisonment period, the Act excludes any period for which the claimant was serving a concurrent sentence. *Id.* § 103.001(b).

[1] Tim Cole died of an asthma attack in 1999 while serving a 25-year sentence for aggravated sexual assault. DNA evidence later cleared him of the crime, and in 2010 Governor Rick Perry granted him the state's first posthumous pardon. *See* Op. Tex. Att'y Gen. No. GA-0754, at 3 (2010) (recognizing Governor's authority to grant posthumous pardon); *see also* Act of May 27, 2009, 81st Leg., R.S., ch. 180, § 1, 2009 Tex. Gen. Laws 523 (naming the Act after Tim Cole).

Relator, who was on parole at the time of his wrongful conviction, complains that he is entitled to additional compensation because the Comptroller erroneously applied the concurrent-sentence restriction to reduce his award. Relator submits that he would not have been imprisoned but for the wrongful conviction and that the resulting revocation of his parole should not be used to reduce his award. The Comptroller concluded that the concurrent-sentence restriction applied and reduced the claimant's compensation accordingly. We do not agree that the concurrent-sentence restriction applies under these circumstances and conditionally grant the relator's petition for mandamus relief.

I

In December 1970, Billy James Smith was convicted of robbery and sentenced to 25 years in prison. He was released on parole in 1983. In 1986, Smith was convicted of aggravated sexual assault and sentenced to life imprisonment. His parole on the 1970 robbery conviction was also revoked. On June 11, 1987, his sentence on the robbery conviction was discharged, but he remained in prison under the life sentence for sexual assault.

In 2006, Smith applied for a state writ of habeas corpus. See TEX. CODE CRIM. PROC. art. 11.07 (establishing procedure for habeas corpus relief in non-death-penalty cases). He alleged that DNA testing and other evidence proved his actual innocence. *See id.* arts. 64.01–.05 (explaining procedure for obtaining forensic DNA testing). The application was filed in the convicting criminal district court, but made returnable to the Court of Criminal Appeals because it involved a final conviction in a felony case. *Id*. art. 11.07, § 3.

The trial court found that DNA testing exonerated Smith, and released him from custody on July 7, 2006. *See id.* art. 11.65(b) (providing that convicting court may order the release of the applicant on bond). The convicting court's findings were transmitted to the Court of Criminal Appeals, which subsequently agreed in an unpublished per curiam opinion that Smith had "established by clear and convincing evidence that no reasonable juror would have convicted him in light of the DNA results." *Ex Parte Smith*, 2006 WL 3691244, *1 (Tex. Crim. App., Dec. 13, 2006); *see also* TEX. CODE CRIM. PROC. art. 11.07, §§ 3, 5. The Court of Criminal Appeals accordingly granted Smith's application on the basis of his actual innocence.

A little less than three years later, Smith applied for compensation under the Tim Cole Act, seeking approximately $1,593,000. *See* TEX. CIV. PRAC. & REM. CODE § 103.003 (requiring application to be filed within three years of pardon or relief granted on the basis of innocence). The Comptroller approved Smith's application, but determined he was owed a lesser amount, approximately $1,527,000, after applying the concurrent-sentence restriction. *See id.* § 103.001(b). Smith accepted the reduced award under protest, asked the Comptroller to reconsider her determination, and when she denied his request, filed this original proceeding.

II

The Comptroller's decision is not appealable, but a claimant may seek review through an original mandamus proceeding. *Id.* § 103.051(e). The original proceeding must be filed in this Court because only the Supreme Court may issue a writ of mandamus against an officer of the executive department of this state, such as the Comptroller. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (Tex. 1995) (orig. proceeding). The Court's mandamus authority extends "to order

or compel the performance of a judicial, ministerial or discretionary act or duty that, by state law, the officer or officers are authorized to perform." TEX. GOV'T CODE § 22.002(c); *see also* TEX. CONST. art. V, § 3.

Although mandamus will not issue to control an officer's legitimate exercise of discretion, it may issue to enforce the performance of a nondiscretionary or ministerial act. *Cobra Oil & Gas Corp. v. Sadler*, 447 S.W.2d 887, 896 (Tex. 1969) (orig. proceeding). In this regard, a public officer has no discretion or authority to misinterpret the law. *See, e.g., Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 602 (Tex.1975) (original proceeding to compel the comptroller to issue a warrant for payment of architects' services); *Gordon v. Lake*, 356 S.W.2d 138, 141 (Tex. 1962) (original proceeding to compel secretary of state to file a corporate charter); *Tarrant Cnty. Water Control & Improvement Dist. No. 1 v. Pollard*, 12 S.W.2d 137, 139 (Tex. 1929) (original proceeding to compel attorney general to approve bonds and certify them to comptroller for registration). Similarly, when an alleged mistake of law involves an issue of statutory construction, our review is de novo. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008).

III

Wrongfully-imprisoned persons have not always been entitled to compensation from the state. The common law provided no recourse for the innocent. *State v. Oakley*, 227 S.W.3d 58, 62 (Tex. 2007). It was not until 1965 that the Legislature enacted the first wrongful-imprisonment statute. Act of May 28, 1965, 59th Leg., R.S., ch. 507, 1965 Tex. Gen. Laws 1022, 1022–24; *see also* TEX. CONST. art. III, § 51-c (constitutional amendment authorizing compensation legislation).

Since then, the statute has undergone several revisions and is now found in Chapter 103 of the Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE §§ 103.001–.154.

Chapter 103, also known as the Tim Cole Act, presently grants compensation to persons who fulfill two requirements. Act of May 27, 2009, 81st Leg., R.S., ch. 180, § 1, 2009 Tex. Gen. Laws 523. First, the person must have "served in whole or in part a sentence in prison under the laws of this state." TEX. CIV. PRAC. & REM. CODE § 103.001(a)(1). Second, the person must have received either "a full pardon on the basis of innocence for the crime for which the person was sentenced," or "been granted relief on the basis of actual innocence of the crime for which the person was sentenced." *Id*. § 103.001(a)(2)(A)–(B). Smith met these requirements.

Additionally, Smith was required to follow certain statutory procedures to obtain compensation. He was required to file an application for compensation with the Comptroller's office, which he did. *See id*. § 103.051(a). The Comptroller, in turn, was under a legal duty to process Smith's claim, verify his eligibility for compensation, and determine the amount of compensation, if any, that he was owed. *Id*. § 103.051(b)(1)–(2), (c). The Comptroller complied.

In determining Smith's eligibility and the amount of compensation owed him, the Comptroller was also required to determine whether any statutory restrictions applied to Smith's claim. There are a number of restrictions that may apply depending on the facts, but pertinent here is the concurrent-sentence restriction. *Id*. § 103.001(b). Under this restriction, a person may have his claim reduced, or entirely extinguished, if he was under a concurrent sentence for another crime to which the Act does not apply while he was serving all or part of a sentence for which the Act does

apply. *Id*. In other words, a person is entitled to compensation for imprisonment for a crime he did not commit unless he was also serving a concurrent sentence for a crime he did commit.

When Smith was wrongfully convicted and incarcerated for the 1986 aggravated sexual assault, he was on parole for his 1970 robbery conviction. The sexual assault conviction revoked that parole. From August 7, 1986, when Smith's wrongful sentence began, to June 11, 1987, when his concurrent sentence on the 1970 robbery conviction discharged, Smith was serving concurrent sentences. Smith's sentence on the wrongful sexual assault conviction ended on July 7, 2006.

Applying the concurrent-sentence restriction, the Comptroller determined that Smith was eligible for wrongful-imprisonment compensation from June 12, 1987, to July 7, 2006, a total 19 years and 25 days. Smith contends that he is entitled to an additional sum for the time he was incarcerated following the revocation of his parole for the robbery conviction to the date of its discharge. The question before us is whether a parolee, whose parole is revoked because of a wrongful conviction, is entitled to compensation under the Act for the period of imprisonment the parolee would have otherwise served out of prison on parole. The question is one of statutory construction.

IV

When construing a statute, we begin with its language. "[W]e consider it 'a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.'" *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008) (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)). But when statutory language is susceptible to more than one reasonable interpretation, we look beyond its

language for clues to the Legislature's intended meaning. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867–68 (Tex. 2009) (referencing TEX. GOV'T CODE § 311.023)). The disagreement here is over the meaning of the concurrent-sentence restriction, which provides:

> (b) A person is not entitled to compensation under Subsection (a) for any part of a sentence in prison during which the person was also serving a concurrent sentence for another crime to which Subsection (a) does not apply.

TEX. CIV. PRAC. & REM. CODE § 103.001(b).

Smith submits that the phrase "in prison" is an indirect prepositional phrase modifying the object "sentence" wherever it appears in section 103.001(b). This grammatical construction comports with the Legislature's intent to compensate individuals for the time spent wrongfully incarcerated, while denying compensation only for the time such individuals would otherwise have spent in prison. Smith argues then that the restriction applies when a person is serving a "concurrent sentence" in prison, but not when the person has been released on parole. He submits that his parole would not have been revoked, and he would not have been incarcerated, but for the wrongful conviction. Under these circumstances, his imprisonment was wrongful not only because of the conviction but also because of the wrongful conviction's effect in revoking his parole.

The Comptroller responds that Smith's status as a parolee at the time of his wrongful conviction is immaterial because the concurrent-sentence restriction makes no exception for parolees. The statute only requires a concurrent sentence, and it is undisputed that Smith was already under a criminal sentence for robbery when he was wrongfully convicted of sexual assault, even though he was not in prison. Because the statute draws no distinction between a concurrent sentence

in prison and a concurrent sentence on parole, the Comptroller concludes that the concurrent-sentence restriction must apply to limit the compensation owed to Smith.

The Comptroller further argues that even if Smith's alternative construction is reasonable, it remains merely an alternate construction of a statute that waives sovereign immunity. Because the statute waives sovereign immunity, the Comptroller submits that two special rules of statutory construction apply that favor her construction. First, a statutory waiver of sovereign immunity must be construed narrowly. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008). Second, statutory language waiving sovereign immunity must be clear and unambiguous. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003); *see also* TEX. GOV'T CODE § 311.034 (codifying the clear and unambiguous standard). The Comptroller concludes that her construction must prevail because it is obviously narrower than Smith's and because the waiver Smith proposes is not expressed in clear and unambiguous statutory language.

The Act previously gave a claimant an option of seeking wrongful-imprisonment compensation by either an administrative proceeding through the Comptroller or a civil lawsuit against the state. Act of June 15, 2001, 77th Leg., R.S., ch. 1488, § 1, 2001 Tex. Gen. Laws 5280 (formerly TEX. CIV. PRAC. & REM. CODE § 103.002 (repealed)). Regarding the civil-litigation option, the Act expressly waived the state's immunity from suit. *Id*. at 5281 (formerly TEX. CIV. PRAC. & REM. CODE § 103.101(a) (repealed). And in *Oakley*, we observed that special rules of statutory construction applied when construing the Act's civil-litigation option because of sovereign immunity. *Oakley*, 227 S.W.3d at 62.

But this case does not involve a civil lawsuit against the state. In fact, since our decision in *Oakley*, the Legislature has eliminated the civil-lawsuit option, retaining only an administrative procedure for wrongful-imprisonment claims. Act of May 11, 2009, 81st Leg., R.S., ch. 180, § 12, 2009 Tex. Gen. Laws 523, 526 (repealing § 103.002 and subchapter C). The current statute directs the Comptroller to determine eligibility and the amount owed according to its terms, and the proceeding here seeks to compel the Comptroller to perform her ministerial duty under the Act. As such, the proceeding does not implicate sovereign immunity or the special rules attendant thereto. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) (observing that proceeding to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity even when the effect compels the payment of money).

Whether the Legislature intended the concurrent-sentence restriction to apply only to persons serving sentences in prison or also to persons serving sentences on parole at the time of the wrongful conviction is a close question. The text of the statute can reasonably be read to support either interpretation; neither the Comptroller's nor Smith's reading of the statute is unreasonable or implausible. When a statute's language is nebulous and "[t]he point of disagreement lies between two plausible interpretations," we resort to additional construction aids to divine the Legislature's intent. *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 355 (Tex. 2009); *see also Galbraith Eng'g Consultants,* 290 S.W.3d at 867-68 (referencing TEX. GOV'T CODE § 311.023)). The Code Construction Act lists a number of matters that may be considered in aid of construction, including the:

(1) object sought to be attained;

(2) circumstances under which the statute was enacted;
(3) legislative history;
(4) common law or former statutory provisions, including laws on the same or similar subjects;
(5) consequences of a particular construction;
(6) administrative construction of the statute; and
(7) title (caption), preamble, and emergency provision.

TEX. GOV'T CODE § 311.023.

A reasonable construction of a statute by the administrative agency charged with its enforcement is entitled to great weight. *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 1999), *cert. denied*, 530 U.S. 1244 (2000). Courts may give less deference to an agency's reading of a statute, however, when legislative intent is at issue rather than the application of technical or regulatory matters within the agency's expertise. *Flores v. Employees Retirement Sys. of Tex.*, 74 S.W.3d 532, 545–46 (Tex. App.—Austin 2002, pet. denied). We may also be guided by reasoned interpretations of a statute by officials of the state executive branch, particularly the attorney general. *Koy v. Schneider*, 221 S.W. 880, 885–86 (Tex. 1920). The opinion of the attorney general is not binding on this Court, but it is often persuasive. *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996).

In this regard, Smith argues that a 2007 Texas Attorney General Opinion provided to the Comptroller supports his claim for compensation. The opinion on which Smith relies involved a wrongful-imprisonment claim arising from one of the "well-publicized . . . Tulia prosecutions." Op. Tex. Att'y Gen. No. GA-0531, at 1 (2007). In those prosecutions, several individuals were arrested in Tulia by a local drug task force and convicted of selling small amounts of cocaine. Following a state investigation, those arrests and convictions were later discredited, and the Governor pardoned most of the individuals who had been convicted.

In the Tulia matter, the Comptroller requested the attorney general's opinion on whether section 103.001(b) barred a claim for compensation of an applicant who had served a concurrent sentence because his wrongful conviction caused his probation on an unrelated crime to be revoked. *See id.* The attorney general concluded that the Comptroller could "approve a claim for compensation under chapter 103 of the Civil Practice and Remedies Code where there is a concurrency between the prison sentences for the wrongful imprisonment and for an unrelated offense if the concurrent sentence was served solely because of the wrongful conviction." *Id.* at 3.

Smith submits that the only difference between himself and the Tulia defendant is that he was on parole at the time of his conviction, whereas the Tulia defendant was on probation. Both had prior convictions for which they were not then serving prison time, both were free at the time of their subsequent convictions, both were wrongfully convicted, and both were exonerated on the subsequent conviction.

The Comptroller maintains, however, that the distinction between parole and probation is significant and renders the Tulia opinion inapplicable here. According to the Comptroller, a parolee is serving a concurrent sentence within the meaning of the Act, whereas a probationer is not. Unlike probation, which, according to the Comptroller, is "an act of grace or clemency which may be granted by a trial court to a seemingly deserving defendant," BLACK'S LAW DICTIONARY 1082 (5th ed. 1979), a parolee is under a criminal sentence and has neither been granted clemency nor had his sentence commuted. TEX. GOV'T CODE § 508.002. Thus, when parole is revoked, the parolee is returned to his original sentence from which he was granted parole. *Ex parte Daniel*, 781 S.W.2d 412, 414 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd). But when probation is revoked, the probationer is

imprisoned for the first time, and the revocation leads to the imposition of a criminal sentence. *Id*. The Comptroller concludes then that Smith, who was on parole at the time of the subsequent wrongful conviction, was nevertheless serving a concurrent sentence, albeit outside prison, unlike the Tulia defendant, who was on probation.[2]

Smith responds that the Comptroller's interpretation unfairly penalizes wrongfully-imprisoned individuals who were leading productive lives on parole. Smith submits that the Act is remedial in nature and intended to compensate persons who should not have been incarcerated in a Texas prison. He questions why the Comptroller should choose to treat parolees and probationers differently, since the Act does not make such distinctions. It instead focuses on the cause of the imprisonment. Because he would not have been in prison but for the wrongful conviction, Smith concludes that the Comptroller's distinction between parolees and probationers only serves to undermine the intent of the entire chapter.

We agree that the Tulia opinion did not focus on the subtle distinction the Comptroller draws here. The attorney general instead analyzed the cause of the concurrent confinement, reasoning that if the defendant would not have served the concurrent prison sentence but for the wrongful conviction, section 103.001(b) would not bar the defendant's entitlement to compensation under the Texas Wrongful Imprisonment Act:

> . . . While it is true that the concurrent sentence in prison was served because of the unrelated crime, it is equally true that such sentence was served because of the Tulia crime. And even though the pardon was applicable directly to, and only to, the Tulia

[2] An edition of Black's Law Dictionary, which is more recent than the Comptroller's quoted source, defines "probation" as "[a] court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison." BLACK'S LAW DICTIONARY 1322 (9th ed. 2009).

> crime, it was applicable to both prison sentences. Thus, in accordance with section 103.001(a), the defendant "received a full pardon on the basis of innocence for the crime for which" *both* prison sentences were served. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001(a)(Vernon 2005). In sum, but for the wrongful Tulia conviction the defendant would not have served the concurrent prison sentence, and thus subsection (a)(2)(A) applies to the concurrent sentence, and thus subsection (b) does not eliminate the defendant's entitlement to compensation for the Tulia sentence.

Op. Tex. Att'y Gen. No. GA-0531, at 3.

This analysis is consistent with the Act's apparent purpose which according to its title is, "Compensation to Persons Wrongfully Imprisoned." *See* TEX. CIV. PRAC. & REM. CODE § ch. 103. Moreover, it seems unlikely that the Legislature intended to compensate wrongfully-imprisoned probationers, and not parolees, given the similarity in their circumstances. The Court of Criminal Appeals has indicated that probation is essentially the power of parole extended to the judiciary. *Ex Parte Hale*, 117 S.W.3d at 870 (noting that "the power to release prisoners on conditions has been given to trial courts as well as the executive"). We find the attorney general's reasoning in the Tulia opinion persuasive and conclude that section 103.001(b)'s concurrent-sentence restriction does not apply when the wrongful conviction is the cause of the person serving a concurrent sentence in prison. Smith was therefore entitled to compensation for the period from August 7, 1986, when Smith's wrongful sentence began, to June 11, 1987, when his concurrent sentence on the 1970 robbery conviction discharged.

* * * * *

We assume that the Comptroller will comply with this opinion and adjust Smith's compensation under the Act accordingly. In the event she fails to do so, a writ of mandamus will issue. The petition for writ of mandamus is conditionally granted.

_____

David M. Medina
Justice

Opinion Delivered: March 4, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0064

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY F/K/A THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, RESPONDENT

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

PER CURIAM

In this insurance coverage dispute The Burlington Northern and Santa Fe Railway Company (BNSF) sought a declaratory judgment that National Union Fire Insurance Company owed duties to defend and indemnify BNSF in a personal injury suit resulting from a collision between one of its trains and an automobile. The trial court granted National Union's motion for summary judgment. The court of appeals affirmed. ___ S.W.3d ___. Because the court of appeals did not consider evidence extrinsic to the pleadings and insurance policy in determining whether National Union owed a duty to indemnify, we reverse the judgment of the court of appeals and remand the case to that court for further proceedings.

In 1994, BNSF contracted with SSI Mobley (Mobley) to control vegetation along certain areas of BNSF's right-of-way. The contract term was "1994 through 1996." Pursuant to the

contract, which required Mobley to purchase a comprehensive general liability (CGL) policy naming BNSF as an additional insured, Mobley purchased a CGL policy from National Union.[1]

On August 25, 1995, a collision took place at a railroad crossing between a BNSF train and an automobile. The driver of the car and one of the passengers were killed; the second passenger was injured. Separate suits filed by survivors of the driver and deceased passenger were eventually consolidated. Pleadings in the consolidated suit alleged that excessive vegetation near the crossing obstructed the driver's view of the oncoming train. The pleadings, in part, stated that

> The Railroad had a contract with SS Mobley Company to carry out chemical weed control. SS Mobley failed to use reasonable care to carry out its chemical weed control, and because of its improper timing and application of chemical weed control, there was excessive vegetation at the crossing at the time of the collision, which proximately caused the collision.

BNSF tendered defense of the case to National Union. After National Union denied that it had either a duty to defend or indemnify, BNSF filed suit seeking a declaratory judgment that National Union had both duties. While the declaratory judgment suit was pending, BNSF settled the claims arising from the death of the driver. It also reached a high-low settlement agreement with the other claimants: BNSF and the claimants agreed that the claimants would receive $1 million if the jury returned a verdict less than that amount, $8 million if the verdict exceeded that amount, or the claimants would receive the exact amount of the verdict if the jury awarded between $1 million and $8 million. The case was then tried to a jury which returned a plaintiff's verdict of over $27 million. BNSF paid $8 million according to the high-low settlement agreement.

[1] Mobley also purchased an umbrella policy from National Union.

In the declaratory judgment suit, BNSF and National Union filed competing traditional motions for summary judgment and the trial court initially granted partial summary judgment in favor of BNSF. Then BNSF filed a final motion for summary judgment. National Union responded by filing a motion to reconsider and an additional traditional and no evidence motion for summary judgment. The trial court withdrew the partial summary judgment it had granted in BNSF's favor, granted National Union's motion, and entered a take-nothing judgment against BNSF.

The court of appeals affirmed. ___ S.W.3d ___. Citing this Court's decision in *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002), the court applied the eight-corners rule in determining National Union's duty to defend. ___ S.W.3d at ___. The court of appeals first determined that National Union did not have a duty to defend. *Id.* at ___. It then concluded that National Union did not have a duty to indemnify because BNSF's arguments as to National Union's duty to indemnify were "based entirely on its duty to defend arguments." *Id.* at ___. The court of appeals did not consider evidence extrinsic to the policy and the pleadings when reaching its decision that there was no duty to indemnify.

BNSF challenges the court of appeals' conclusions as to both National Union's duty to defend and its duty to indemnify. It maintains that the court of appeals (1) incorrectly applied the eight-corners rule when determining whether National Union owed a duty to defend, and (2) erred in failing to consider extrinsic evidence when determining whether National Union had a duty to indemnify.

National Union responds that (1) the court of appeals correctly applied the eight-corners rule, and (2) even if the court of appeals had analyzed National Union's duty to indemnify in light of

extrinsic evidence, its conclusion would have been the same: National Union does not have a duty to indemnify BNSF.

As relevant to our consideration of this matter, National Union's policy coverage contains a "completed operations" exclusion which excludes coverage for "all 'bodily injury' and 'property damage' occurring away from premises [Mobley] own[s] or rent[s] and arising out of '[Mobley's] product' or '[Mobley's] work.'" However, the policy also excepts from the completed operations exclusion "[w]ork that has not yet been completed or abandoned." The policy provides that Mobley's work would be "deemed completed" at the earliest of the following times:

> (1) When all of the work called for in [the] contract has been completed.
> (2) When all of the work to be done at the site has been completed if [the] contract calls for work at more than one site.
> (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or sub-contractor working on the same project.

The policy also states:

> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

The duty to defend and the duty to indemnify "enjoy a degree of independence from each other." *D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743-44 (Tex. 2009); *Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (2004). The duty to defend arises before litigation is completed, *D.R. Horton*, 300 S.W.3d at 744 n.2, thus the determination as to duty to defend is according to the eight-corners rule wherein only the pleadings and the policy language are considered. *See GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 307 (Tex. 2006); *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997). On the other

hand, the insurer's duty to indemnify is determined based on the facts actually established in the underlying suit. *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 490 (Tex. 2008).

In some circumstances the pleadings can negate both the duty to defend and the duty to indemnify. *See Griffin*, 955 S.W.2d at 84. National Union argues that this is such a case and that the court of appeals correctly concluded National Union owes no duty to indemnify.

In *Griffin*, the insurance policy covered bodily injury or property damage "for which any person becomes legally responsible because of an auto accident." *Id.* at 82. Farmers sought a declaratory judgment that it had no duty to defend or indemnify its insured under the facts pled in a suit brought by the victim of a drive-by shooting. *Id.* at 81-82. This Court evaluated the duty to defend under the eight-corners rule and held that a drive-by shooting could not constitute an "accident" as contemplated by the language of the policy. *Id.* at 83. The Court then explained that the pleadings alleging that the plaintiff's injuries resulted from a drive-by shooting likewise negated "any possibility the insurer will ever have a duty to indemnify." *Id.* at 84. In other words, under the facts pled by the plaintiffs it would have been impossible for the insured defendant to show by extrinsic evidence that the loss fell under the terms of the policy. *See id.*

The principle underlying our decision in *Griffin* does not govern this case. Here the court of appeals determined that National Union did not have a duty to defend because the language in the plaintiffs' pleadings referenced Mobley's actions as having happened in the past, so the policy's "completed operations" exclusion precluded a duty to defend. ___ S.W.3d at ___. But unlike the situation in *Griffin*, in this case the pleadings do not show that contractual provisions and other extrinsic evidence cannot possibly bring Mobley's vegetation control operations within coverage of

National Union's policy for the 1995 accident when Mobley's contract unquestionably extended through 1996. *See D.R. Horton*, 300 S.W.3d 740, 744-45 (noting that *Griffin* "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 pleadings").

Assuming, without deciding, that the court of appeals correctly determined that National Union owed no duty to defend, the court nevertheless erred by not considering all the evidence presented by the parties when it determined the question of National Union's duty to indemnify BNSF. Without hearing oral argument, *see* TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and remand the case to that court for further proceedings consistent with this opinion.

OPINION DELIVERED: February 25, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0096

LANCER INSURANCE COMPANY, PETITIONER,

v.

GARCIA HOLIDAY TOURS, ET AL., RESPONDENTS

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

Argued January 4, 2011

JUSTICE MEDINA delivered the opinion of the Court.

The question in this appeal is whether the transmission of a communicable disease from the driver of a motor vehicle to a passenger is a covered loss under a business auto policy, which affords coverage for accidental bodily injuries resulting from the vehicle's use. The issue is one of first impression in this state and perhaps the country. The parties advise that they have found no similar reported cases.

The trial court concluded that the policy covered this type of occurrence and rendered summary judgment that the insurance carrier owed a duty to indemnify the insured. The court of appeals agreed that the policy might provide coverage for such a claim but reversed the summary judgment and remanded the case to the trial court to resolve a factual dispute about whether the passengers had contracted the disease while in the vehicle. 308 S.W.3d 35, 47 (Tex. App.—San

Antonio 2009). Because we conclude that communicable diseases are not an insured risk under this particular policy, we reverse the judgment below and render judgment for the insurance carrier.

I

Garcia Holiday Tours operates a commercial bus company in South Texas. It contracted with the Alice Independent School District to provide a bus and driver for a field trip to Six Flags Fiesta Texas in San Antonio. The trip was for members of the Alice High School band, several of whom observed the driver coughing during the trip. Upon their return, the driver was hospitalized after being diagnosed with an active case of tuberculosis.

Tuberculosis, or TB, is a bacterial infection that can live in a person's body without making the person sick.[1] In this inactive state, referred to as latent tuberculosis, the disease is not contagious. Active tuberculosis, on the other hand, is contagious and commonly transmitted by the infected person coughing or sneezing. As one court has observed: "The vast majority of tubercular patients gain their infection through inhalation of the bacilli directly into the lungs. Infection is usually due to the inhalation of wet sputum coughed into the air, where it may float about in the form of tiny globules for a considerable time and distance." *Earle v. Kuklo*, 98 A.2d 107, 108 (N.J. Super. Ct. App. Div. 1953) (citing 1 GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE § 36.11, p. 542 (3rd ed. 1949)).

The immune systems of most people who breathe in the TB bacteria are able to fight off the disease, and thus the newly infected person remains asymptomatic. Only about 10% of those

[1] *See generally* Centers for Disease Control and Prevention at http://www.cdc.gov/tb/ (last visited on June 28, 2011).

infected with TB develop an active case.[2] Active TB, however, can be quite serious not only because it is contagious but also because the bacteria cause tissue death in the infected organs. The driver here had reportedly been asymptomatic for many years before his TB became active.

The passengers were tested for the disease after learning of the driver's diagnosis, and several tested positive for latent TB. These passengers subsequently sued the driver and bus company, asserting that they were negligently exposed to the disease as a result of being confined on the bus with the infected driver during the band trip. The bus company notified Lancer Insurance Company, its insurance carrier, but Lancer refused to defend the claim, maintaining that such claims were not covered under the policy. Left to defend itself, the bus company proceeded to trial where a jury found it and the driver liable and awarded collectively over $5 million in damages to the passengers who had contracted the disease.

After judgment in the passengers' tort suit, the bus company and driver sued Lancer, asserting contractual and extra-contractual claims and seeking a declaration of rights under the business auto policy. The passengers, now judgment creditors of the insureds, intervened, also seeking a declaration of Lancer's obligations under the policy.

Lancer and the passengers filed summary judgment motions. Lancer's motion sought to establish that the passengers' underlying claims and judgment required neither a defense nor indemnification under the terms of the business auto policy, while the passengers' motion sought to establish Lancer's obligation to indemnify the insureds for the passengers' underlying tort

[2] VINAY KUMAR, ABUL K. ABBAS, NELSON FAUSTO & RICHARD N. MITCHELL, ROBBINS BASIC PATHOLOGY pp. 516–22 (8th ed. 2007).

judgment. The bus company and its driver, who as the insureds had initiated the suit, did not seek summary judgment.

The trial court granted the passengers' motion and denied Lancer's. It then severed the passengers' claims from the remainder of the case, allowing Lancer to appeal the passengers' favorable summary judgment, which Lancer did.

The court of appeals reversed the summary judgment. 308 S.W.3d 35 (Tex. App.—San Antonio 2009). While agreeing that the policy might provide coverage for communicable diseases transmitted during the bus trip, the court of appeals nevertheless reversed the passengers' summary judgment because there was no conclusive proof that the passengers'[3] infections had occurred on the bus. *Id*. at 44–47. The court remanded the case to the trial court to resolve this factual dispute about where the infected passengers contracted the disease which would apparently then resolve whether Lancer had an obligation to indemnify its insureds. *Id.* at 47. Unsatisfied with the court of appeals' decision, Lancer appealed to this Court, and we granted its petition for review to consider the novel coverage question.

II

Lancer's business auto policy states that coverage is afforded for damages the insured is legally obligated to pay "because of 'bodily injury' . . . caused by an 'accident' and resulting from

[3] The court of appeals consolidated the appeal of another passenger, John A. Vela, Jr., who, unlike the other passengers, had yet to obtain a judgment against the bus company. Vela had, however, intervened in the coverage suit and obtained a favorable summary judgment and severance order, like the other passengers. The court of appeals concluded that Vela had no justiciable interest in the underlying coverage action and therefore no basis to intervene. 308 S.W.3d at 48. It accordingly reversed the summary judgment in his favor and dismissed his suit in intervention. Vela has not appealed that judgment.

the ownership, maintenance or use of a covered 'auto.'"[4] The terms accident, auto, and bodily injury are defined in the policy, to wit:

> A. "Accident" includes continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage."
>
> B. "Auto" means a land motor vehicle . . . designed for travel on public roads . . . .
>
> C. "Bodily injury" means bodily injury, sickness or disease sustained by a person including death resulting from any of these.

Lancer concedes that the bus is a covered "auto," the passengers' claims involve an accident, and tuberculosis is a "bodily injury" under the policy's definitions. Lancer maintains, however, that the accident and the injuries did not result from the use of the bus, as the policy requires, but rather from other causes, such as the use of a contagious bus driver. Lancer submits that the risk of being exposed to an infectious individual and contracting a disease is a general liability risk, not an auto liability risk, even when the infectious individual happens to be the vehicle's driver. In short, Lancer contends that the nexus between the passengers' injuries and the bus's use is insufficient to invoke the policy's coverage.

The bus company and passengers respond that the policy generally provides coverage for passenger injuries so long as the bus is being used as a bus. They submit that the term "use" is broadly defined in the case law to extend coverage well beyond vehicular accidents or collisions. See, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Pan Am. Ins. Co.*, 437 S.W.2d 542, 545 (Tex. 1969)

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[4] The policy described its "Liability Coverage" in section II(A) as follows:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."

(defining "use" as a "general catchall" that includes "all proper uses of the vehicle not falling within other terms of definition such as ownership and maintenance"). They maintain that because the bus was being used to transport the passengers at the time of their injury that a sufficient nexus exists between that use and their injuries.

Although the parties disagree about whether the bus's use caused the injuries, they agree that *Mid-Century Insurance Co. of Texas v. Lindsey* is the place to begin the analysis of that question. 997 S.W.2d 153 (Tex. 1999). *Lindsey* involved a similar coverage question concerning the requisite causal relationship that should exist between the injury-producing accident and the insured's use of a covered motor vehicle. On the question of liability associated with such use, we said that a covered liability under the auto policy required some causal connection "between the accident or injury and the use of the motor vehicle." *Id*. at 156. In analyzing that connection, we proposed a three-part test, which we borrowed from two respected treatises on insurance law. *Id*. at 157 (quoting 8 COUCH ON INSURANCE 3D § 119.37, at 119–56 (1997) and citing 6B JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4317, at 367–369 (Buckley ed. 1979)). Applying that test, we concluded that the accident in *Lindsey* arose out of the use of the vehicle and was therefore a covered event. *Lindsey*, 997 S.W.2d at 164.

Lancer submits, however, that the *Lindsey* test must be applied in light of policy language and that its policy requires a more direct causal connection between the injury-producing event and the vehicle's use than did the policy in *Lindsey*. Lancer's business auto policy provides coverage for accidental injuries "resulting from the ownership, maintenance or use of a covered 'auto,'" whereas the personal auto policy in *Lindsey* provided coverage for accidental injuries "aris[ing] out

of the ownership, maintenance, or use of the . . . motor vehicle." Lancer argues that the phrase "arising out of" implies broader coverage than the phrase "resulting from."

The phrase "arising out of" means "originating from, having its origin in, growing out of or flowing from." *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 370 (5th Cir. 1998). We have not decided whether policies that insure against injuries "resulting from" the use of an auto are significantly different from those that insure against injuries "arising out of" the use. *See Nat'l Union Fire Ins. Co. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 142 n.1. (Tex. 1997) (per curiam) (expressing no opinion whether "resulting from" requires a higher degree of causation than "arising out of").

Some jurisdictions find no significant distinction between the two phrases. *See, e.g.*, *Mork Clinic v. Fireman's Fund Ins. Co.*, 575 N.W.2d 598, 602 (Minn. Ct. App. 1998) ("'Resulting from' has the same ordinary and plain meaning as 'arising out of.'" (quoting AMERICAN HERITAGE COLLEGE DICTIONARY 73 (3d ed. 1997) (definition of "arise" includes "result")); *see also Pension Trust Fund v. Fed. Ins. Co.*, 307 F.3d 944, 952 (9th Cir. 2002)*; Heritage Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 657 So. 2d 925, 927 (Fla. Dist. Ct. App. 1995); *St. Paul Fire & Marine Ins. Co. v. Antel Corp.*, 899 N.E.2d 1167, 1175 (Ill. App. Ct. 2008); *Dupuy v. Gonday*, 450 So. 2d 1014, 1016 (La. Ct. App. 1984). Others suggest that "resulting from" requires a narrower or more direct causation analysis. *See Ohio Cas. Grp. of Ins. Cos. v. Bakaric*, 513 A.2d 462, 465–66 (Pa. Supr. Ct. 1986) (stating that "resulting from" was narrower than the standard "arising out of" language); *State Farm Mut. Auto. Ins. Co. v. Flanary*, 879 S.W.2d 720, 723 (Mo. Ct. App 1994) (equating "resulting from" to "caused by" rather than "arising out of"). The treatises generally equate the two phrases.

Couch on Insurance states that both phrases are understood to mean "flowing from" or "having its origin in." 7 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 101.52 (3d ed. 1997). Another commentary makes no distinction between the two phrases, stating that a policy "written to apply to injuries 'caused by' a particular event should be applied more narrowly than [one] written to apply to injuries 'resulting from' or 'arising out of' a particular event." 2 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 6.3 at 6-93 (5th ed. 2007); *cf. Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004) (distinguishing between "arising out of" and "due to" when used in parallel exclusions in the policy). Like these authorities, we see no significant distinction between the two phrases and conclude that the analysis is the same whether the policy requires that an injury "result from" or "arise out of" the covered auto's use. With that in mind, we return to our previous decision in *Lindsey*.

III

The injury-producing event in *Lindsey* concerned the accidental discharge of a shotgun, which at the time was resting in a mounted gun rack above a pickup's rear window. *Lindsey*, 997 S.W.2d at 154. The accident occurred when a young boy, who had been fishing with his parents, returned to the family's truck to retrieve his coveralls. Finding the truck locked, the boy climbed into the bed and attempted to enter the cab through the truck's sliding rear window. While attempting this, he accidentally bumped the gun rack and loaded shotgun, which discharged striking Richard Lindsey, who was seated in his mother's car parked nearby.

Lindsey sued the boy's parents and settled for the policy limits on their truck. The settlement did not cover Lindsey's damages, and so he also sought to collect the limits of the

uninsured/underinsured motorists coverage of his mother's policy. His mother's insurance carrier, Mid-Century, denied the claim.

Mid-Century argued that there was no coverage under the policy because there had been no physical contact between the two vehicles. We rejected that argument, concluding that the policy's insuring agreement did not cover only auto collisions but also other accidents connected to the auto's use. *Id*. at 156. Turning to the question of liability associated with such use, we stated that a covered liability under the auto policy required some causal connection "between the accident or injury and the use of the motor vehicle," and in analyzing that connection, we proposed a three-part test. *Id.* Although not an absolute test, we recommended the following three factors as "helpful in focusing the analysis" of the coverage question:

> (1) the accident must have arisen out of the inherent nature of the automobile, as such,
>
> (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated,
>
> (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury.

Id. at 157 (quoting 8 COUCH ON INSURANCE 3D § 119.37, at 119-56 (1997); *accord*, 6B JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4317, at 367–69 (Buckley ed. 1979)).

The passengers contend that the accident here satisfies *Lindsey*'s three part test. The passengers submit that they were exposed to tuberculosis while inside the bus being transported to their destination, thus satisfying the first two factors: the accident occurred within the bus's "natural territorial limits" and arose out of the bus's "inherent nature" as a bus, that is, as a means of

transportation. Regarding the third factor, the passengers argue that the use of the bus caused their tuberculosis infection in two ways. First, they submit that the bus's closed environment required them to breathe the bacteria expelled by the infected driver for hours, causing them to contract the disease. Second, the passengers argue that the bus's air-conditioning system exposed them to the bacteria by recirculating the contaminated air throughout the bus.

But Lancer maintains that the bus's connection to the infectious disease is too remote or minimal to invoke coverage. Similarly, an amicus[5] submits that the bus and its air conditioning system merely furnished the condition for, rather than caused, the accident and that it was the unhealthy driver, not the bus, that was instrumental in causing the injury. The amicus concludes that the parties to an automobile liability policy reasonably expect the policy to cover against the risk of automobile accidents and that the injury-producing event in this case—negligent exposure to a communicable disease—is not an "automobile accident" in any sense of that phrase.

For liability to "result from" the use of a motor vehicle, there must be a sufficient nexus between its use as a motor vehicle and the accident or injury. *Lindsey*, 997 S.W.2d at 157. According to *Lindsey*'s third factor, the insured vehicle must not merely contribute to cause the condition which produces the injury, but must itself produce the injury. *Id.* This factor is "especially troublesome because of the difficulty in many circumstances of deciding what role a vehicle, as opposed to other things, played in producing a particular injury[.]" *Id.* We cautioned

[5] Property Casualty Insurers Association of America, a trade association representing more than 1,000 property casualty insurance companies doing business throughout the nation, prepared an amicus brief in support of the Petitioner.

in *Lindsey*, however, that not every injury capable of connection to the use of an auto is a covered use.

For example, a drive-by shooting involves a use of a vehicle, but its use is incidental; "the vehicle's role in the occurrence is minimal as compared with the shooter's." *Id*. at 158. Similarly, liability for an injury resulting from an assault committed in an automobile is generally held to be outside coverage.[6] When the vehicle is merely the "situs of an incident that could have occurred anywhere," the causal connection to the vehicle's use is typically too remote to invoke coverage. *Id.; accord LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992).

Lindsey indicates then that to invoke coverage the vehicle's use must be a producing cause or cause in fact of the accidental injury. *Cf. Utica Nat'l Ins. Co.*, 141 S.W.3d at 203 (suggesting a "but for" causal analysis). To be a producing cause of harm, the use must have been a substantial factor in bring about the injury, which would not otherwise have occurred. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005). And when the vehicle merely furnishes a place for the accident or injury to occur, it is not a substantial factor, and the causal link is insufficient to invoke coverage. *See id.* (noting that cause in fact does not exist when act merely furnishes a condition making injury possible).

The previously mentioned assault cases provide perhaps the closest analogy to our present circumstances. Generally, the courts have held that an auto policy does not cover injuries resulting

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[6] *See generally*, Larry D. Scheafer, Annotation, *Automobile Liability Insurance: What are Accidents or Injuries "Arising Out of Ownership, Maintenance, or Use" of Insured Vehicle*, 15 A.L.R. 4th 10, § 9(e) (1982) (compiling cases); *see also* 2 JEFFERY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS § 22.12[D] (3d ed. 2008) (discussing the auto use requirement); 1 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE, § 4.16 (2006) (discussing causal relation between use and accident).

from an assault that occurs in a motor vehicle.[7] The California Court of Appeals decision in *American National Property & Casualty Co. v. Julie R.* is an example. 90 Cal. Rptr. 2d 119 (Cal. App. 1999).

In that case, a passenger sued a shuttle service operator, alleging sexual assault by one of the operator's drivers. The business auto policy, like our present policy, provided coverage for "'bodily injury . . . result[ing] from the ownership, maintenance, or use of the vehicle.'" *Id*. at 121. The passenger was driven to a secluded location, where the driver parked the car next to a fence in such a way as to prevent her escape. *Id.* at 120. The court concluded the vehicle's use had to be a "substantial factor" in the injury, and that its mere use as transportation to the scene of the injury did "not establish a sufficient causal connection between the 'use' and the injury." *Id*. at 123. The court acknowledged that the driver's "placement of his vehicle against the fence increased the danger that he would be successful in carrying out his intent to rape" his passenger, but the court concluded that the rape "'originated from, grew out of [and] flowed from' [the driver's] intent to rape [his passenger] and his actions with his body to achieve that end," not from the use of the vehicle. *Id.* at 124. Thus, the vehicle's "use was a circumstance accompanying the rape, not a . . . substantial factor in [the passenger's] injury." *Id.*

In other assault cases, courts have found the role of the vehicle to be merely the situs for the injury-producing act. *See, e.g., Payne v. Twiggs Co. Sch. Dist*., 496 S.E.2d 690, 692 (Ga. 1998) (coverage did not extend to injuries that student sustained when attacked on school bus, under policy insuring against any bodily injury "caused by an accident and resulting from the ownership,

[7] *See* n.6 supra.

maintenance, or use of a [school bus]"); *SCR Med. Transp. Servs., Inc. v. Browne*, 781 N.E.2d 564 (Ill. App. Ct. 2002) (sexual assault committed by driver for medical transportation services provider was not accident arising out of use of insured vehicle); *State Farm Fire & Cas. Co. v. Aytes*, 503 S.E.2d 744 (S.C. 1998) (injury from shooting after abduction did not arise from "use" of automobile even though car was used to abduct woman to location of shooting); *Whitmire v. Mid-Continent Cas. Co.*, 928 P.2d 959 (Okla. Civ. App. 1996) (same, except abductor tried to immolate victim); *but see Dotts v. Taressa*, 390 S.E.2d 568 (W.Va. 1990) (because of elevated duty of care owed to passengers by common carriers, assault of passenger by employee would be construed as arising out of use of vehicle). In these cases, the injury-producing event did not result from the act of transportation or, as we said in *Lindsey*, the "vehicle *qua* vehicle" but rather from person-to-person exchanges, which only incidentally occurred within the locational setting of a motor vehicle. *See Lindsey*, 997 S.W.2d at 156.

The bus company argues, however, that the Fifth Circuit's decision in *Lincoln General Insurance Co. v. Aisha's Learning Center* is the more analogous case. 468 F.3d 857 (5th Cir. 2006). There, the driver of a van, used to transport children from their homes to a day care center, failed to unload one of the children upon arriving at the center. The two-year-old child left behind was trapped in the parked van for approximately seven hours during the heat of the day. The court concluded that the van caused, rather than merely contributed to, the conditions that produced the injury because of the inherent nature of a closed vehicle to trap heat:

> Le'Yazmine was injured because she was left in a hot, unventilated *vehicle* by the driver. The vehicle was not merely the situs of the injury, but a producing cause. Unfortunately, the danger of leaving children in locked vehicles during extreme

> weather conditions is well known; it is a danger inherent in the manner in which automobiles trap heat. The same dangers are not found in classrooms or parks. Thus, "but for" the use of the van to transport Le'Yazmine, she would not have been injured.

Id. at 860. Similarly, the bus company argues that the physical characteristics of the bus, its closed environment and ventilation system, caused the passengers' injuries.

The bus here, however, was not as instrumental in producing the passengers' injuries as the van in *Lincoln General*. The bus did not generate the tuberculosis bacteria or make it more virulent. As the Fifth Circuit observed in *Lincoln General*, "[w]here a vehicle is a mere situs of injury, fungible with any other situs, it is not being 'used.'" *Id*. at 860 n.2. Here, the bus was the mere physical situs of the exposure to the infected person, which could have occurred anywhere. *See Lindsey*, 997 S.W.2d at 156 (noting that if the vehicle is merely the "locational setting for an injury, the injury does not arise out of any use of the vehicle"); *see also State Farm Mut. Ins. Co. v. Peck*, 900 S.W.2d 910, 913 (Tex. App.—Amarillo 1995, no writ) (concluding that passenger bitten by dog while riding in vehicle was not involved in an "auto accident" because the only nexus between the dog-biting accident and the vehicle was that the passenger was sitting in it). Exposure to the disease might have occurred in any number of other enclosed, air-conditioned locations, such as a classroom, theater or restaurant because the instrumentality causing the disease is the infected person, not the infected person's surroundings or the act of using the covered vehicle. We conclude then that the exposure of passengers to a communicable disease was not a risk covered by Lancer's business auto policy because the injury resulted from causes other than the use of the covered vehicle. The bus itself was not a substantial factor in causing the passenger's injuries.

IV

Lancer also complains that the court of appeals erred in not ruling on the issue of its duty to defend under the auto policy. The duties to defend and to indemnify are typically separate and distinct obligations. *King v. Dall. Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002). Lancer's motion in the trial court sought summary judgment that it did not owe either duty under the circumstances of this case. The trial court denied Lancer's motion. The passengers' motion sought summary judgment that Lancer had breached both duties, but the trial court granted their motion only as to the indemnity issue. The trial court subsequently severed the indemnity claim from the remainder of the case, making the court's summary judgment on indemnity final for purposes of appeal.

Because the passengers' motion, like its own, sought summary judgment on both indemnity and defense, Lancer submits that the court of appeals had both issues before it and should have reviewed the duty-to-defend issue, even though the trial court's summary judgment did not rule on the issue. We disagree.

The trial court's only ruling on the issue was to deny Lancer's motion for summary judgment. The denial of summary judgment is an interlocutory order over which an appellate court typically lacks jurisdiction absent some special statutory grant. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) (noting the general rule that appeal may be taken only from final judgments). Lancer submits, however, that no appellate jurisdictional problem exists in this case because both sides moved for summary judgment on the issue. When opposing parties file counter motions for summary judgment and the trial court grants one motion and denies the other, the appellate court has jurisdiction to determine all questions presented in the opposing motions and to

render the judgment the trial court should have rendered. *Progressive Cnty. Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 806 (Tex. 2009) (per curiam). This circumstance is an exception to the general rule prohibiting the appeal of an order denying summary judgment. *See generally* TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS, § 8.01[3][b] (3d ed. 2010).

That exception, however, has no application here because the passengers had no right to move for summary judgment on the issue. The duty to defend is owed to insureds, not to third-party judgment creditors of the insureds. The passengers therefore had no justiciable interest in Lancer's alleged breach of that duty, and the bus company, which did have a justiciable interest in the matter, did not move for summary judgment. The final judgment here does not include that issue, and it is not part of this appeal. The court of appeals therefore did not err in failing to address the issue as the matter remains in the trial court as part of the severed action.

* * * * *

We conclude that the transmission of a communicable disease from a bus driver to his passengers was not a risk assumed by the insurance carrier under this business auto policy because the passengers' injuries did not result from the vehicle's use but rather from the bus company's use of an unhealthy driver. The bus, itself, in its capacity as a mode of transportation, did not produce, and was not a substantial factor in producing, the passengers' injuries. The court of appeals' judgment is accordingly reversed and judgment rendered that the passengers, bus company, and driver take nothing on their indemnity claim against the insurance carrier.

David M. Medina
Justice

Opinion Delivered: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0117

CHIQUITA MITCHELL, ET AL., PETITIONERS,

v.

THE METHODIST HOSPITAL, ET AL., RESPONDENTS

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

PER CURIAM

While a patient at The Methodist Hospital, staff placed an IV catheter in Frank Mitchell's left arm. Shortly after being discharged from the hospital, he developed an infection in his left arm and was readmitted with a diagnosis of septic thrombophlebitis, an inflamation of a vein caused by a bacterial infection. During this second hospital stay, Mitchell developed multisystemic organ failure and died.

Mitchell's family filed a health care liability claim against the hospital and several of its employees, alleging that they had caused Mitchell's infection and death by their negligent use of the IV catheter in Mitchell's left arm during his first hospital stay. The Mitchells timely served an expert report, which the hospital challenged as inadequate. *See* TEX. CIV. PRAC. & REM. CODE § 74.351 (providing the requirements and time-line for serving and challenging the expert report required to support a health care liability claim). The hospital moved to dismiss the Mitchells' claim, arguing

that their expert report was "wholly conclusory and based on mere conjecture and assumptions that are contrary to the medical record and fact." The Mitchells responded that their expert report was sufficiently specific to support their claim, but in the event the court disagreed, they asked for additional time to cure any deficiency. *See id*. § 74.341(c).

Following a hearing, the trial court granted the hospital's motion to dismiss without expressly ruling on the Mitchells' request for additional time. The court of appeals affirmed the trial court's judgment in a memorandum opinion, concluding that the trial court had not abused its discretion in failing to grant an extension to cure under section 74.351(c) "given the extreme deficiencies" in the expert report. 2009 Tex. App. Lexis 9916, *21, 2009 WL 5174186, *8 (Tex. App.—Houston [1st Dist.] Dec. 31, 2009) (mem. op.).

While this case has been pending on appeal, we have decided *Samlowski v. Wooten*, ___ S.W.3d ___ (Tex. 2011), explaining this Court's views on requests to cure deficient expert reports under section 74.351(c). In light of *Samlowski*, we grant the Mitchells' petition for review, and without hearing oral argument, reverse the court of appeals' judgment and remand the case to the trial court for further proceedings. TEX. R. APP. P. 59.1.

Opinion Delivered: March 11, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0134

CESAR ROMERO, M.D., ANTHONY CLAXTON, M.D., AND DAVID KORMAN, M.D., PETITIONERS,

v.

JACOB LIEBERMAN ON BEHALF OF THE ESTATE OF LARRY LIEBERMAN, DECEASED, RESPONDENT

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

PER CURIAM

After Larry Lieberman, a psychiatric patient at Terrell State Hospital, died of sepsis allegedly as a result of a complete lack of care, his father, respondent Jacob Lieberman, sued petitioners, Doctors Romero, Claxton, and Korman. The doctors moved to dismiss the suit against them under section 101.106(f) of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.106(f), and brought a plea to the jurisdiction on the same ground, claiming that the suit was based on conduct within the general scope of their employment with the State Hospital and could have been brought against the State Hospital. The trial court dismissed the action. On respondent Lieberman's appeal, the court of appeals reversed. No. 05-08-01636-CV, 2009 Tex. App. LEXIS 8414, at *5, 2009 WL 3595128, at *2 (Tex. App.–Dallas Nov. 3, 2009) (mem. op.).

While this case has been pending on appeal, we have decided *Franka v. Velasquez*, ___ S.W.3d ___ (Tex. 2011), holding that, for purposes of section 101.106(f), a tort action is brought "under" the Texas Tort Claims Act, even if the government has not waived its immunity for such actions. ___ S.W.3d at ___. In light of *Franka*, we grant the doctors' petition for review, and without hearing oral argument, reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings. TEX. R. APP. P. 59.1.

Opinion delivered: January 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0145

G & H TOWING COMPANY, ET AL., PETITIONERS,

v.

CORY WAYNE MAGEE, ET AL., RESPONDENTS

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

PER CURIAM

This summary judgment appeal involves an employer's liability for a tragic vehicular accident involving one of its employees. At the time of the accident, the employee had left work and was driving a personal vehicle that he borrowed from a co-worker. The representatives of the decedent-occupants of the other vehicle sued the employer, alleging negligence, negligent hiring, and negligent entrustment. These plaintiffs also sued the co-worker, alleging negligent entrustment, and the employee, alleging negligence. Both the employer and the co-worker obtained summary judgments, which after severance orders, the plaintiffs appealed.

The court of appeals affirmed the co-worker's summary judgment, concluding that as a matter of law the co-worker had not negligently entrusted his vehicle to the other employee. 312 S.W.3d 807, 809, 812 (Tex. App.—Houston [1st Dist.] 2009). The court of appeals, however, reversed the employer's summary judgment because its summary judgment motion did not

specifically address one of the plaintiffs' claims: the claim that the employer was vicariously liable for its agent's (the co-worker's) negligent entrustment. *Id*. at 810–11. Concluding that the employer's summary judgment granted more relief than requested, the court remanded the case against the employer without considering the plaintiffs' other claims or the employer's related grounds for summary judgment. *Id.* at 813.

Because an employer cannot be vicariously liable in tort when its agent or employee has not engaged in tortious conduct, we conclude that the court of appeals erred in remanding the vicarious liability claim while simultaneously holding that the employee had not committed a tort. We reverse the court of appeals' judgment and remand the cause to that court for consideration of the other grounds for summary judgment.

William Colson and Joseph Violante were employed by G&H Towing as tugboat quartermasters. They worked on the same tugboat, but they were on different schedules. One would work for several days and then be relieved by the other, who then worked for a similar period. Because the tugboats did not have a regular route that allowed each man to return to the place he began his shift, the men would loan their personal vehicles to one another to drive home at the end of a shift. Whether G&H required or endorsed this practice was disputed.

As was their custom, Violante borrowed Colson's vehicle at the end of one shift and drove himself home. Some time later, Violante drove Colson's vehicle to a bar at which he became inebriated. After leaving the bar, Violante was involved in a collision that killed Douglas and Lois Magee. Violante was subsequently convicted of intoxication manslaughter.

The Magees' adult children (the Magees) sued Violante, Colson, G&H Towing, and others connected to the bar, asserting theories of negligence, negligent hiring, and negligent entrustment. The claims against G&H were both direct and vicarious. Regarding the latter, the Magees asserted that G&H was vicariously liable for Colson's negligent entrustment of his vehicle to Violante because Colson was acting as G&H's employee and agent at the time. The Magees further asserted that Colson had a duty to make inquiry about Violante's competence as a driver because G&H had a company policy of checking the driving records of employees who would be driving in the course of their employment.

G&H Towing filed a motion for summary judgment, which the trial court granted, rendering an interlocutory take-nothing summary judgment. The Magees thereafter moved to sever their claims against G&H from the remainder of the case, and the trial court granted the motion making the summary judgment a final, appealable order. Colson also filed a motion for summary judgment, which the trial court similarly granted and then severed, making Colson's take-nothing summary judgment final. The Magees appealed both summary judgments.

The Magees moved to consolidate their two appeals, but the court of appeals denied the motion. The court also declined to hear oral argument in either case. G&H contended on appeal that its motion for summary judgment encompassed the issue of its vicarious liability for Colson's actions. In the alternative, G&H urged that even if its motion omitted this issue, the trial court's error in granting final summary judgment on the omitted issue was nevertheless harmless because of the court's determination that Colson had not negligently entrusted his vehicle to Violante. G&H

reasoned that if Colson did not negligently entrust his vehicle, G&H could not be vicariously liable for negligent entrustment.

Although the appeals remained separate, the court discussed their respective merits in a single opinion. 312 S.W.3d at 809. In separate judgments, the court affirmed Colson's take-nothing summary judgment but reversed and remanded the summary judgment favoring G&H Towing. *Id.* at 813.

The court of appeals concluded that the trial court correctly granted Colson's no-evidence summary judgment because there was no evidence of at least one element of the Magees' negligent entrustment claim against him. *Id*. at 812. The court accordingly affirmed Colson's summary judgment, and the Magees have not appealed that judgment.

The court further concluded that the trial court had erred in rendering a take-nothing summary judgment in favor of G&H Towing because G&H's motion for summary judgment failed to address the Magees' claim that G&H was vicariously liable for Colson's negligent entrustment of his vehicle to Violante. *Id*. at 810–11. G&H's summary judgment motion addressed its direct responsibility for allegedly entrusting the vehicle to Violante, but the motion did not also address its alleged vicarious liability for Colson's negligent entrustment. Because of this omission, the court of appeals held the motion to be "legally insufficient as a matter of law in regard to that ground." *Id*. at 811 (citing *McConnell v. Southside Indep. Sch. Dist*., 858 S.W.2d 337, 342 (Tex. 1993)). The court, with one justice dissenting, reversed the summary judgment and remanded the cause without considering the other grounds raised in the motion for summary judgment. *Id.* at 813.

G&H Towing again argues here that any error in granting summary judgment on this vicarious liability claim was harmless in light of the court's conclusion that there was no evidence to support the Magees' negligent entrustment claim against Colson. Generally, a master is vicariously liable for the torts of its servants committed in the course and scope of their employment. *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 617 (Tex. 1999). But having concluded as a matter of law that its alleged agent, Colson, did not commit the tort of negligent entrustment, G&H submits that the trial court's error is harmless and that remanding the vicarious liability claim is a meaningless gesture because its liability is derivative of Colson's. *See Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 n.2 (Tex. 1980) (noting "that where the employer's liability rests solely on respondeat superior, an adjudication acquitting the employee of negligence will [bar] a subsequent suit against the employer").

The purpose of a summary judgment is to "provide a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine issue of fact." *Gaines v. Hamman*, 358 S.W.2d 557, 563 (Tex. 1962). Summary judgments, however, may only be granted upon grounds expressly asserted in the summary judgment motion. TEX. R. CIV. P. 166a(c); *see also McConnell*, 858 S.W.2d at 341 (holding that a motion for summary judgment must expressly present grounds on which it is made). Granting a summary judgment on a claim not addressed in the summary judgment motion therefore is, as a general rule, reversible error. *Chessher v. Sw. Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983) (per curiam).

Several appellate courts have recognized a limited exception to this general rule. These courts have affirmed summary judgments, even though the underlying motion omitted one of

multiple causes of action, when the omitted ground was intertwined with, and precluded by, a ground addressed in the motion. *See, e.g.*, *Zarzosa v. Flynn*, 266 S.W.3d 614, 621 (Tex. App.—El Paso 2008, no pet.) (holding reversal would be meaningless because questioned recovery precluded as a matter of law); *Withrow v. State Farm Lloyds*, 990 S.W.2d 432, 437–38 (Tex. App.—Texarkana 1999, pet. denied) (same); *Vogel v. Travelers Indem. Co.*, 966 S.W.2d 748, 754–55 (Tex. App.—San Antonio 1998, no pet.) (same); *Cissne v. Robertson*, 782 S.W.2d 912, 918 (Tex. App.—Dallas 1989, writ denied) (same). One authority states the exception as follows: "If the defendant has conclusively disproved an ultimate fact or element which is common to all causes of action alleged, or the unaddressed causes of action are derivative of the addressed cause of action, the summary judgment may be affirmed." TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS: PRACTICE, PROCEDURE AND REVIEW § 3.06[3] at 3-20 (3d ed. 2010) (collecting cases).

Although the court of appeals did not apply this exception here, it has previously recognized it. In fact, a different panel of the court surveyed the Texas decisions discussing this limited exception and wrote the following just a few months before the decision in this case:

> [S]ome courts of appeals, including our own, have recognized a very limited exception to the general rule. Although the exception's application has been expressed in various ways, it can be reduced to two: (1) when the movant has conclusively proved or disproved a matter (usually corresponding to a claim's element or to an affirmative defense) that would also preclude the unaddressed claim as a matter of law or (2) when the unaddressed claim is derivative of the addressed claim, and the movant proved its entitlement to summary judgment on that addressed claim. For the exception to apply, this Court has always required a very tight fit between what was proved or disproved in the motion and what elements the unaddressed claim, as it was alleged, required: otherwise, the exception could swallow the rule.

Wilson v. Davis, 305 S.W.3d 57, 73 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (internal footnotes omitted).

The harmless error rule states that before reversing a judgment because of an error of law, the reviewing court must find that the error amounted to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause "the rendition of an improper judgment," or that the error "probably prevented the appellant from properly presenting the case [on appeal]." TEX. R. APP. P. 44.1(a). The rule applies to all errors. *Lorusso v. Members Mut. Ins. Co.*, 603 S.W.2d 818, 819–20 (Tex. 1980). Although a trial court errs in granting a summary judgment on a cause of action not expressly presented by written motion, we agree that the error is harmless when the omitted cause of action is precluded as a matter of law by other grounds raised in the case. *See, e.g.*, *Withrow*, 990 S.W.2d at 437–38 (affirming summary judgment on cause of action not specifically addressed in movant's motion where reversing the summary judgment would be meaningless because omitted cause of action was precluded as a matter of law); *cf. Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 667 (Tex. 1996) (holding that wrongful denial of jury trial is harmful error only when the case contains a question of material fact). The undisputed facts and Colson's final judgment establish that Colson did not negligently entrust his vehicle. G&H therefore cannot have vicarious liability for negligent entrustment because its agent did not commit the tort.

When a trial court grants more relief than requested and, therefore, makes an otherwise partial summary judgment final, that judgment, although erroneous, is final and appealable. *See Bandera Elec. Coop. v. Gilchrist*, 946 S.W.2d 336, 337 (Tex. 1997) (per curiam). The court of appeals should treat such a summary judgment as any other final judgment, considering all matters

raised and reversing only those portions of the judgment based on harmful error. *Page v. Geller*, 941 S.W.2d 101, 102 (Tex. 1997) (per curiam). Because the court of appeals did not follow this procedure, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and remand the case to that court for further proceedings. *See* TEX. R. APP. P. 59.1.

Opinion Delivered: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0226

MILLARD VAUGHN AND BARBARA VAUGHN, PETITIONERS,

v.

PAUL DRENNON AND MARY DRENNON, RESPONDENTS.

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

PER CURIAM

In this dispute between neighbors, we must decide whether the trial court's judgment issued after a conventional trial on the merits was final for purposes of appeal. We conclude that it was. The Drennons' grandchildren were joined as parties due to their shared interest in the subject property, but no claims against the grandchildren were addressed at trial nor were any jury questions submitted on the grandchildren. The grandchildren were not mentioned in the trial court's judgment, and this raised finality concerns in the court of appeals. Under the *Aldridge* presumption, any judgment following a conventional trial on the merits creates a presumption that the judgment is final for purposes of appeal. *See Ne. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897–98 (Tex. 1966). A judgment following a conventional trial on the merits need not dispose of every party and claim for the *Aldridge* presumption of finality to apply. *See id.* at 895, 897–98. Accordingly, we conclude

that the *Aldridge* presumption applied in this case, and it was error for the court of appeals to dismiss the appeal for want of jurisdiction.

Millard and Barbara Vaughn and Paul and Mary Drennon had repeated disputes about water drainage off the Vaughns' property. The Vaughns sued the Drennons for blocking and diverting the natural flow of water off the Vaughn property with a concrete fence, also alleging trespass and intentional infliction of emotional distress. The Drennons filed a separate lawsuit against the Vaughns for intentional infliction of emotional distress, and the trial court consolidated the two cases.

The Vaughns' first amended petition added the Drennons' grandchildren, Chase Atwood and Taylor Atwood, as defendants, because the Drennons had executed a deed in favor of the Atwoods. The Drennons' attorney then filed a general denial on behalf of the Atwoods. At trial, the Drennons stipulated that there had been a deed reserving a life estate in the Drennons. The Vaughns proceeded with their claims against the Drennons only, based on their understanding that the Drennons remained in sole possession of the property throughout the duration of the events giving rise to the suit. The Vaughns did not pursue any claims against the Atwoods at trial, and they did not request the submission of any jury questions regarding the Atwoods, nor were any given.

The jury found that the Drennons' fence and diversion of the natural flow of water caused $4,000 in damages to the Vaughns' property, and that Paul Drennon's intentional infliction of emotional distress had caused Millard Vaughn $25,000 in damages, but the jury awarded no damages for trespass. The jury also awarded each of the Drennons $25,000 for their emotional distress. The trial court, in its judgment, disregarded the jury's findings regarding the diversion of the natural flow

of water, offset Millard Vaughn's and Paul Drennon's emotional distress damages, and awarded Mary Drennon $25,000. The judgment made no mention of the Atwoods.

The Vaughns appealed, and from the outset the court of appeals expressed concern about whether the trial court's judgment was final. The court requested that the Vaughns produce evidence of jurisdiction before full briefing, which they did, and the court of appeals then notified both parties in a letter that, in its opinion, the Vaughns had established jurisdiction. Nevertheless, the question of finality and jurisdiction was again raised at oral argument. The Vaughns argued in a post-submission letter that the *Aldridge* presumption applied to the trial court's judgment following a conventional trial on the merits and that, in the alternative, the court of appeals should abate the appeal to allow the trial court to clarify the judgment's finality or to issue a more definitive judgment. Instead, the court of appeals denied the request for abatement and dismissed the appeal for want of jurisdiction. ___ S.W.3d ___, ___ (Tex. App.—Tyler 2009) (mem. op.).

This is exactly the kind of delay in the appellate process that this Court has sought to avoid in continuously enforcing the *Aldridge* presumption. *See Aldridge*, 400 S.W.2d at 895 ("[A]ll too often judgments which were obviously *intended* to be final were being held interlocutory because of careless draftsmanship. The rule had to be changed to accommodate oversight or carelessness."). We have long recognized a presumption of finality for judgments that follow a conventional trial on the merits. *Moritz v. Preiss*, 121 S.W.3d 715, 718–19 (Tex. 2003); *see Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001) ("[W]e have tried to ensure that the right to appeal is not lost by an overly technical application of the law. . . . Simplicity and certainty in appellate procedure are nowhere more important than in determining the time for perfecting appeal."); *Aldridge*, 400 S.W.2d

at 897–98. As a general rule, "an appeal may be taken only from a final judgment." *Lehmann*, 39 S.W.3d at 195. But a trial court's judgment need not expressly dispose of all issues and claims in order to be final. *See Aldridge*, 400 S.W.2d at 897–98. In *Aldridge*, we held that:

> When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, no order for a separate trial of issues having been entered . . . it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.

Id. This presumption arose out of our concern that too often the right to appeal was abridged by judgments that were drafted poorly or were unclear. *See id.* at 895. Therefore, unless a trial court orders a separate trial to resolve a specific issue, there is a presumption that the trial court's judgment disposes of all claims and issues in the case. *See id*. at 897–98. If there is any doubt as to the judgment's finality, then "[f]inality must be resolved by a determination of the intention of the court [as] gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties." *Lehmann*, 39 S.W.3d at 203 (internal quotation marks omitted). Here, the parties and trial court clearly treated this judgment as final. When the Vaughns did not receive notice of the signed judgment, they filed a motion to extend the period for filing a motion for new trial and notice of appeal under Texas Rule of Civil Procedure 306a(4), which the trial court granted. Such a motion would not be necessary, nor would it be granted, were the judgment not believed to be final by both the Vaughns and the trial court. *See* TEX. R. CIV. P. 306a(3)–(4). In addition, when the court of appeals raised concerns as to the judgment's finality, neither party contended that the trial court's judgment was not final.

A judgment need not address every party and claim for it to be a final judgment for purposes of appeal. *See Moritz*, 121 S.W.3d at 719. In *Moritz v. Preiss*, we held that even though the plaintiff sued four parties for medical malpractice but only submitted jury questions as to three, this did not prevent the judgment from being final for purposes of appeal. *Id.* ("[T]here is nothing to indicate that the trial court did not intend to finally dispose of the entire case."). Similarly, in *John v. Marshall Health Services, Inc.*, 58 S.W.3d 738, 740 (Tex. 2001) (per curiam), we held that even though a judgment failed to mention three defendants who had settled, the finality presumption applied to all parties. There is no reason in this case to deviate from our well-established precedent.

While the court of appeals recognized that the starting point in this case was the *Aldridge* presumption, the court looked to our recent decision in *Crites v. Collins*, 284 S.W.3d 839, 841 (Tex. 2009) (per curiam), to rebut the presumption. ___ S.W.3d at ___. Unlike the instant case, however, our decision in *Crites* dealt with a judgment issued without a conventional trial on the merits, and thus the *Aldridge* presumption did not apply. *Crites*, 284 S.W.3d at 840 ("[W]hen there has been no traditional trial on the merits, no presumption arises regarding the finality of a judgment."). The court of appeals interpreted *Crites* as requiring that the judgment "unequivocally express an intent to dispose of all claims and all parties . . . either explicitly or implicitly." ___ S.W.3d at ___. That reasoning was in error. Nothing in *Crites* suggests that the requirement for such express language addressing every claim and party should apply to a judgment that follows a conventional trial on the merits, such as the one issued in this case. *See Crites*, 284 S.W.3d at 840–41. The court of appeals erred in holding that the trial court's judgment was anything but a final appealable judgment.

Because the trial court's judgment after a conventional trial on the merits was final for purposes of appeal, we reverse the court of appeals' judgment dismissing for want of jurisdiction and remand the case to the court of appeals to determine the merits of the Vaughns' appeal.

OPINION DELIVERED: October 22, 2010

IN THE SUPREME COURT OF TEXAS

NO. 10-0235

IN RE STATE OF TEXAS, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued March 3, 2011

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

After the State sought to condemn a tract of land, the owners subdivided the property into eight separate parcels. The trial court then severed the case into eight different proceedings. The State contends that the severance was improper, and it seeks a writ of mandamus requiring the trial court to vacate the order. Because the severance would require eight trials where only one is appropriate, and because it would preclude the State from presenting relevant valuation evidence, we conditionally grant the writ.

I. Background

The State of Texas filed a petition to condemn a tract of land and a drainage easement from its owners, the Laws family. The State sought to acquire a 39.619 acre fee tract as well as a 0.23 acre drainage easement, which would come out of the Lawses' 185.835 acre property in Travis County. The property was to be used in the construction of State Highway 130. On the same day that it filed its condemnation petition, the State also filed a notice of lis pendens, giving notice of

the pendency of a suit affecting the Lawses' land. *See* TEX. PROP. CODE § 12.007 (authorizing the filing of a notice of lis pendens in eminent domain actions).

A Special Commissioner's hearing was set, but five days before the hearing, nine separate limited liability corporations filed nine separate Pleas in Intervention and Suggestions of Succession.[1] Each LLC alleged a justiciable interest in the case as successor in title to property being condemned in the suit. The assertion of interest was the result of a complex series of transactions. In all, some fifty-one acres of the Lawses' property, including all of the land subject to the condemnation petition, had been subdivided by twenty-four special warranty deeds and split among three ownership groups, each of which consisted of three investing LLCs. After these transactions, the Lawses no longer owned a direct interest in any of the land against which the State had filed, their interest now being a result only of their membership in the various LLCs. In this manner, the Lawses subdivided their original property into eight separate tracts, each of which contained some of the land being condemned.

After the subdivision, the State added the nine intervenors as parties claiming an interest in the Acquisition, but the State nonetheless continued to proceed against the Acquisition as a single plot of land. At the Special Commissioners hearing, the Lawses and the LLCs were represented by the same counsel. The State's appraisal expert testified at the hearing that because of the lack of significant retail and commercial development in the area, the property should be appraised as a single unit and that its best and highest use was to hold the frontage for future commercial use. On

[1] The nine LLCs were Creedmoor Investments, LLC; Prudent Path Equity Group, LLC; Holcombe Ranchland Investments, LLC; Ranch Gone, LLC; Frugal Choice Investments, LLC; Holcombe Prairie Holdings, LLC; Creedmoor Holdings, LLC; Sentimental Asset Holders, LLC; and Holcombe Family Holdings, LLC.

this basis, the State appraised the land at $0.65 per square foot and valued the whole property, including the drainage easement, at $1,155,693.

The Lawses' appraiser, rather than value the property as a single economic unit, appraised each of the eight subdivided tracts separately. He determined that the best and highest use of each of the tracts was as highway frontage commercial property. On this basis, he recommended total compensation of $4,145,000. The Special Commissioners issued an award of $2,487,991, which, at the Lawses' request, was apportioned among the eight tracts. The Lawses and the State filed various objections to the award, and the case was transferred to the County Court at Law in Travis County for trial on the appeal of the Commissioners' award. *See* TEX. PROP. CODE § 21.018. The State filed a Notice of Deposit and tendered the award into the court's registry, and the trial court granted the LLCs' motion to withdraw the funds. The Lawses filed disclaimers of interest in the Acquisition and award.

Before trial in the county court at law, the various intervening LLCs filed eight motions to sever, one for each of the tracts into which the property had been subdivided, arguing that there was no unity of ownership between the tracts. At the hearing on those motions, the LLCs did not introduce any valuation evidence. Over the State's objections, the court signed eight orders severing the single cause of action into eight separate actions. The State unsuccessfully sought mandamus relief from the court of appeals. 2010 Tex. App. LEXIS 2377, *1.

II. Mandamus

The State asks us to order the trial court to vacate its severance order.[2] Generally, mandamus relief is appropriate only when (1) there has been a clear abuse of discretion by the trial court, and (2) there is no adequate remedy on appeal. *In re Olshan Found. Repair*, 328 S.W.3d 883, 887 (Tex. 2010). We will consider these two requirements in turn.

Courts permit severance principally to avoid prejudice, do justice, and increase convenience. *F.F.P. Oper. Partners v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007). In light of these fundamental principles, we have enumerated several requirements for proper severance: (1) the controversy must involve multiple causes of action, (2) the severed claim would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim must not be so interwoven with the remaining action that they involve the same facts and issues. *Guaranty Fed. Savings Bank. v. Horseshoe Oper. Co.*, 793 S.W.2d 652, 658 (Tex. 1990); *see also* TEX. R. CIV. P. 41.

Assuming the validity of the conveyances,[3] we focus particularly on the issue of interrelatedness, *see Guaranty Fed.*, 793 S.W.2d at 658, keeping in mind the importance of doing justice and avoiding prejudice. *See F.F.P.*, 237 S.W.3d at 693. The Lawses sought to have one trial separated into eight, but in each case, the legal and factual issues would be much the same. The legal issues raised in the eight trials would be essentially identical, and, because the land was all

[2] The Texas Farm Bureau submitted a brief as amicus curiae in support of the Lawses. SH 130 Concession Company, LLC, and Travis County submitted briefs as amicus curiae in support of the State.

[3] The State asserts that the conveyances by which the Lawses divided their property are invalid. Because we conclude that the severance was improper even if the conveyances were valid, and because the State raised the invalidity argument for the first time at this Court, we assume the conveyances' validity and analyze the case on that basis. The State also argues that severance was improper because of the doctrine of lis pendens, but because we resolve this issue on the basis of the claims' interrelatedness, we do not reach the lis pendens argument.

originally part of a single plot, the factual valuation testimony would likely be very similar, even if the value of the different parcels varied somewhat.[4] Both the Lawses and the State would thus pay the same lawyers to argue, and same experts to testify, in eight separate cases, an issue that could be tried once. Such duplication is inconvenient, and, worse, prejudicial to the State, which has a right to offer evidence that the entire property being taken should be valued as a single economic unit. *See State of Texas v. Windham*, 837 S.W.2d 73, 76 (Tex. 1992).[5] Because of this, and because of the waste involved in having valuation experts give testimony eight times that they could give once, we hold that the trial court abused its discretion by ordering a severance that, by breaking up a deeply interrelated set of legal and factual issues, prejudices the parties and causes great inconvenience. *Cf. F.F.P.*, 237 S.W.3d at 693; *Guaranty*, 793 S.W.2d at 658.

Because the trial court abused its discretion, we must consider whether the State has an adequate remedy by appeal. If it does not, mandamus is proper. We assess the adequacy of an appellate remedy by "balancing the benefits of mandamus review against the detriments." *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2007). In performing this balancing, we look at a number of factors, among them "whether mandamus will spare litigants and the public 'the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'" *Id.*

[4] As previously noted, none of the LLCs presented valuation evidence at the hearing on the motions to sever. Thus, there is no evidence in the trial court that any of the tracts had a different valuation from the others or that any of the conveyances had economic substance, such as a bona fide arms-length sale to a third party.

[5] Such a right might be diminished in severed suits. If the State were forced to proceed in eight separate lawsuits against eight separate owners, it is unclear on what basis it could offer *Windham* evidence that the proper economic unit by which to value a particular parcel includes other land not part of that condemnation suit and not commonly owned with the land being condemned. However, a single suit would permit the State, where it has condemned land all under common ownership at the time the condemnation petition was filed, to offer evidence that the entire condemned parcel should be valued together, thus preserving its *Windham* right.

(*quoting In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004)). Thus, in *Team Rocket*, we granted mandamus where the trial court's ruling would allow a plaintiff to refile his case "in county after county . . . inevitably result[ing] in considerable expense to taxpayers and defendants." *Id.* Because the trial court's order "subject[ed] taxpayers, defendants, and all of the state's district courts to meaningless proceedings and trials," we held that "requiring defendants to proceed to trial in the wrong county" could not be considered an adequate remedy. *Id.* Similarly, in *In re Masonite Corp.*, we considered whether mandamus was appropriate to reverse a trial court's order that severed two suits into sixteen different cases that were transferred to sixteen different counties. *In re Masonite*, 997 S.W.2d 194, 196 (Tex. 1999). Conditionally granting mandamus, we held that the appellate remedy was inadequate because, while some parties might be able to appeal, such appeal would be "no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue." *Id.* at 198.

We believe that the circumstances of this case also make the appellate remedy inadequate because of the enormous waste of judicial and public resources that compliance with the trial court's order would entail. Requiring eight separate suits here, when only one is proper, would be a clear waste of the resources of the State, the landowners, and the courts.[6] For this reason, we hold that the State lacks an adequate remedy by appeal and conditionally grant the writ of mandamus.

[6] The Lawses admit as much. At the Special Commissioners Hearing, the Lawses' attorney stated, in reference to the division of the property: "this exercise that we've gone through, to deed out the property, is a waste of money and it's a waste of time, and it's something that—that shouldn't happen."

III. Valuation

The Lawses subdivided their property and sought severance based on a belief that its highest and best use was as multiple parcels. Though they have called the procedural wrangling in this case a waste of time and money, they pursued it out of an "abundance of caution" due to a fear that our opinions in *City of Harlingen v. Sharboneau*, 48 S.W.3d 177 (Tex. 2001), and *State of Texas v. Willey*, 360 S.W.2d 524 (Tex. 1962), would prevent them from seeking a valuation based on the subdivision. *Willey* and *Sharboneau* are distinguishable.

In *Willey*, the State condemned a 3-acre portion of Willey's 104-acre property. At the condemnation trial, Willey sought to admit evidence that the best and highest use of the 3-acre tract was "subdivision into residential homesites, with some commercial sites." *State v. Willey*, 351 S.W.2d 904, 905 (Tex. Civ. App.—Waco 1961), *rev'd*, 360 S.W.2d 524 (Tex. 1962). We held that Willey could not admit such evidence because "at the time of the taking . . . there had been no subdivision or development of the 104-acre tract in question." *Willey*, 360 S.W.2d at 524. We further held that "one seeking to prove the value of such a tract of land may not show what the price of the lots would be if subdivided, or show the price for which already subdivided lots were selling." *Id.* at 525. In *Willey*, we relied on *City of Austin v. Cannizzo*, 267 S.W.2d 808, 816 (Tex. 1954), which held that, because a lot was undeveloped and unimproved, "[o]pinion testimony as to the front-foot value of nonexistent lots in a hypothetical subdivision is too speculative to be admitted as direct evidence of market value." As in *Willey*, the landowners in *Cannizzo* were seeking valuation of their property as if it were a developed, primarily residential, subdivision. *See City of Austin v. Cannizzo*, 260 S.W.2d 54, 58 (Tex. Civ. App.—Austin 1953), *rev'd*, 267 S.W.2d 808.

Unlike *Willey* and *Cannizzo*, however, the Lawses are not seeking valuation on the basis of the residential subdivision of their undeveloped property. They seek something much simpler. The property that the State took from the Lawses is primarily highway frontage, and their appraiser testified that the highest and best use was as several individual tracts that could be sold as highway frontage commercial property. This was based on their belief that similar property in the area was sold not in bulk but, rather, in somewhat smaller, commercial-sized parcels.

In *City of Harlingen v. Sharboneau*, 48 S.W.3d 177 (Tex. 2001), we held that a property owner could not value his property according to the so-called "subdivision development method" because such a valuation included substantial speculation. The method used by the landowner in *Sharboneau* was complex: it started with the condemnee's undeveloped, 10-acre parcel; assumed that it could be divided into 44 lots; estimated the sales prices of those lots; subtracted sale and development expenses, the developer's profit, and the costs to make the lots suitable for residential construction; applied a "discount rate to the annual net sales proceeds to reflect the interest rate necessary to attract debt and equity capital for the development"; and arrived at value for the tract. *Id.* at 180–81. A method such as this requires numerous speculative inferences because the value of a small residential parcel is based on a number of factors which, in an undeveloped property, do not exist. These include such things as the costs of planning, platting, development, and marketing. In a 10-acre tract like that considered in *Sharboneau*, it is unlikely that a 1/44th-tract lot would be bought for residential purposes unless the entirety of the residential subdivision had been planned and created, and substantial funds had been invested. Inferences like these are unnecessary to support the sale of parcels such as those into which the Lawses divided their property. The costs

of dividing raw land are insubstantial. If the Lawses were to offer evidence that the typical size of highway-frontage commercial parcels was similar to their subdivided parcels, and that those parcels were similarly appropriate for that use, it would not be speculative to permit them to admit valuation evidence on that basis. Of course, the State would be permitted to offer its own evidence that the land was best valued as a single unit. *See Windham*, 837 S.W.2d at 76.

Our precedents support this sort of valuation testimony. In *State v. Meyer*, 403 S.W.2d 366 (Tex. 1966), we considered how to value a 14-acre strip of property that the State condemned out of Meyer's 103-acre tract. Though Meyer stipulated that there had been no remainder damage, the State attempted to value the 14-acre strip based on the value of the entire 103-acre plot. It therefore arrived at a per-acre value for the whole property and multiplied it by the 14 acres to be taken. Meyer argued, however, that the remainder could not be considered and that the 14-acre plot had to be considered as its own economic unit. Moreover, because it was highway frontage, unlike most of the 103-acre plot, it was more valuable than the averaged per-acre value of the whole property. We agreed with Meyer, writing that "it is beyond dispute that the land being condemned had, at the time of the taking, a significantly higher per acre market value than the land not being condemned which lay further from the highway." *Id.* at 375. Therefore, the "value of the part taken should be ascertained by considering such portion alone, and not as a part of the larger tract." *Id.*

We expanded upon our *Meyer* analysis in *Windham*. There, the state condemned a 110-foot-deep, 2-acre plot out of Windham's 19-acre property. Windham argued that the 2 acres that the State condemned was not itself a self-sufficient economic unit and therefore sought valuation of a 200 foot deep strip consisting of 3.84 acres, which he argued would, unlike the condemned strip, be valuable

as a single unit suitable for commercial development. We permitted Windham's valuation theory but held that he alone could not define the suitable economic unit. *Windham*, 837 S.W.2d at 77. Accordingly, we allowed the State to present its own expert testimony that the proper economic unit was different and that there was no demand for such subdivision. *Id.* We wrote:

> When the severed portion of the land can be considered as an independent economic unit, the market value can be determined without reference to the remainder. A different situation arises, however, when the portion of the land taken by the State, considered without reference to the remainder, cannot be considered an independent economic unit reflecting the highest and best use of the property and would thus deprive the land owner of adequate compensation for the part taken if considered solely as severed land. In such instances the market value must necessarily be determined by considering some portion or all of the remainder in order to construct an economic unit. . . .
>
> . . . In deciding market value the jury is permitted to consider all of the uses to which the property is reasonably adaptable and for which it is, or in all reasonable probability will become, available within the foreseeable future. Here the trial court properly instructed the jury to consider all uses to which the property is reasonably adaptable, including its highest and best use. If Windham is permitted to present evidence of the market value of the part taken utilizing a larger tract than that sought by the condemning authority based on its theory of the highest and best use of the property, then the State should be allowed to present evidence based on its competing theory of the highest and best use the property. It is then for the jury to decide which evidence to accept and which to reject in deciding the ultimate issue of market value.

Id. at 76–77 (citations omitted).

Similar reasoning is applicable here. The State believes that the ideal economic unit is the entire condemned tract, the highest and best use of which is to hold as investment for future development. The State is permitted under *Windham* to offer this testimony. The Lawses, like Windham, believe that the condemned tract is an inferior economic unit. Where Windham thought the proper unit was larger than the condemned tract, however, the Lawses believe that the tract to

be condemned contains several self-sufficient economic units. If they have non-speculative evidence to support this contention, they should be permitted to offer it at trial. Though the State has a right to define the property being taken, it does not have the power to constrain the owners' evidence of competing conceptions of the best economic unit by which the taken property should be valued.

IV. Conclusion

The trial court's severance order prejudices the State's right to offer its valuation evidence and would cause needless duplication of legal services and expert testimony, wasting not only the parties' resources but those of the public at large. Accordingly, we conditionally grant the writ of mandamus and direct the trial court to vacate its severance order. 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: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0238

IN RE UNIVERSAL UNDERWRITERS OF TEXAS INSURANCE COMPANY, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued December 8, 2010

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

JUSTICE LEHRMANN did not participate in the decision.

Appraisal clauses, a common component of insurance contracts, spell out how parties will resolve disputes concerning a property's value or the amount of a covered loss. When the parties disagree, but neither seeks appraisal until one has filed suit, has the party demanding appraisal waived its right to insist on the contractual procedure? Because we conclude that, absent conduct indicating waiver and a showing of prejudice, it has not, we conditionally grant relief.

I. Background

Grubbs Infiniti, a car dealership in the Dallas-Fort Worth area, suffered hail damage to buildings on its property. When Grubbs filed a claim with its insurer, Universal Underwriters, a claims representative inspected the property. Universal subsequently paid Grubbs $4,081.95 for the damage. Grubbs asked Universal to reinspect the property, contending that the claim had not been

properly investigated or fully paid. Universal sent an engineer to reinspect the property, after which it issued a $3,000 supplemental payment to cover scuff marks on the roof. In November 2008, Universal explained that

> [i]f you would like to have your roof expert discuss the findings with [the engineer], please advise and we will put the two parties in touch with one another. We will hold our file open for 15 days pending any further contact from you regarding this matter.
>
> . . . .
>
> . . . Should you disagree with [Universal's] decision as set forth in this letter, please review your policy and govern yourself accordingly being mindful of the policy requirement that legal action contesting [Universal's] decision on this claim must be brought within 24 months and 1 day from the date you discover the loss, but no sooner than 90 days after you file a sworn proof of loss.
>
> Please feel free to contact me . . . if you should have any questions.

Universal also sent Grubbs a copy of the engineer's roof inspection report. Grubbs made no further inquiries or demands for payment.

Four months later, Grubbs sued Universal for underpayment of its claim, alleging breach of contract, breach of the duty of good faith and fair dealing, as well as violations of the Deceptive Trade Practice-Consumer Protection Act, Insurance Code, and Prompt Payment of Claims Act. In response, Universal invoked the policy's appraisal clause, which provides, in pertinent part,

> [i]f YOU or WE can't agree on the value of the property or the amount of YOUR property LOSS, either of us can demand in writing, an appraisal within 20 days of such demand. Then, each will select a competent and disinterested appraiser who will, in turn, select a competent and disinterested umpire. . . .
>
> The appraisal shall be then made at a reasonable time and place. Each appraiser will state his appraisal of the value or LOSS. If they can't agree, they will submit their differences to the umpire. The value of the property or amount of the LOSS will be

> determined by a written agreement of any two of them. Such an agreement is binding.

Universal moved to compel an appraisal and to abate all other proceedings in the interim. Grubbs alleged that Universal waived its right to appraisal by not invoking it sooner. When the trial court denied the motion, Universal unsuccessfully sought mandamus relief from the court of appeals. ___S.W.3d at___. Universal petitioned this Court,[1] and, after hearing oral argument, we conditionally grant relief.

II. Waiver of appraisal clauses

Appraisal clauses, commonly found in homeowners, automobile, and property policies in Texas, provide a means to resolve disputes about the amount of loss for a covered claim. *See State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888 (Tex. 2009). These clauses are generally enforceable, absent illegality or waiver. *See id*. ("'In the absence of fraud, accident, or mistake, the parties having agreed that the amount of loss shall be determined in a particular way, we are constrained to hold that such stipulation is valid.'" (quoting *Scottish Union & Nat'l Ins. Co. v. Clancy*, 8 S.W. 630, 631 (Tex. 1888))). Appraisals can provide a less expensive, more efficient alternative to litigation, and we recently held that they "should generally go forward without preemptive intervention by the courts." *Id*. at 895.

[1] The Insurance Council of Texas and Property Casualty Insurers Association of America submitted a brief of amici curiae in support of Universal. The Texas Apartment Association, Inc., the Texas Association of School Boards Legal Assistance Fund, and the Texas Organization of Rural & Community Hospitals, joined by the Houston Apartment Association, the Texas Building Owners and Managers Association, and United Policyholders, submitted a brief of amici curiae in support of Grubbs, as did the Texas Trial Lawyers Association, the Texas Automobile Dealers Association, and the Texas Community Association Advocates.

Indeed, appraisals have proceeded for well over a century with little judicial involvement. *Id.* at 889 (noting that only five of our prior decisions involved appraisals). Of our three cases to address waiver of appraisal clauses, only one found that waiver had actually occurred. *See Del. Underwriters v. Brock*, 211 S.W. 779, 780-81 (Tex. 1919) (waiver due to insurer's selection of biased arbitrator, in violation of the policy); *Am. Cent. Ins. Co. v. Bass*, 38 S.W. 1119, 1119-20 (Tex. 1897) (same); *Scottish Union*, 8 S.W. at 632 (no waiver). In that case, we held that an insurer could not claim as a defense that the insured failed to submit to an appraisal because the insurer did not nominate a "disinterested appraiser" as the policy required. *Brock*, 211 S.W. at 780.

We have explained that

> [to] constitute waiver the acts relied on must be such as are reasonably calculated to induce the assured to believe that a compliance by him with the terms and requirements of the policy is not desired, or would be of no effect if performed. The acts relied on must amount to a denial of liability, or a refusal to pay the loss.

Scottish Union, 8 S.W. at 632. Or, as we more recently concluded, "[w]aiver requires intent, either the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *In re Gen. Elec. Capital Corp.*, 203 S.W.3d 314, 316 (Tex. 2006) (quotations omitted).[2]

Grubbs asserts that Universal waived its right to invoke appraisal by waiting eight months, from the date that Grubbs asked for a reinspection of its property to the date that Grubbs sued, before

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[2] *See also Dwyer v. Fid. Nat'l Prop. & Cas. Ins. Co.*, 565 F.3d 284, 288 (5th Cir. 2009) ("The district court incorrectly homed in on the interval between the appraisal request and the trial date. The appropriate waiver inquiry examines Fidelity's knowledge and action—when Fidelity knew that the appraisal clause could be invoked, whether it reacted timely to the knowledge."); *Round Rock Indep. Sch. Dist. v. First Nat'l Ins. Co.*, 324 F.2d 280, 284 (5th Cir. 1963) (quoting *Scottish Union*); *Rolison v. Puckett*, 198 S.W.2d 74, 78 (Tex. 1946) ("A waiver is the intentional relinquishment of a known right,—or, . . . acts as would warrant inference of the relinquishment of such right."); *In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d 556, 563 (Tex. App.–Houston [14th Dist.] 2010, no pet.) (quoting *Scottish Union*).

demanding an appraisal. Grubbs argues that this delay was unreasonable as a matter of law, citing a number of cases in which our courts of appeals found appraisal demands untimely when made as little as thirty-nine days from the date of disagreement. *See, e.g.*, *Int'l Serv. Ins. Co. v. Brodie*, 337 S.W.2d 414, 416 (Tex Civ. App.–Fort Worth, 1960, writ ref'd n.r.e.) (noting that the parties disputed whether it had been thirty-nine or seventy-two days from the date of disagreement); *Boston Ins. Co. v. Kirby*, 281 S.W. 275, 276 (Tex. Civ. App.–Eastland 1926, no writ) (noting that insurer waited fifty-eight days after receiving proof of loss to make demand for appraisal); *Am. Fire Ins. Co. v. Stuart*, 38 S.W. 395, 396 (Tex. Civ. App. 1896, no writ) ("The retention of the proofs of loss by appellant for an unreasonable time without objection would be a waiver of any defect therein."). These decisions, however, were not based solely on the length of delay, but rather on the parties' conduct, as indications of waiver.[3] In *Brodie*, for example, after several attempts to reach a settlement, the insurer wrote to the insured that "[i]t would be superfluous" to further enumerate the claims, and that "there appears to be no item that has or will need a point of compromise." *Brodie*, 337 S.W.2d at 416. The court concluded that "[t]his [wa]s evidence of a failure to agree. The Company could then pay what Mrs. Brodie demanded, do nothing, or demand an appraisal." *Id*. The fact that thirty-nine or seventy-two days had passed during their negotiations was not determinative of the waiver issue. Instead, the expression of the parties' unwillingness to negotiate further

[3] In *Boston Insurance Company v. Kirby*, 281 S.W. 275, 276 (Tex. Civ. App.–Eastland 1926, no writ), the court did not describe what acts may have constituted waiver, but held that "[t]here [wa]s sufficient evidence in the record to support the finding" of the jury that the delay had been "unreasonable." Without further elaboration from the Court, we presume that the evidence presented to the jury included some evidence of the parties' conduct beyond the mere stipulation that fifty-eight or fifty-nine days had passed from the date that the insurer received proof of loss. To the extent the case may have been decided on the length of delay alone, we disapprove of that holding.

indicated that the clause should have been invoked. In other words, while the time period may be instructive in interpreting the parties' intentions, it alone is not the standard by which courts determine the reasonableness of a delay. *See Equitable Life Assurance Soc. v. Ellis*, 152 S.W. 625, 629 (Tex. 1913) ("A waiver may be created by acts, conduct, or declarations." (quotations omitted)); *Scottish Union*, 8 S.W. at 632 (describing the kind of "acts relied on" that constitute waiver).

A. Delay must be measured from the point of impasse.

Thus, while an unreasonable delay is a factor in finding waiver, reasonableness must be measured from the point of impasse, as several cases have recognized. *See In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d 556, 562 (Tex. App.–Houston [14th Dist.] 2010, no pet.) (holding that "the date of disagreement, or impasse, is the point of reference to determine whether a demand for an appraisal is made within a reasonable time"); *see also Sanchez v. Prop. & Cas., Ins. Co. of Hartford*, No. H-09-1736, 2010 U.S. Dist. LEXIS 6295, *13-14 (S.D. Tex. Jan. 27, 2010) ("The proper point of reference for determining whether an insurer waived the right to invoke appraisal by delay is the point at which the insurer knew the appraisal clause could be invoked because of a disagreement over the amount of damages, that is, the point of impasse with the insured."). That requires an examination of the circumstances and the parties' conduct, not merely a measure of the amount of time involved in seeking appraisal.

An impasse is not the same as a disagreement about the amount of loss. Ongoing negotiations, even when the parties disagree, do not trigger a party's obligation to demand appraisal. Nor does an insurer's offer of money to cover damages necessarily indicate a refusal to negotiate further, or to recognize additional damages upon reinspection. *See Scottish Union*, 8 S.W. at 632.

Texas state and federal courts have cited a federal district court case from Iowa, *Terra Industries, Inc. v. Commonwealth Insurance Co. of America*, 981 F. Supp. 581 (N.D. Iowa 1997), for its analysis of the point of "impasse" in insurance negotiations. *See Tran v. Am. Econ. Ins. Co.*, No. H-10-0016, 2010 U.S. Dist. LEXIS 66283, at *6-7 (S.D. Tex. July 2, 2010); *Sanchez*, 2010 U.S. Dist. LEXIS 6295, at *11; *Laas v. State Farm Mut. Auto. Ins. Co.*, No. 14-98-00488-CV, 2000 Tex. App. LEXIS 5332, at *16-18 (Tex. App.–Houston [14th Dist.] Aug. 10, 2000, no pet.) (not designated for publication). The *Terra* court looked to other jurisdictions for insight in determining at what point an insurer has waived its appraisal right and formulated the following factors:

> In deciding whether a demand for appraisal was made within a reasonable time, and consequently has not been waived even if suit was filed before the demand was made, courts have considered the timeliness of the demand in light of the circumstances as they existed at the time the demand was made. Pertinent circumstances include (1) the time between the breakdown of good faith negotiations concerning the amount of the loss suffered by the insured and the appraisal demand; and (2) whether there would be any prejudice to the other party resulting from the delay in demanding an appraisal.

Id. at 602 (citation omitted). In *Terra*, despite two and a half years of negotiations, "and evident dispute," *id.* at 601, the court found that the insurer "had no notice that an impasse had been reached, because only the filing of [the insured]'s suit demonstrated [the insured]'s unilateral conclusion that the parties were at an impasse." *Id*. at 603.

Other courts have relied on *Terra* to measure the point of impasse at which parties are to invoke appraisal clauses. *See, e.g.*, *Lyon v. Am. Family Mut. Ins. Co.*, 617 F. Supp. 2d 754, 760 (N.D. Ill. 2009); *Rebel Tractor Parts, Inc. v. Auto-Owners Ins. Co.*, No. CV206-102, 2006 U.S. Dist. LEXIS 86502, at *8 (S.D. Ga. Nov. 28, 2006); *SR Int'l Bus. Ins. Co., Ltd. v. World Trade Ctr. Props.*

LLC, No. 01 Civ. 9291, 2003 U.S. Dist. LEXIS 3881, at *4 (S.D.N.Y. Mar. 18, 2003). Using the point of "impasse," rather than the first sign of disagreement, corresponds with our definition of waiver as an "intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *In re GE Capital*, 203 S.W.3d at 316 (quotation omitted). In other words, both parties must be aware that further negotiations would be futile, "or would be of no effect if performed." *Scottish Union*, 8 S.W. at 632. If one party genuinely believes negotiations to be ongoing, it cannot have intended to relinquish its right to appraisal (unless it expressly waives it). *See Keesling v. W. Fire Ins. Co.*, 520 P.2d 622, 627 (Wash. Ct. App. 1974) (finding no waiver where, "insofar as the record shows, until the insured filed suit, the frame of mind of both parties welcomed additional communications and negotiations rather than confrontation").

The definition of impasse as the apparent breakdown of good-faith negotiations is supported in another context as well, which we find persuasive in our analysis. Under the National Labor Relations Act, 29 U.S.C. § 151, an employer may implement unilateral changes in employment terms only after good-faith negotiations have been exhausted, and the parties have reached an "impasse." *Beverly Farm Found. v. NLRB*, 144 F.3d 1048, 1052 (7th Cir. 1998); *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967). The United States Supreme Court has defined impasse under these circumstances as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 (1988); *see also Beverly Farm Found.*, 144 F.3d at 1052 ("The touch-stone for determining whether a genuine 'impasse' or 'deadlock' existed

. . . is the absence of any realistic possibility that continuation of the negotiations would have been fruitful.").

Universal invoked appraisal within a reasonable time after the parties reached an impasse. The policy contained no time limit for the appraisal request, and Universal never denied liability for the loss. At no point did Grubbs notify Universal that it refused to discuss the matter further, despite Universal's statement that it would leave its file open for further discussions should Grubbs care to do so. Whether Universal was aware of Grubbs' disagreement as to the estimate of damages is also irrelevant, since mere disagreement does not in itself signal an unwillingness to negotiate further. *See NLRB v. Cent. Plumbing Co.*, 492 F.2d 1252, 1254 (6th Cir. 1974) ("[M]ere rejection of a bargaining proposal does not create an impasse."); *Lyon*, 617 F.Supp. 2d at 759 n.8 ("[T]he relevant event is not the existence of a difference of views as to the loss amount, but rather the parties' inability to resolve that difference despite their attempts to do so."). Once the parties have reached an impasse—that is, a mutual understanding that neither will negotiate further—appraisal must be invoked within a reasonable time. Here Universal sought appraisal approximately one month after Grubbs sued. We conclude that Universal demanded appraisal within a reasonable time after the parties reached an impasse.

Grubbs contends that, because Universal's correspondence included a provision alerting the insured of the statute of limitations on bringing suit, Universal effectively acknowledged that the parties were at an impasse (". . . being mindful of the policy requirement that legal action contesting Universal Underwriter's decision on this claim must be brought within 24 months and 1 day from the date you discover the loss . . ."). Universal counters that its letters included no statements

regarding waiver of appraisal, or any suggestion that it was not open to further negotiation. To the contrary, it "specifically reserve[d] its rights under both the laws of the State of Texas and the terms of the subject policy of insurance." Moreover, Universal stated that it would leave the file open should Grubbs want to pursue further discussions. We will not infer waiver where neither explicit language nor conduct indicates that such was the party's intent.

Scottish Union is again instructive. In that case, the insurer conducted an inspection in response to the insured's claim and offered its calculation of damages. 8 S.W. at 630. When the parties disagreed on their estimates, the insurer offered an amount in settlement. *Id*. The insured declined the offer, then brought suit. *Id*. When the insurer demanded appraisal, the insured argued that the insurer had waived its right to do so. *Id*. at 631. We held that the insurer's attempt at reaching a settlement did not constitute a refusal to pay the loss: "It does not appear that [the insurer] at any time denied its liability or refused to pay whatever amount of loss and damage might be determined in the manner required by the policy to be due." *Id*. at 632. As such, it had not waived its appraisal right. The same reasoning applies here.

B. Delay alone is not enough; a party must also show prejudice.

Even if Universal had waited to request appraisal, mere delay is not enough to find waiver; a party must show that it has been prejudiced. *See* 15 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 210:77 (3d ed. 1999) ("In addition, a waiver will not be declared where there has been no showing of prejudice to the other party by a delay in demanding an appraisal."); *Terra*, 981 F. Supp. at 602 (requiring courts to examine "whether there would be any prejudice to the other party resulting from the delay in demanding an appraisal"). If the insured has suffered no prejudice due

to delay, it makes little sense to prohibit appraisal when it can provide a more efficient and cost-effective alternative to litigation. Of course, prejudice to a party may arise in any number of ways that demonstrate harm to a party's legal rights or financial position. *See, e.g.*, *Perry Homes v. Cull*, 258 S.W.3d 580, 597 (Tex. 2008) (defining prejudice for purposes of waiver of arbitration as "the inherent unfairness in terms of delay, expense, or damage to a party's legal position" (quoting *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004))); *see also In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 47 n.5 (1st Cir. 2005) ("[A] party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party." (*quoted in Perry Homes*, 258 S.W.3d at 597)); *Menorah Ins. Co., Ltd. v. INX Reinsurance Corp.*, 72 F.3d 218, 222 (1st Cir. 1995) (finding prejudice where party "incurred expenses as a direct result of [opponent's] dilatory behavior").

We have, in other instances, required a showing of prejudice to establish waiver. *See, e.g.*, *In re ADM Investor Servs.*, 304 S.W.3d 371, 374 (Tex. 2010) ("A party waives a forum-selection clause by substantially invoking the judicial process to the other party's detriment or prejudice."); *In re Fleetwood Homes of Tex., L.P.*, 257 S.W.3d 692, 694 (Tex. 2008) (per curiam) ("'[A] party waives an arbitration clause by substantially invoking the judicial process to the other party's detriment or prejudice.'" (alteration in original) (quoting *Perry Homes*, 258 S.W.3d at 589-90)); *In re Automated Collection Techs.*, 156 S.W.3d 557, 559 (Tex. 2004) (per curiam) ("'[E]ven substantially invoking the judicial process does not waive a party's arbitration rights unless the opposing party proves that it suffered prejudice as a result.'" (quoting *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998))).

In the context of waiver of arbitration clauses, which is in some ways similar to waiver of appraisal, we also require a showing of prejudice. *See Prudential Sec. v. Marshall*, 909 S.W.2d 896, 898-899 (Tex. 1995) ("A party does not waive a right to arbitration merely by delay; instead, the party urging waiver must establish that any delay resulted in prejudice."). In addition, we require an insurer to show prejudice before it can deny coverage based on an insured's failure to comply with a policy's "as soon as practicable" notice provision. *See Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 382 (Tex. 2009) (noting that, because the insurer "admitted that it was not prejudiced by the delay in receiving notice, it could not deny coverage based on [the insured's] alleged failure to provide notice 'as soon as practicable'").

Other jurisdictions have recognized that there can be no appraisal waiver absent a showing of prejudice to the other party. *See, e.g.*, *Kester v. State Farm Fire & Cas. Co.*, 726 F. Supp. 1015, 1019-20 (E.D. Pa. 1989); *Meineke v. Twin City Fire Ins. Co.*, 892 P.2d 1365, 1371 (Ariz. Ct. App. 1994) ("Among the circumstances courts consider are the timing between the breakdown of good faith negotiations concerning the amount of the loss suffered by the insured and the appraisal demand, and whether any prejudice to the other party resulted from the delay in demanding an appraisal."); *Sch. Dist. v. Globe & Republic Ins. Co.*, 404 P.2d 889, 893 (Mont. 1965) ("Whether a demand for appraisal has been made within a reasonable time depends upon the circumstances of each case. An examination of the cases involving this issue reveals that principally, two factors have been decisive: prejudice resulting from the delay, and the breakdown of good-faith negotiations concerning the amount of loss." (citations omitted)). Because the prejudice requirement aligns with our own analysis of waiver in arbitration and other insurance contexts, we find it useful here as well.

In order to establish waiver, therefore, a party must show that an impasse was reached, and that any failure to demand appraisal within a reasonable time prejudiced the opposing party.

Grubbs has not attempted to show prejudice here. Instead, Grubbs contends that requiring prejudice would be "new law," and because no Texas cases have required such a showing, we should not impose such a requirement. But waiver is an equitable doctrine,[4] and we have frequently required a showing of prejudice before concluding that rights are waived. *See, e.g., In re E.I. du Pont de Nemours & Co.*, 92 S.W.3d 517, 524 (Tex. 2002) (holding that delay did not waive defendant's right to dismissal, as plaintiffs "failed to show how the delay . . . prejudiced them in any way"); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996) (per curiam) (noting that party waives right to arbitration only if party seeking to enforce agreement substantially invoked the judicial process to the other party's detriment). Our failure to explicitly require prejudice is more a function of the paucity of cases in which we have addressed waiver of appraisal than its inapplicability to the doctrine.

Moreover, it is difficult to see how prejudice could ever be shown when the policy, like the one here, gives both sides the same opportunity to demand appraisal. If a party senses that impasse has been reached, it can avoid prejudice by demanding an appraisal itself. This could short-circuit potential litigation and should be pursued before resorting to the courts.

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[4] *See Pacheco v. Rice*, 966 F.2d 904, 906 (5th Cir. 1992); *Baker v. Fort Worth Mut. Benevolent Ass'n*, 280 S.W. 165, 169 (Tex. 1926).

III. Propriety of mandamus relief

We have held that mandamus relief is appropriate to enforce an appraisal clause because denying the appraisal would vitiate the insurer's right to defend its breach of contract claim. *In re Allstate Cnty. Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002). There, as here, "the parties . . . agreed in the contracts' appraisal clause to the method by which to determine whether a breach has occurred," and, if the appraisal determined that the full value was what the insurer offered, there would be no breach of contract. *Id*. The same is true here. We conditionally grant the writ of mandamus and direct the trial court to grant Universal's motion to compel appraisal.[5] *See id.* (holding that refusal to order appraisal would "den[y] the development of proof going to the heart of a party's case and cannot be remedied by appeal"). 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: May 6, 2011

[5] The trial court's failure to grant the motion to abate is not subject to mandamus, and the proceedings need not be abated while the appraisal goes forward. *See In re Allstate Cnty. Mut. Ins. Co.*, 85 S.W.d 193, 196 (Tex. 2002).

IN THE SUPREME COURT OF TEXAS

NO. 10-0243

VERONICA ELLIS AND PACESETTER BUILDERS, INC. D/B/A COLDWELL BANKER PACESETTER STEEL REALTORS, PETITIONERS,

v.

DR. RON AND TANA SCHLIMMER, RESPONDENTS

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

PER CURIAM

In this case, the court of appeals dismissed an interlocutory appeal of the trial court's order denying the defendants' motion to compel arbitration for want of jurisdiction because the movants failed to establish that the Federal Arbitration Act did not apply. ___ S.W.3d ___, ___. We reverse and remand to the court of appeals to consider the appeal's merits.[1]

In 2006, Ron and Tana Schlimmer purchased a house in Corpus Christi from Veronica Ellis. Coldwell Banker Pacesetter Steel Realtors ("Pacesetter") was the broker in the transaction and Ellis, who worked for Pacesetter, was the home's listing agent. After purchasing the home, the Schlimmers allegedly discovered various undisclosed defects. The Schlimmers sued Pacesetter and

[1] We have jurisdiction over this interlocutory appeal because we are called upon to decide whether the court of appeals correctly determined that it lacked jurisdiction. *See Klein v. Hernandez*, 315 S.W.3d 1, 3 (Tex. 2010).

Ellis, alleging claims for fraud, breach of contract, negligent misrepresentation, and violations of the Deceptive Trade Practices Act. Ellis filed a third-party complaint against the builder from whom she purchased the house originally. Ellis's third-party claim was later severed and the Schlimmers' lawsuit was set for trial. Ellis and Pacesetter initiated discovery and proceeded with the lawsuit until five months before the trial setting, when their lawyers purportedly discovered a mandatory arbitration clause in the Schlimmers' real estate contract with Ellis. The clause provided:

> Should there be any disagreement between seller and buyer that can not be resolved through mediation, both buyer and seller agree to submit this disagreement to binding arbitration with a mutually agreeable arbitrator.

Pacesetter and Ellis then filed a motion to abate and compel arbitration. The Schlimmers claimed waiver and estoppel and argued that the language of the agreement did not cover the dispute between the parties.

The trial court denied the motion, and Pacesetter and Ellis filed an interlocutory appeal under section 171.098(a)(1) of the Civil Practice and Remedies Code, a provision of the Texas Arbitration Act. Although the Schlimmers did not contest its jurisdiction, the court of appeals *sua sponte* dismissed the interlocutory appeal. According to the court, Pacesetter and Ellis's motion to compel failed to invoke either the TAA or the FAA. ___ S.W.3d at ___. It reasoned that since the trial court did not decide which statute applied and an interlocutory appeal is only authorized under the TAA, there was no evidence an appeal was authorized. *Id.* at ___. Consequently, the court dismissed the appeal for want of jurisdiction. *Id.* at ___.

A party attempting to compel arbitration must first establish the existence of a valid arbitration agreement. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003); TEX. CIV.

PRAC. & REM. CODE § 171.021(a). Once the party seeking arbitration does so, a strong presumption favoring arbitration arises, and the burden shifts to the party opposing arbitration to raise an affirmative defense to the agreement's enforcement. *Id.* Further, courts should resolve any doubts as to the agreement's scope, waiver, and other issues unrelated to its validity in favor of arbitration. *See In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008). If a trial court denies a motion to compel arbitration, appellate review may be available under both the TAA and the FAA so long as the TAA is not preempted. *In re D.R. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006). The TAA is preempted only when it or other state law would not allow enforcement of an arbitration agreement that the FAA would enforce. *Id.* at 779-80.

In this case, while Ellis and Pacesetter did not specifically invoke the TAA in their motion to compel arbitration, their counsel specifically referred to it in the hearing on the motion. The burden was on the Schlimmers to show that some Texas state law or statutory requirement would prevent enforcement of the arbitration agreement under the TAA so that the FAA would preempt the Texas act. They did not raise any such defenses, nor did they question the agreement's existence. Instead, they argued merely that the agreement did not cover the dispute, and that Ellis and Pacesetter had waived the right to arbitration or were estopped from enforcing it.

The court of appeals' decision erroneously placed the burden to establish the absence of any defenses to arbitration on Ellis and Pacesetter. Under these circumstances, its decision is contrary to the strong policy favoring arbitration. *Forest Oil Corp. v. McAllen,* 268 S.W.3d 51, 56 (Tex. 2008). Accordingly, under Rule 59.1 of the Texas Rules of Appellate Procedure, without hearing

oral argument, we reverse the court of appeals' judgment and remand to that court to allow it to consider the appeal's merits.

OPINION DELIVERED: April 1, 2011

IN THE SUPREME COURT OF TEXAS

444444444444
NO. 10-0245
444444444444

PATRICK O. OJO, ON BEHALF OF HIMSELF AND
ALL OTHERS SIMILARLY SITUATED, APPELLANT

v.

FARMERS GROUP, INC., FIRE UNDERWRITERS ASSOCIATION,
FIRE INSURANCE EXCHANGE, FARMERS UNDERWRITERS ASSOCIATION,
AND FARMERS INSURANCE EXCHANGE, APPELLEES

4444444444444444444444444444444444444444444444444444
ON CERTIFIED QUESTION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
4444444444444444444444444444444444444444444444444444

Argued October 14, 2010

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE JOHNSON, JUSTICE GUZMAN, and JUSTICE LEHRMANN joined, and in which JUSTICE WILLETT joined as to Parts I, II, III.A–B, IV, and V.

CHIEF JUSTICE JEFFERSON filed a concurring opinion.

JUSTICE WILLETT filed an opinion concurring in part.

JUSTICE HECHT did not participate in the decision.

The United States Court of Appeals for the Ninth Circuit certified to this Court the following question:

> Does Texas law permit an insurance company to price insurance by using a credit-score factor that has a racially disparate impact that, were it not for the [McCarran-

> Ferguson Act],[1] would violate the federal Fair Housing Act, 42 U.S.C. §§ 3601–19, absent a legally sufficient nondiscriminatory reason, or would using such a credit-score factor violate Texas Insurance Code sections 544.002(a), 559.051, 559.052, or some other provision of Texas law?

Ojo v. Farmers Group, Inc., 600 F.3d 1201, 1204–05 (9th Cir. 2010) (en banc) (per curiam). Pursuant to Article 5, section 3-c of the Texas Constitution and Texas Rule of Appellate Procedure 58.1, we answer that Texas law prohibits the use of race-based credit scoring, but permits race-neutral credit scoring even if it has a racially disparate impact.

I. Introduction

Patrick Ojo, an African-American resident of Texas, carries a homeowner's property-and-casualty insurance policy issued by Farmers Group, Inc. *Id.* at 1202. Although Ojo has never made a claim on his homeowner's policy, Farmers raised Ojo's insurance premium by nine percent. *Id.* Ojo alleges that Farmers increased the premium as a result of unfavorable credit information acquired though its automated credit-scoring system. *Id.*

On behalf of himself and other racial minorities whose premiums increased as a result of Farmers' use of a credit-scoring system, Ojo sued Farmers and its affiliates, subsidiaries, and reinsurers in federal court. *Id.* Ojo alleges that the defendants' credit-scoring systems employ several "undisclosed factors" which result in disparate impacts for minorities and violate the federal Fair Housing Act (FHA), 42 U.S.C. §§ 3601–3619. *Ojo*, 600 F.3d at 1202. Ojo does not assert that

[1] The McCarran-Ferguson Act (MFA) allows state insurance law to "reverse-preempt" federal law that does not directly relate to insurance. *See* 15 U.S.C. § 1012(b); *Ojo v. Farmers Group, Inc.*, 600 F.3d 1201, 1203 (9th Cir. 2010) (en banc) (per curiam).

he or any other member of the putative plaintiff class has suffered intentional discrimination at the hands of the defendants. *Id.*

Citing Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), the defendants moved to dismiss all of Ojo's claims. *Id.* Applying the McCarran-Ferguson Act's (MFA) reverse-preemption standard, 15 U.S.C. § 1012(b), the district court concluded that the Texas Insurance Code preempted Ojo's FHA claims. *Id.* at 1203. Accordingly, the district court declined to answer whether Ojo's disparate-impact discrimination claim sufficiently complied with Federal Rule of Civil Procedure 12(b)(6). *Id.* at 1202. On appeal to the United States Court of Appeals for the Ninth Circuit, a divided three-judge panel held that Texas law did not reverse-preempt Ojo's FHA claim, initially reversing the district court. *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175, 1178 (9th Cir. 2009). Subsequently, the Ninth Circuit ordered the case reheard en banc. *Ojo v. Farmers Group, Inc.*, 586 F.3d 1108, 1108 (9th Cir. 2009). The Ninth Circuit's rehearing en banc resulted in the certified question now before us. *See Ojo*, 600 F.3d at 1204–05.

II. Background

Ojo sued in federal court based on the FHA, under which it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race." 42 U.S.C. § 3604(b). Federal courts of appeals have interpreted this FHA provision to prohibit not just intentional acts of discrimination, but also race-neutral actions that have discriminatory effects on racial minorities

(disparate-impact discrimination).[2] Several courts of appeals have also held that the FHA applies in the underwriting of homeowner's property insurance, given the FHA's prohibition of discrimination "in the provision of services . . . in connection" with the "sale or rental of a dwelling." 42 U.S.C. § 3604(b); *see, e.g.*, *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992). Ojo's cause of action asserts this type of disparate impact liability in Farmers' pricing of homeowner's insurance based on credit scoring.

Ojo's disparate impact claim, however, may be "reverse-preempted" by Texas law under the MFA, which provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Under the MFA, state law reverse-preempts a federal statute if: "(1) the federal law does not specifically relate to insurance; (2) the state law is enacted for the purpose of regulating insurance; and (3) the application of federal law to the case might invalidate, impair, or supersede

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[2] *See Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1293–94 (7th Cir. 1977) (recognizing that a village's refusal to rezone plaintiffs' property to accommodate federally financed low-cost housing had the potential to effect a strong discriminatory impact capable of violating the federal FHA); *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974) ("Title VIII [the FHA] is designed to prohibit all forms of discrimination, sophisticated as well as simple-minded." (internal quotation marks omitted)); *cf. Pfaff v. U.S. Dep't of Hous. and Urban Dev.*, 88 F.3d 739, 747–50 (9th Cir. 1996) (holding that the Department of Housing and Urban Development (HUD) failed to establish a prima facie case against a private landlord that a facially neutral, numerical occupancy restriction illegally discriminated against families with children, and admonishing HUD for alleging such restrictions were discriminatory); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555–56 (5th Cir. 1996) (holding that a jury verdict awarding damages for disparate impact discrimination under the federal FHA was not supported by sufficient evidence when the plaintiff identified only a bank's rejection of his loan application, rather than a specific bank policy or practice, as having adverse, discriminatory effects on minorities). *But see Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16 (1988) (per curiam) (refusing to address whether a town's refusal to rezone violated the federal FHA and provided a cause of action based on disparate impact).

the state law." *Ojo*, 600 F.3d at 1208–09 (citing *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999)). The Ninth Circuit, hearing this case en banc, held that "it is undisputed that the FHA does not specifically relate to insurance," thus satisfying the first prong of MFA reverse-preemption.[3] *Id.* at 1203. It is also undisputed that "the relevant provisions of Texas law . . . are enacted for the purpose of insurance regulation," thus satisfying the second prong. *Id.* The certified question before us specifically deals with the third prong, and asks whether allowing Ojo's claim under the FHA might invalidate, impair, or supersede Texas law. *See id.* at 1204–05. In light of the fact that Texas only prohibits the use of credit score factors or rates *based on* race, or rates that differ *because of* race, we answer that application of the FHA to permit a cause of action for disparate impact resulting from the use of credit scoring in the field of insurance certainly might invalidate, impair, or supersede Texas law.

III. The Texas Insurance Code Does Not Provide for a Cause of Action Based on a Racially Disparate Impact

The Texas Insurance Code expressly prohibits "unfair discrimination" and specifically states that "[a] person may not charge . . . an individual a rate that is different from the rate charged to other individuals for the same coverage because of the individual's race, color, religion, or national origin." TEX. INS. CODE § 544.002(a)(2). An exception to this provision provides that "[a] person does not violate Section 544.002 if the refusal, limitation, or charge is required or authorized by law

[3] We note the conundrum this creates: without reverse-preemption of the federal FHA by Texas law, Ojo would have a disparate impact cause of action for *insurance* pricing under the federal FHA, and yet, reverse-preemption is only at issue if the federal FHA does not "specifically relate[] to the business of insurance." 15 U.S.C. § 1012(b). However, this is not an issue the certified question requires us to resolve. We instead focus our attention on whether Texas law provides for a disparate impact cause of action for insurance pricing based on credit scoring.

or a regulatory mandate." *Id.* § 544.003(c). Farmers points out that § 559.051 authorizes the use of race-neutral credit score factors, and that this authorization is the exception to § 544.002,which is recognized in § 544.003. Section 559.051 permits an insurer to "use credit scoring, except for factors that constitute unfair discrimination, to develop rates, rating classifications, or underwriting criteria." *Id.* § 559.051; *see also id.* § 559.052(a)(1) ("An insurer may not use a credit score that is computed using factors that constitute unfair discrimination . . . ."). The factors that "constitute unfair discrimination" are not defined in the Texas Insurance Code. However, the Code does define an "unfairly discriminatory" rate as one that "is *based wholly or partly on the race*, creed, color, ethnicity, or national origin of the policyholder or an insured." *Id.* § 560.002(c)(3)(C) (emphasis added).

Under Texas Insurance Code § 559.201, the use of credit score factors defined by § 559.052(a)(1) that constitute "unfair discrimination" is deemed an "unfair practice in violation of Chapter 541." *Id.* § 559.201 (making violations of Chapter 559 an unfair practice under Chapter 541). Unfair practices under Chapter 541 are subject to private civil suits, including class actions. *Id.* §§ 541.151 (Private Action for Damages Authorized), 541.251(a) (Class Action Authorized); *see Farmers Group, Inc. v. Lubin*, 222 S.W.3d 417, 421–22 (Tex. 2007).

No Texas courts have interpreted whether these Insurance Code provisions prohibit only intentional discrimination or also discrimination based on disparate impact. We derive from these provisions that insurance rates may not be "based wholly or partly on" race, and that an individual may not be charged a rate that is "different from the rate charged to other individuals for the same coverage *because of* the individual's race." TEX. INS. CODE §§ 544.002(a)(1) (emphasis added),

560.002(c)(3)(C). Additionally, while credit scoring is authorized, it may not be based on "factors that constitute unfair discrimination." *Id.* §§ 559.051, 559.052(a)(1). We can only assume that a credit score *factor* constitutes unfair discrimination if it is "based wholly or partly on" race, or if it is used to arrive at an insurance rate that is "different from the rate charged to other individuals for the same coverage *because of* the individual's race." *See id.* §§ 544.002(a)(1), 560.002(c)(3)(C). Ojo alleges these provisions not only prohibit intentional discrimination—the use of race-based classifications to price insurance differently—but also prohibit disparate impact discrimination—the use of race-neutral pricing schemes that effectuate disparate results (in this case, racial minorities alleging they have suffered higher premium rates as a direct consequence of race-neutral credit scoring). However, nothing in the Insurance Code prohibits the use of race-neutral credit scoring. In fact, the Code requires that the factors used in credit scoring to price insurance be race-neutral, or not *based on* race. *See id.* §§ 544.002(a)(1), 560.002(c)(3)(C). The nature of Ojo's disparate impact claim presupposes that these factors are race neutral, which is exactly what the Code requires. Nevertheless, to support his argument that the "based on" and "because of" race language in the Texas Insurance Code implies the availability of a cause of action for disparate impact discrimination, Ojo draws our attention to the same language used in the FHA, an act which has been interpreted to provide for disparate impact protection. *See* 42 U.S.C. § 3604; *see, e.g.*, *City of Black Jack*, 508 F.2d at 1184. Ojo also relies on the United States Supreme Court's interpretation of Title VII of the Civil Rights Act as providing for a disparate impact cause of action, an act that also prohibits discrimination "because of" race. *See* 42 U.S.C. § 2000e-2; *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). However, given the

numerous other considerations, addressed below, that have led federal courts to broadly interpret the FHA and Title VII, we find this argument unavailing. We are also guided by the fact that the use of the "because of" race and "based on" race language in Texas case law and the Texas Labor Code has been more in association with intentional discrimination claims than claims for disparate impacts. We first address the use of this language within Texas statutes and case law.

A. The Language of the Insurance Code Is Inconsistent with a Disparate Impact Theory of Liability

The Texas Insurance Code prohibits "unfairly discriminatory" insurance rates as those that charge differently "because of" or "based wholly or partly on" race. *See* TEX. INS. CODE §§ 544.002(a)(1), 560.002(c)(3). Texas courts considering this language in the employment context have used the "because of" and "based . . . on" race language in the disparate treatment context, but not in the area of disparate impacts. In *University of Texas v. Poindexter*, 306 S.W.3d 798 (Tex. App.—Austin 2009, no pet.), the court of appeals held that "[d]isparate-treatment discrimination addresses employment actions that treat an employee worse than others *based on* the employee's race, color, religion, sex, or national origin. In such disparate-treatment cases, proof and finding of discriminatory motive is required." *Id.* at 804 n.1 (emphasis added); *accord Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 117 (3d Cir. 1983) (noting that a plaintiff could establish intentional discrimination when his "employer applied an expressly *race-based* or *sex-based* standard in its treatment of the plaintiff" (emphasis added)). In *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30 (Tex. App.—Austin 1998, pet. denied), the court of appeals described disparate impact claims as those that "involve facially neutral practices . . . that operate to exclude a disproportionate percentage

of persons in a protected group and cannot be justified by business necessity. . . . Disparate treatment [exists where] the defendant . . . treats some people less favorably than others *because of* their race, color, religion, sex, or national origin." *Id.* at 44 (emphasis added). The United States Supreme Court has similarly distinguished between disparate treatment discrimination and disparate impact discrimination, noting that the former is discrimination against others "because of their race," while the latter encompasses "practices that are facially neutral . . . but that in fact fall more harshly on one group than another." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1976); *see also Smith*, 544 U.S. at 239 (plurality opinion).

Significantly, the phrase "because of race" is also used in the Texas Labor Code, which makes an employer liable for taking action adverse to an employee "because of race." *See* TEX. LAB. CODE § 21.051. Under the Labor Code, a plaintiff must show causation by demonstrating that race was a motivating factor in the employer's decision, the standard for proving intentional discrimination, or disparate treatment. *See id.* § 21.125(a) ("Except as otherwise provided by this chapter, an unlawful employment practice is established when the complainant demonstrates that race . . . was a motivating factor for an employment practice, even if other factors also motivated the practice . . . ."); *cf. Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 480 (Tex. 2001) (holding that in a claim for age discrimination, an employee must show that age was a motivating factor in the employer's decision to terminate the employee); *Herbert v. City of Forest Hill*, 189 S.W.3d 369, 375 (Tex. App.—Fort Worth 2006, no pet.) (holding that to prove causation in a race discrimination case, a plaintiff "must establish that race was a motivating factor for [the] employment practice" (internal quotation marks omitted)). In addition, the Texas Legislature expressly provided for

disparate impact protection in Texas Labor Code § 21.122(a)(1),[4] where it defined the burden of proof for disparate impact cases in the employment context:

> An unlawful employment practice based on disparate impact is established under this chapter only if a complainant demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity . . . .

Id. No such section appears in the Texas Insurance Code. The Texas Legislature, well aware of how to create a cause of action for disparate impact discrimination, chose not to do so in the field of insurance, specifically with regards to the use of credit scoring.[5] Because the Legislature chose not to include a section expressly providing for or defining a disparate impact claim in the Texas Insurance Code, but did do so in the Texas Labor Code, we conclude that the Legislature did not intend to provide for disparate impact liability for the use of credit scoring in pricing insurance.

B. The Use of "Because of" Race in the Federal FHA and Title VII Did Not Alone Prompt Federal Courts to Hold That These Acts Create Causes of Action Based on Racially Disparate Impacts

Ojo relies on federal case law interpreting the FHA and Title VII to provide for disparate impact protection, arguing that the Texas Insurance Code should also be interpreted to provide for

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[4] The Texas Government Code also prohibits fire departments from administering tests that disparately impact "any group defined by race." TEX. GOV'T CODE § 419.103. These tests must also comply with Chapter 21 of the Labor Code, which occurs when "the disparate impact on a group is the result of a bona fide occupational qualification." *Id.* § 419.103(b).

[5] *See Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 847 (Tex. 2009) ("The judiciary's task is not to refine legislative choices . . . . The judiciary's task is to interpret legislation as it is written."); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) ("It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose . . . [and] we believe every word excluded from a statute must also be presumed to have been excluded for a purpose."); *cf. Tex. Natural Res. Conservation Comm'n v. IT-DAVY*, 74 S.W.3d 849, 854 (Tex. 2002) (similarly holding that in the realm of statutory waiver of sovereign immunity, it is the Texas Legislature's task to "weigh the conflicting public policies" in enacting statutes providing for such waiver).

disparate impact protection because it uses the same "because of race" language as those federal acts. *See* 42 U.S.C. § 2000e-2 (prohibiting discrimination by employers of individuals "because of such individual's race"); 42 U.S.C. § 3604(b) (prohibiting discrimination in the provision of services in connection with housing "because of race"); TEX. INS. CODE § 544.002(a) (defining unfair discrimination as providing insurance coverage differently "because of the individual's . . . race"). Although Ojo has pointed us to a wealth of federal authority holding that the FHA and Title VII provide for disparate impact protection, the reasons supporting those holdings extend far beyond the use of the phrase "because of race." *See, e.g.*, *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977) (focusing on the policy goals of the FHA in deciding on a broad interpretation of its provisions); *see also* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 425 (1998) (describing the origins of the disparate impact standard under the FHA as partially "borrowed" from the case law on Title VII, and also noting the standard's diverse and inconsistent application by federal courts). In determining whether a statute provides for disparate impact protection, federal and state courts have looked first to the language of the statute to assess whether "the thrust of the Act [is] to the consequences of . . . practices, not simply the motivation." *Griggs*, 401 U.S. at 432; *see also Tex. Parks & Wildlife Dep't. v. Dearing*, 240 S.W.3d 330, 352 (Tex. App—Austin 2007, pet. denied). The United States Court of Appeals for the Seventh Circuit actually regarded the phrase "because of race" as a potential obstacle to disparate impact protection before considering the policy goals behind the FHA:

> The major obstacle to concluding that action taken without discriminatory intent can violate section 3604(a) is the phrase "because of race" contained in the statutory provision. The narrow view of the phrase is that a party cannot commit an act "because of race" unless he intends to discriminate between races. . . . The broad view is that a party commits an act "because of race" whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent.

Vill. of Arlington Heights, 558 F.2d at 1288; *accord Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977) ("[W]e note that the 'because of race' language might seem to suggest that a plaintiff must show some measure of discriminatory intent."). The Seventh Circuit declined to take a narrow view of the "because of race" language because of the congressional mandate within the FHA "to provide, within constitutional limitations, for fair housing throughout the United States." *Vill. of Arlington Heights*, 558 F.2d at 1289 (quoting 42 U.S.C. § 3601). The Seventh Circuit also relied on previous interpretations of the FHA, and its goal to "promote 'open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.'" *Id.* (quoting *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973)). Other federal circuit courts applying disparate impact protections under the FHA have also relied upon this congressional mandate.[6] Numerous courts have also noted that the need for disparate impact protection under the FHA arose from the lack of disparate impact

[6] *See, e.g.*, *Rizzo*, 564 F.2d at 147 (noting that "[a]lthough the legislative history of Title VIII [the FHA] is somewhat sketchy, the stated congressional purpose demands a generous construction of Title VIII"); *City of Black Jack*, 508 F.2d at 1184 (recognizing that the FHA was "passed pursuant to the congressional power under the Thirteenth Amendment to eliminate the badges and incidents of slavery," and noting that the United States Supreme Court has treated the entire Civil Rights Act of 1866, another act passed under the power of the Thirteenth Amendment, broadly (citing *Jones v. Mayer Co.*, 392 U.S. 409, 442–43 (1968) ("[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."))).

liability under the Fourteenth Amendment after the United States Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), and the difficulty of proving intentional discrimination.[7]

In determining whether discriminatory impact liability exists within the FHA, Title VII, and the Age Discrimination in Employment Act (ADEA), state and federal courts have also focused on the breadth and reach of prohibitory language, and have refused to find disparate impact liability when a statute focuses only on the nature of an action, and not on its effects. *See, e.g.*, *Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 67 (Minn. Ct. App. 2009) (holding that there was no disparate impact liability where "the [state law] does not include such effects-based language"); *see also Smith*, 544 U.S. at 235–36 (holding that the ADEA provides for disparate impact liability because it not only prohibits employers' actions that "limit, segregate, or classify" persons, but rather, also prohibits actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee" (citing 29 U.S.C. § 623(a))); *Dearing*, 240 S.W.3d at 339 (quoting *Smith*, 544 U.S. at 235). Both Title VII and the ADEA have been interpreted by the United States Supreme Court to provide for disparate impact liability because they go so far as to prohibit practices that "tend to deprive employees of opportunities." *See Smith*, 544 U.S. at 235–36 (ADEA);

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[7] *See, e.g.*, *Rizzo*, 564 F.2d at 146 ("Given the increased burden of proof which *Washington v. Davis* and *Arlington Heights* now place upon equal protection claimants, we suspect that Title VIII will undoubtedly appear as a more attractive route to nondiscriminatory housing, as litigants become increasingly aware that Title VIII rights may be enforced even without direct evidence of discriminatory intent."); *Vill. of Arlington Heights*, 558 F.2d at 1290 ("[A] requirement that the plaintiff prove discriminatory intent . . . is often a burden that is impossible to satisfy."); *City of Black Jack*, 508 F.2d at 1185 ("Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations . . . ."); *see also* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 425–26 (1998) (noting that many federal courts in the years after enactment of the FHA "aggressively expand[ed] the scope and application of equal protection analysis to a host of local governmental activities" because of the "difficulty of proving an overt intent to discriminate," which led to a similar expansion of the protection afforded by the FHA).

Griggs, 401 U.S. at 430–32 (Title VII); *see also Huntington*, 488 U.S. at 18 (declining to determine whether the FHA provides for disparate impact protection, stating: "Since appellants conceded the applicability of the disparate-impact test for evaluating the zoning ordinance under Title VIII, we do not reach the question whether that test is the appropriate one.").

Sections 544.002(a) and 560.002(c)(3) of the Texas Insurance Code do not include the type of broad prohibitory language that gives rise to disparate impact claims. Rather, both sections focus exclusively on the manner in which insureds are classified; that is, they prohibit classifications *because of* or *based on* race. Neither statute broadens its application so as to prohibit practices that may "otherwise adversely affect" or "tend to deprive" an insured of an opportunity, or any other similarly expansive language, as was the case in the federal acts at issue in *Griggs* and *Smith*. *See Smith*, 544 U.S. at 235–36 (ADEA); *Griggs*, 401 U.S. at 430–32 (Title VII). Rather, the Texas Insurance Code authorizes actions that classify individuals based on credit score in order to affect insurance pricing, as long as such classifications are not based on race or because of race. *See* TEX. INS. CODE §§ 544.002(a), 559.051, 560.002(c)(3). As long as insurers use race-neutral factors in credit scoring to set insurance rates, they do not run afoul of the Texas Insurance Code in the way an employer would run afoul of Title VII for using race-neutral testing that adversely affects employees of a certain race. *See Griggs*, 401 U.S. at 430 ("Under [Title VII], practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."). Because the Texas Insurance Code expressly authorizes credit scoring, it cannot be subject to the same breadth of interpretation applied to Title VII or the FHA simply because it uses the phrases "because of" or

"based . . . on" race. Ojo's argument that federal interpretations of these acts should control our interpretation of the Texas Insurance Code is unavailing in light of the additional considerations, other than some similar language, present in the federal case law.

C. The Legislative History of the Insurance Code Is Inconsistent with a Disparate Impact Theory of Liability

In addition to the express language of the statute, courts have looked to a statute's legislative history when determining whether the statute gives rise to a disparate impact theory of liability. *See, e.g.*, *Smith*, 544 U.S. at 238 ("[W]e think the history of the enactment of the ADEA . . . supports the . . . consensus concerning disparate-impact liability."); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982) (examining the legislative history of 42 U.S.C. § 1981 and holding the statute did not give rise to a disparate impact claim); *Griggs*, 401 U.S. at 436 ("From the sum of the legislative history relevant in this case, the conclusion is inescapable that the [agency's] construction . . . comports with congressional intent."); *Dearing*, 240 S.W.3d at 351 ("When ascertaining legislative intent, we may also consider . . . the law['s] . . . history . . . ."); *see also* TEX. GOV'T CODE § 311.023(3) (allowing courts to consider legislative history when construing statutes). We also look to legislative history in this instance because the declared policy of the MFA is to ensure that state legislatures are able to regulate the business of insurance without unintended federal interference.[8]

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[8] *See* 15 U.S.C. § 1011 ("Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."); *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 654 (1981) (stating that Congress passed the MFA "believing that the business of insurance is 'a local matter, to be subject to and regulated by the laws of the several States'" (citing H.R. Rep. No. 143, at 2 (1945))); *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d 840, 871 (N.D. Ohio 2010) ("Indeed, it

The legislative history of the credit scoring bill and the arguments of its opponents indicates that the Texas Legislature was aware of the possibility of a disparate impact on racial minorities, yet did not expressly provide for a disparate impact claim as it did in the Texas Labor Code. Despite its longstanding prohibition of unfair discrimination, the Legislature first expressly authorized the use of credit scoring in setting insurance rates in 2003. Act of June 2, 2003, 78th Leg., R.S., ch. 206, § 3.01, 2003 Tex. Gen. Laws 916, 916–21, *repealed by* Act of May 24, 2005, 79th Leg., R.S., ch. 728, § 11.020(b), 2005 Tex. Gen. Laws 2188, 2217 (recodifying the relevant credit scoring sections of the Insurance Code into TEX. INS. CODE chapter 559) (originally codified at TEX. INS. CODE ANN. art. 21.49-2U, § 7(a) (West Supp. 2003)). Opponents of the credit scoring bill admonished:

> The state should ban the practice of credit scoring altogether. Tornadoes do not strike homeowners on the basis of their credit scores, and no independent studies have proven any statistical relationship between a consumer's credit history and his or her ability to drive or maintain an automobile. . . . Credit scoring is discriminatory, especially against women, minorities, low-income consumers, and consumers who conduct all of their personal business on a cash basis.

House Research Org., Bill Analysis, Tex. S.B. 14, 78th Leg., R.S., 20 (May 21, 2003). Despite those concerns, the Legislature decided to authorize credit scoring in pricing insurance, but addressed some of the concerns with certain statutory restrictions. In addition to prohibiting the use of "factors that constitute unfair discrimination," TEX. INS. CODE ANN. art. 21.49-2U, § 7(a) (West Supp. 2003) (current version at TEX. INS. CODE § 559.051), the Legislature prohibited insurers from denying, cancelling, or refusing to renew a policy "solely on the basis of credit information," as well as from denying coverage solely because the consumer does not have a credit card account. *Id.* § 3(a)

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would seem that this type of activity [setting insurance rates] is precisely the kind that the McCarran-Ferguson Act meant to leave to the state legislatures to regulate.").

(current version at TEX. INS. CODE § 559.052). Also, certain information could not be used as a negative factor in an insurer's scoring methodology, such as a collection account with a medical industry code. *Id.* § 4(a)(3) (current version at TEX. INS. CODE § 559.101). However, even with these restrictions, the Legislature included no language expressly providing for a cause of action based on disparate impact.

The Legislature also directed the Commissioner of the Texas Department of Insurance (TDI) to conduct a study and submit a report to state officials and the 79th Legislature before January 1, 2005, containing, among other things:

- a summary statement regarding the use of credit information, credit reports, and credit scores by insurers . . . ;
- *any disproportionate impact on any class of individuals, including classes based on income, race, or ethnicity* . . . ; and
- recommendations from the department to the [L]egislature regarding the use of credit information by insurers.

Act of June 2, 2003, 78th Leg., R.S., ch. 201, § 3.01, sec. 15(a), (b)(1), (b)(5)–(6), 2003 Tex. Gen. Laws 916, 920–21 (expired Mar. 1, 2005) (emphasis added) (previously located at TEX. INS. CODE ANN. art. 21.49-2U, § 15 (West Supp. 2003)). Insurance Commissioner Jose Montemayor completed this credit scoring study and submitted his findings in December 2004, stating in part:

> Similar to other published studies,[9] there appears to be a strong relationship between credit score and insurance risk (or loss). . . . [With regards to auto insurance,] as credit scores improve, the frequency decreases, i.e. people have fewer accidents or claims.

TEX. DEP'T OF INS., REPORT TO THE 79TH LEGISLATURE: USE OF CREDIT INFORMATION BY INSURERS IN TEXAS 18–20 (Dec. 2004), http://www.tdi.state.tx.us/reports/documents/creditrpt04.pdf. These findings were supplemented with a report to the Legislature, which explained that under a multivariate analysis:

> For both personal auto liability and homeowners, credit score was related to claim experience even after considering other commonly used rating variables. . . . For both personal auto liability and homeowners, the difference in claims experience by credit score was substantial. Typically, the claim experience for the 10 percent of policyholders with the worst credit scores was 1.5 to 2 times greater than that of the 10 percent of policyholders with the best credit scores. The magnitude of the variation noted in the earlier report remains unchanged even after considering other commonly used rating variables.

TEX. DEP'T OF INS., SUPPLEMENTAL REPORT TO THE 79TH LEGISLATURE: USE OF CREDIT INFORMATION BY INSURERS IN TEXAS: THE MULTIVARIATE ANALYSIS 6 (Jan. 2005), http://www.tdi.state.tx.us/reports/documents/credit05sup.pdf.

In a letter accompanying the report, Commissioner Montemayor explained that while disparate impacts result from the use of credit scoring, he was without authority to ban or regulate the use of credit scoring that produces disparate impacts as long as it is actuarially sound and not

[9] In 2003, EPIC Actuaries, LLC published a study reviewing more than 2.7 million auto insurance policies and found that an insured's credit-based insurance score is directly connected to the insured's likelihood of filing a claim, and that credit scoring measures risk not previously measured by other rating factors and is among the top predictors of risk. *See* Michael J. Miller & Richard A. Smith, THE RELATIONSHIP OF CREDIT-BASED INSURANCE SCORES TO PRIVATE PASSENGER AUTOMOBILE INSURANCE LOSS PROPENSITY (June 2003), http://www.ask-epic.com/Publications/Relationship%20of%20Credit%20Scores_062003.pdf.

intentionally discriminatory.[10] Commissioner Montemayor stated that "credit scoring, if continued, is not unfairly discriminatory as defined in current law because credit scoring is not based on race, nor is it a precise indicator of one's race." Letter from Jose Montemayor to the 79th Texas Legislature (Jan. 31, 2005) (accompanying TEX. DEP'T OF INS., SUPPLEMENTAL REPORT TO THE 79TH LEGISLATURE: USE OF CREDIT INFORMATION BY INSURERS IN TEXAS: THE MULTIVARIATE ANALYSIS (Jan. 2005), http://www.tdi.state.tx.us/reports/documents/credit05sup.pdf). In addition, Commissioner Montemayor stated that the use of credit scoring in pricing insurance inevitably

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[10] The letter specifically stated:

> Disproportionate impact is a lack of symmetry, or unequal percentages. In other words, disproportionate impact is an uneven distribution of each racial group with a given risk factor, although the uneven distribution is not caused by one's race. . . . By the nature of risk-based pricing and underwriting, all factors used in insurance have a disproportionate impact to some extent. One could make a convincing argument to ban the use of all risk-related factors based solely on disproportionate impact. Effectively, we would ban risk-based pricing and underwriting and revert to a pricing system where we homogenize the risk and essentially charge everyone the same price—regardless of risk. That would be a set-back to all Texans, of all races, especially those of moderate to lower income whose risk remains low.
>
> As Commissioner, I have the authority to end a practice that is either unfairly or intentionally discriminatory. However, I do not have a legal basis to ban a practice that has a disproportionate impact if it produces an actuarially supported result and is not unfairly or intentionally discriminatory. Prior to the study, my initial suspicions were that while there may be a correlation to risk, credit scoring's value in pricing and underwriting risk was superficial, supported by the strength of other risk variables. Hence, there would be evidence that credit scoring was a coincidental variable that served as a surrogate for an unlawful factor in rating and underwriting. If this were proven to have been the case, I would have had a legal basis to make the connection between disproportionate impact and intentional discrimination, and . . . ban credit scoring outright . . . .
>
> The study, however, did not support those initial suspicions. *Credit scoring, if continued, is not unfairly discriminatory as defined in current law because credit scoring is not based on race, nor is it a precise indicator of one's race. . . .*
>
> . . . .
>
> Allowing credit scoring to be used . . . will ensure its link to risk under some of the strongest consumer protections in the nation, especially for people that suffer hardship. However, if the presence of credit scoring in insurance will only feed suspicion and divide us as Texans, its continued use to any degree may simply not be worth it. If the Legislature determines that credit scoring should be eliminated, then I recommend that it be phased out over time.

Letter from Jose Montemayor to the 79th Texas Legislature (Jan. 31, 2005) (accompanying TEX. DEP'T OF INS., SUPPLEMENTAL REPORT TO THE 79TH LEGISLATURE: USE OF CREDIT INFORMATION BY INSURERS IN TEXAS: THE MULTIVARIATE ANALYSIS (Jan. 2005), http://www.tdi.state.tx.us/reports/documents/credit05sup.pdf) (emphasis added).

carried the risk of disproportionate impacts just as any risk-based assessment would, and that to discontinue insurers' assessment of risk factors would effectively homogenize the risk and essentially charge everyone the same insurance rate, something that would "be a set-back to all Texans, of all races, especially those of moderate to lower income whose risk remains low." *Id.*

"Even when a statute is not ambiguous on its face, we can consider other factors to determine the Legislature's intent, including . . . administrative construction of the statute . . . ." *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (citing TEX. GOV'T CODE § 311.023). We cite the Commissioner Montemayor's letter and report here, however, more for evidence of the Texas Legislature's awareness of potential disparate impacts, and to show that the Legislature, knowing this, still chose not to expressly provide for disparate impact protection as it did in the Labor Code. The Texas Legislature expressly directed the Commissioner to analyze the effects of credit scoring in insurance pricing and report back during the next legislative session. It was during this subsequent session that the Legislature re-codified various portions of the Insurance Code, including the sections on credit scoring now codified at Texas Insurance Code chapter 559, and made no relevant changes to the Code, despite the Commissioner's warnings of the potential for disparate impacts. In fact, two bills banning credit scoring (H.B. 23 and S.B. 167), which were introduced by members of the 79th Legislature before the submission of Commissioner Montemayor's January 2005 report, died in committee after the report was submitted. *See* Tex. H.B. 23, 79th Leg., R.S. (2005); Tex. S.B. 167, 79th Leg., R.S. (2005).

Given the Legislature's and the Insurance Commissioner's awareness of the potential for disparate impacts, and the Legislature's decision to not enact any express prohibition of disparate

impact discrimination in the Insurance Code, we can only conclude that the Legislature did not intend to create a cause of action for disparate impact discrimination in insurance pricing based on credit scoring.

IV. The Texas Fair Housing Act (TFHA) Does Not Change Our Conclusion Regarding the Lack of Disparate Impact Liability in the Texas Insurance Code

The certified question also asks us to consider other provisions of Texas law that may provide for disparate impact protection. Ojo argues that the Texas Fair Housing Act (TFHA) should provide such protection because the FHA, which the TFHA was intended to mirror, provides for disparate impact liability in the provision of housing. *See* TEX. PROP. CODE § 301.002(3) ("The purposes of this chapter are to provide rights and remedies substantially equivalent to those granted under federal law."). Federal courts have interpreted the FHA to apply to the provision of homeowner's insurance. *See, e.g., Am. Family Mut. Ins. Co.*, 978 F.2d at 299. Ojo is correct that Texas courts will generally construe Texas statutes implementing federal rights consistently with federal case law. *See, e.g.*, *Quantum Chem. Corp.*, 47 S.W.3d at 476 (holding that the Texas Commission on Human Rights Act (TCHRA) was enacted to implement the policies of Title VII, and thus federal case law interpreting Title VII guides this Court's reading of the TCHRA). However, the TFHA contains a "carve-out" provision, which provides that provisions of the TFHA "do[] not affect a requirement of nondiscrimination in any other state or federal law." TEX. PROP. CODE § 301.044(b). In addition, Ojo cannot direct us to, and indeed there is very little, federal authority confirming the existence of disparate impact liability even under the FHA in the field of insurance. *See, e.g.*, *Saunders v. Farmers Ins. Exch.*, 537 F.3d 961, 964 (8th Cir. 2008) ("Applying [HUD] standards, we have

recognized a disparate impact [FHA] claim against private actors in another context. But at least with respect to insurers, the question is not free from doubt. However, the Insurers have not raised the issue and therefore we assume, without deciding, that private insurers may be liable under the [FHA] on a disparate impact theory." (internal citations omitted)); *Dehoyos v. Allstate Corp.*, 345 F.3d 290, 299 n.7 (5th Cir. 2003) ("We . . . decline to differentiate claims of disparate impact and claims of intentional discrimination at this preliminary stage of litigation"); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1362 (6th Cir. 1995) (stating that "HUD has never applied a disparate impact analysis to insurers"); *Allstate Fair Hous. Opportunities of Nw. Ohio v. Am. Family Mut. Ins. Co.*, 684 F. Supp. 2d 964, 967–70 (N.D. Ohio 2010) (holding that plaintiffs failed to make a prima facie case of disparate impact discrimination regarding the use of a specific valuation method as an underwriting criterion). Because the relevant provisions of the Texas Insurance Code are more recent and specific regarding discriminatory liability in the field of insurance, and because we have determined that the Insurance Code does not provide for disparate impact liability, we conclude that Ojo's argument that Texas provides for disparate impact liability in the field of insurance under the TFHA lacks merit.

V. Conclusion

The Texas Insurance Code is void of any language creating a cause of action for a racially disparate impact. The Texas Legislature has demonstrated that it is well aware of how to create a cause of action for disparate impact in other contexts, but it has chosen not to do so in the field of insurance. When dealing with issues of policy, this Court has consistently deferred to the judgment of the Legislature, and has not created causes of action where the Legislature did not clearly express

a desire to do so. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726 (Tex. 1995) (recognizing that it is not our responsibility "to judge the wisdom of the policy choices of the Legislature, or to impose a different policy of our own choosing."). The decision to either allow or prohibit the use of credit scoring in pricing insurance that creates disparate impacts properly rests with the Legislature, and we leave to the Legislature's judgment the question of whether to expressly create a cause of action for disparate impact in the field of insurance, as it expressly created within the Texas Labor Code. *See* TEX. LABOR CODE § 21.122(a)(1) (defining the burden of proof in asserting a cause of action for discrimination based on disparate impact). Allowing a claim against Texas insurers for using completely race-neutral factors in credit scoring would frustrate the regulatory policy of Texas that the MFA is meant to protect, which is the continued regulation of the field of insurance by the states without unintentional congressional intrusion. *See* 15 U.S.C. §§ 1011 ("[T]he continued regulation and taxation by the several States of the business of insurance is in the public interest . . . ."), 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance . . . ."). Therefore, we answer the certified question by holding that Texas law does not prohibit an insurer from using race-neutral factors in credit-scoring to price insurance, even if doing so creates a racially disparate impact.

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Paul W. Green
Justice

OPINION DELIVERED: May 27, 2011

IN THE SUPREME COURT OF TEXAS

444444444444
NO. 10-0245
444444444444

PATRICK O. OJO, ON BEHALF OF HIMSELF AND
ALL OTHERS SIMILARLY SITUATED, APPELLANT

v.

FARMERS GROUP, INC., FIRE UNDERWRITERS ASSOCIATION,
FIRE INSURANCE EXCHANGE, FARMERS UNDERWRITERS ASSOCIATION,
AND FARMERS INSURANCE EXCHANGE, APPELLEES

4444444444444444444444444444444444444444444444444444
ON CERTIFIED QUESTION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
4444444444444444444444444444444444444444444444444444

Argued October 14, 2010

CHIEF JUSTICE JEFFERSON, concurring.

Legislative history is not always a villain. It is central to the process by which the Legislature enacts the laws that govern society. Yet a statute's pedigree is not itself law. For that reason, this Court usually applies a text-centric model when it construes a statute. We look first to the text. When the text is not clear, we explore extrinsic aids, including legislative history. *See, e.g.*, *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008). That we have reached some methodological agreement,[1] even if inconstant,[2] is itself impressive, particularly in light of the difficulties other

[1] One scholar has described methodological agreements of this type as "methodological stare decisis," which is the "practice of giving precedential effect to judicial statements about methodology." *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE

courts have experienced when attempting to accomplish this same task.[3] Textualism is easy to advocate. The difficulty lies in its implementation.

We start with the text because it is the best indication of the Legislature's intent. *See Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010) ("Our ultimate purpose when construing statutes is to discover the Legislature's intent. Presuming that lawmakers intended what they enacted, we begin with the statute's text, relying whenever possible on the plain meaning of the words chosen." (citations and quotations omitted)). Thus, when we can interpret a statute by reference to its language alone, we generally do so. *Id.* In this way, we mean to avoid sacrificing a clear textual command to conflicting language in an extrinsic, non-authoritative source.[4] The animating principle behind this standard is a reluctance to use legislative history to *interpret* a clear statute. Accordingly, our cases consistently tie a discomfort with extrinsic aids to the language of construction. *See City of Rockwall*, 246 S.W.3d at 626 ("When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids *to construe* the

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L.J. 1750, 1754 (2010).

[2] *See id.* at 1789 (noting that, compared to the Court of Criminal Appeals, the Texas Supreme Court is "inconsistent but often reaches the same result, albeit more diplomatically").

[3] *See id.* at 1765 ("[T]he U.S. Supreme Court is simply not in the practice of picking a single interpretive methodology for statutes. Indeed, the Court does not give stare decisis effect to *any* statements of statutory interpretation methodology."); Nicholas Quinn Rozenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144 (2002) (noting that the Supreme Court "do[es] not seem to treat methodology as part of the holding").

[4] The Supreme Court most infamously did this in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), when it ignored the text of a statute on the basis of a Congressional report and its beliefs about the statute's general purpose. This decision has been frequently criticized. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION 19 (Amy Gutmann, ed. 1997) (deriding the Court's "utterly inexplicable" reasoning); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 84 (2000) ("[T]he Supreme Court blundered badly in [*Holy Trinity*] by incautiously equating the contents of a Senate committee report with Congress's intention. In fact, the committee report proved highly misleading . . . .").

language." (emphasis added));[5] *see also Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) ("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." (alteration in original; emphasis added; quotations and citations omitted)).

Our general rule, then, is that extrinsic aids are inappropriate "to construe" an unambiguous statute. And while the Court today does cite several pieces of legislative history, none are used to construe the relevant statute, and thus the Court follows our standard practice. Indeed, the Court states that its construction is based on the statute's language: "The Texas Insurance Code is void of any language creating a cause of action for a racially disparate impact." ___ S.W.3d at ___. The Court's opinion could begin and end with those nineteen words, just as our Constitution, without the *Federalist Papers*, has a first and last word. We engage in a larger discourse, however, because it is useful to understand what options were available when our representatives in government enacted policy.[6]

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[5] We have relied on this language from *Rockwall* multiple times. *See Molinet v. Kimbrell*, 54 Tex. Sup. Ct. J. 491, 493(Jan. 21, 2011); *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010).

[6] And we engage in this wider discourse regularly. In 2010 alone, we repeatedly cited legislative history absent a finding of ambiguity. For example, in *Robinson v. Crown Cork & Seal Co. Inc.*, 54 Tex. Sup. Ct. J. 71, 72-90(Oct. 22, 2010), we delved deeply into legislative history despite finding no statutory ambiguity, looking even to floor statements and defeated amendments. Similarly, in *Klein v. Hernandez*, we cited legislative history, noting, without regard to questions of ambiguity, that it was a proper subject for consideration in statutory interpretation. *Klein*, 315 S.W.3d 1, 6 (Tex. 2010) ("The cardinal rule of statutory construction is to ascertain and give effect to the Legislature's intent. When determining that intent, the Code Construction Act further guides our analysis, listing a number of relevant factors including . . . legislative history . . . ." (citation omitted)). *See also Franka v. Velasquez*, 332 S.W.3d 367, 381 n.66 (Tex. 2011) (finding no statutory ambiguity, but citing and quoting at length Michael S. Hull, et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH. L. REV. 169, 290-93 (2005)); *Tex. Comptroller of Pub. Accounts v. Atty. Gen. of Tex.*, 54 Tex. Sup. Ct. J. 245, 255 (Dec. 3, 2010) (finding no ambiguity, but citing, for background and contextual information, OFFICE OF CONSUMER CREDIT, LEGISLATIVE REPORT REVIEWING

An appellate opinion is not a mere recitation of legal standards and conclusions. It *is* that, to be sure, but it is also, perhaps more importantly, one part of a dialogue between parties, citizens, legislators, and judges—a dialogue that provides a historical record of the relevant controversy. Even where our decision is purely legal, it begins with an account of the case's facts—the story of how the case arose, and how it came to be in front of us. Many times, we could give our conclusions of law without reference to any of this, but we choose to include this "extraneous" information because it gives context to our decision, making it more approachable to our readers and more easily integrated into our social fabric. In this sense, we as judges act as storytellers and historians.[7]

We tell these stories because doing so is crucial to our legitimacy. Our judgments carry with them a threat of state authority.[8] As justification for the coercive impulse behind our decisions, we

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IDENTITY THEFT AND SENATE BILL 473 (2004)); *Univ. of Tex. v. Herrera*, 322 S.W.3d 192, 198 n.39 (Tex. 2010) (citing legislative history to determine "whether Congress validly abrogated the State's immunity" because that inquiry is "mandated by controlling caselaw"); *City of Waco v. Kelley*, 309 S.W.3d 536, 548 (Tex. 2010) (despite not finding ambiguity, noting that "[n]othing 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 suspension"); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384-85 (Tex. 2010) (citing legislative history absent a finding of statutory ambiguity).

[7] *Cf.* OLIVER WENDELL HOLMES, THE COMMON LAW 5 (2005) ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."). *See also Interview by Bryan A. Garner with Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. LEGAL WRITING 6, 16 (2010) ("Every lawsuit is a story. I don't care if it's about a dry contract interpretation; you've got two people who want to accomplish something, and they're coming together—that's a story."), *available at* http://legaltimes.typepad.com/files/garner-transcripts-1.pdf (all Internet materials as visited May 25, 2011 and copy available in Clerk of Court's file).

[8] Max Weber famously described the state as "the form of human community that . . . lays claim to the monopoly of the legitimate physical violence within a particular territory." Max Weber, *Politics as a Vocation*, *in* THE VOCATION LECTURES 33 (David Owen & Tracy B. Strong, eds., Rodney Livingstone, trans. 2004). This principle also applies to the courts, the arm of the state tasked with interpreting the law. Our pronouncements are therefore law, and the law is enforced through the threat of the state's authority; thus, one scholar notes that "legal interpretation is as a practice incomplete without violence—because it depends upon the social practice of violence for its efficacy." Robert

give not only a conclusion but also a narrative,[9] by which we seek to legitimize our decision by placing it in historical context, demonstrating that it is consistent with our notions of justice—and, indeed, that it comports with the state of the law.

When used in this contextual manner, there is little reason to think legislative history inappropriate for citation.[10] An exhortation that extrinsic sources *never* be cited for *any* purpose gives such sources too much power and judges too little credit. A legislative report, for example, frequently will provide useful information about the period in which the statute was enacted.[11] It can

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M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1613 (1986). Indeed,

> Legal interpretation takes place in a field of pain and death. . . . Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.

Id. at 1601.

[9] *Cf.* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983) ("[L]aw and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral." (footnote omitted)).

[10] *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 38-39 (2006) ("Legislative history may or may not have any bearing on the outcome of the case, even when it is considered. . . . [I]n some circumstances even textualists themselves will look to legislative history. Of course they will not use it to try to construct the intent of a statute's authors. That is precisely the offense that textualism has been rallying against for decades. But textualists will sometimes use legislative history to gain a background understanding of the problems Congress was trying to address." (citations omitted)).

[11] For example, in *United States v. Fausto*, 484 U.S. 439, 444-45 (1988), Justice Scalia, writing for the Court, cited a Senate Report as evidence of a statute's purpose. *See also* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 42 (2008) ("Reference to legislative history [in judicial opinions] for background and historical context is commonplace."); CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 189 (2002) ("But other kinds of information may also be found in legislative history: factual information about the historical and political context in which the statute was debated and ultimately enacted, expert analysis about the issues implicated by the statute, and even contextual linguistic usage."); NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 48:1 (7th ed. 2007) ("Extrinsic aids consist of background information about circumstances which led to the enactment of a statute, events surrounding enactment, and developments pertinent to subsequent operation.").

give the reader some indication of *why* an issue was before the Legislature, and this information is useful as context even where it is irrelevant to the specific act of interpretation.[12] This "why" may not be important to the result, but it is important to readers—both lay and expert—and the Legislature,[13] all of whom look to our opinions as a complete and fair recording of the case's circumstances. Nothing we do is in a vacuum, and our readers care about more than mere results—background is given not because it controls, but because it contextualizes.[14] And, of course, we as judges frequently make decisions in light of other extraneous information that could, in some circumstances, bear on our decisionmaking. If we are trusted to make fair decisions despite recitations of sympathetic or compelling facts, why should we not also be trusted to give fair interpretations despite looking to legislative history for general background? There is no justification for placing one enormous, useless hole in our consideration of a case's history. That this information can be useful in a non-interpretive manner is well-demonstrated by the fact that all but one justice, aware of and in agreement with our methodological principles, nonetheless join

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[12] *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 431 (1989) ("Legislative history has in fact provided a valuable sense of context in a number of recent cases.").

[13] The Code Construction Act expressly gives courts permission to consider legislative history even in the absence of statutory ambiguity. TEX. GOV'T CODE § 311.023(3). Thus, a court never acts illegally when it considers legislative history, and to the extent that we believe that history usually should not be considered when construing a clear statute, that belief is the result of pragmatic considerations—a recognition that extrinsic aids will usually be a less reliable guide to legislative intent than the words the Legislature used. But a standard based on pragmatism does not benefit from pronouncements of universality.

[14] *See* MAMMEN, *supra* note 11, at 102 ("[D]iscovering the context in which the statute was enacted seems to be an integral part of the rationale for using extrinsic materials . . . ."); Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 979 (2005) ("[A]llowing courts to consult statutory history, legislative history, and administrative history . . . allows courts to contextualize statutory language."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 702 (1997) ("In their search for context, textualist judges routinely draw interpretive insights from sources outside the statutory text." (footnote omitted)).

today's opinion. This is not inconsistency; it is a recognition that commitment to the text is not a commitment to blind ourselves to otherwise useful information solely because of its source.

So what does the Court's survey of legislative history tell us today? The Court makes no attempt to construct the statute's meaning by looking at its history. Instead, it gives us information that, while not essential to our interpretation of the Insurance Code, is far from irrelevant: "The legislative history of the credit scoring bill and the arguments of its opponents indicates that the Texas Legislature was aware of the possibility of a disparate impact on racial minorities, yet did not expressly provide for a disparate impact claim as it did in the Texas Labor Code." ___ S.W.3d at ___. Thus, we are told that the statute says what it says because the Legislature intended that meaning.[15] This fact has no bearing on our interpretation, and we would interpret clear language the same regardless of whether or not the Legislature had given thought to the specific issue before us. The inclusion of this history gives notice to those who feel wronged by the statute. The remedy they seek requires engagement in the political process, on the legislative battlefield. Moreover, it gives

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[15] Even Justice Scalia would permit reference to legislative history when it is not used to give meaning to statutory terms. Thus, in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989), Justice Scalia concurred in the result but wrote separately to criticize the majority for consulting legislative history to "determin[e] what, precisely, the" text at issue meant. *Id.* at 528 (Scalia, J., concurring). But his opposition to legislative history was not without limits, and rather focused only on the link between extrinsic sources and construction:

> I think it entirely appropriate to consult all public materials, including the background of [the statute] and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of . . . .

Id. at 527; *see also* Sunstein, 103 HARV. L. REV. at 431 n.96 ("In *Bock* . . . *all* the members of the Court . . . agreed that the legislative history helped to reveal that literalism would lead to inadvertent absurdity. . . . Indeed, even Justice Scalia acknowledged the usefulness of history here . . . ."); Manning, 97 COLUM. L. REV. at 702 (noting that elements of Justice Scalia's interpretive philosophy "require[] judges to resort to extrinsic sources in determining statutory meaning"). Today, the Court engages in exactly this sort of use, consulting historical sources to show that the Legislature was aware of what it was doing.

those same aggrieved citizens some indication of *why* the Legislature would have made the choice that it did, allowing them to hone their advocacy. For those who support the statute, this language's relevance is much the same. This guidance will not harm democracy, our reputation, or the bar, and indeed it may help.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: May 27, 2011

IN THE SUPREME COURT OF TEXAS

444444444444
NO. 10-0245
444444444444

PATRICK O. OJO, ON BEHALF OF HIMSELF AND
ALL OTHERS SIMILARLY SITUATED, APPELLANT

v.

FARMERS GROUP, INC., FIRE UNDERWRITERS ASSOCIATION,
FIRE INSURANCE EXCHANGE, FARMERS UNDERWRITERS ASSOCIATION,
AND FARMERS INSURANCE EXCHANGE, APPELLEES

444444444444444444444444444444444444444444444444444
ON CERTIFIED QUESTION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
444444444444444444444444444444444444444444444444444

Argued October 14, 2010

JUSTICE WILLETT, concurring in part.

The Court is right that today's outcome is dictated by the Insurance Code as it is written. That being so, I wish the Court were more inhibited to do what we have prohibited—mine extratextual clues to illuminate an already-unambiguous statute. Text alone does not answer every question, but it answers many, including today's, as the Court concedes. I accept a cautious (and non-villainous) role for extrinsic aids, including certain legislative history, where a nebulous statute is susceptible to varying interpretations,[1] but our rule for unambiguous statutes is uncomplicated:

[1] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 & n.4 (Tex. 2006) ("[W]here enacted language is nebulous, we may cautiously consult legislative history to help divine legislative intent," but as a rule, "[i]f the text is unambiguous, we must take the Legislature at its word and not rummage around in legislative minutiae.").

"Where text is clear, text is determinative,"[2] making any foray into extratextual aids not just inadvisable but, as we have repeatedly derided it, "inappropriate."[3]

The Court nowhere states—or even suggests—the Insurance Code is ambiguous. But even assuming *arguendo* it is, "thus justifying cautious use of secondary construction aids,"[4] the Court beckons some strange ones, including some we have consistently decried as patently unreliable (like failed bills in a subsequent Legislature). The Court's detour may be well meaning, but it is not well supported, and I regret its "disparate impact" on our interpretive precedent. I would hold to our holdings—when the Legislature speaks plainly, the judiciary should as well. In other words, and applying a rule less prudish than prudent, if it is not necessary to look further, it is necessary not to look further. An unembellished interpretation of an unambiguous statute can be spare without being sparse. For these reasons, I agree with all but Part III.C of today's opinion.

As for CHIEF JUSTICE JEFFERSON's concurrence, I confess it vexes me. It at once espouses methodological stare decisis, that our interpretive rules merit precedential effect, yet declines to embrace it. It reaffirms our concretized rule that "extrinsic aids are inappropriate to construe an unambiguous statute," yet allows legislative history a "general background" and "non-interpretive" role.[5] Boiled down, legislative materials *cannot* be used to construe but *can* be used to contextualize.

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[2] *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (citations omitted).

[3] *Molinet v. Kimbrell*, 2011 WL 182230, at *6 (Tex. Jan. 21, 2011)(citations omitted); *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010) (citation omitted); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008) (citations omitted); *Ex parte Roloff*, 510 S.W.2d 913, 915 (Tex. 1974) (citation omitted); *Fox v. Burgess*, 302 S.W.2d 405, 409 (Tex. 1957).

[4] *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 868 n.5 (Tex. 2009).

[5] __ S.W.3d at __ (internal quotation marks omitted).

This distinction strikes me as gossamer-thin (and is notably undrawn by the Court itself).[6] Given that context is baked into construction, I cannot easily discern at what epochal point "contextualizing" (permitted) ends and "construing" (prohibited) begins. In my view, such opaque differentiations incautiously invite semantic gamesmanship (by litigants, legislators, and judges alike), and I am concerned that one judge's context is another judge's pretext. One mystifying (and hazardous) byproduct of the proposed context/construction distinction: Judges using legislative history to "contextualize" apparently have unfettered license to rely on materials (like subsequent failed bills) that precedent roundly condemns as untrustworthy. How can something we have discarded as absolutely unreliable suddenly rate absolute reliance? And how exactly are readers, absent an express disclaimer, to divine the true interpretive basis of a court's decision? The concurrence depicts judges as "storytellers,"[7] but given that context and construction are inextricably fused, how can one know when a court is telling a story versus selling a story?

I. The Court Rightly Holds the Statute is Unambiguous, Making it "Inappropriate" to Rummage Around in Legislative Minutiae.

The Court's textual analysis is clear, careful, and convincing. The crux is whether scoring is based on race, not bears on race.

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[6] It brings to mind Chico Marx's classic quip, "I wasn't kissing her, I was just whispering in her mouth." THE OXFORD DICTIONARY OF QUOTATIONS 451 (Angela Partington ed., 4th ed. 1992).

[7] ___ S.W.3d at ___.

Beyond the Insurance Code's use of "based on"[8] and "because of"[9] is its conspicuous non-use of disparate-impact language. I say conspicuous because at least two other Texas antidiscrimination laws predating these Insurance Code provisions—one in the Labor Code and one in the Government Code—expressly authorize disparate-impact liability in other areas.[10] The Legislature knows well how to permit such claims, and the inclusion in those laws suggests something about its exclusion in this law: It was intentional. We should generally presume the Legislature "acts intentionally and purposely in the disparate inclusion or exclusion" of particular statutory language,[11] and it would exceed our judicial function "to eliminate clearly expressed inconsistency of policy" when an unambiguous statute collides with policies adopted in related statutes.[12] Unlike other Texas laws, the textual focus of the Insurance Code is solely motivative, not resultive, asking if credit scoring purposely draws racial lines or merely falls along such lines. In my view that ends the inquiry, textually and *con*textually.

Instead of calling it a day, however, the Court swerves into the flotsam and jetsam of legislative history. This roundabout detour is a little jarring given our forceful pronouncements over the years that unambiguous text equals dispositive text. By and large, this is a text-centric Court. Less than eight months ago, and 9-0, we cemented our commitment to determinacy in *Texas Lottery*

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[8] TEX. INS. CODE § 560.002(c)(3)(C).

[9] *Id*. § 544.002(a).

[10] TEX. LAB. CODE § 21.122(a)(1); TEX. GOV'T CODE § 419.103(b).

[11] *Russello v. United States*, 464 U.S. 16, 23 (1983).

[12] *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991).

Commission v. First State Bank of DeQueen, holding that extrinsic sources have no place when unambiguous text yields a non-absurd result.[13] This point about ambiguity is mighty unambiguous, and mighty settled given our repeated reaffirmations in 2006,[14] 2007,[15] 2008,[16] 2009,[17] 2010,[18] and 2011.[19] As we held in *DeQueen*, materials outside the statute matter little—actually, not at all—when a statute itself decides the case. I pray *DeQueen* has not been dethroned.[20]

This Court has not adopted an overarching interpretive methodology to govern all statutory-interpretation cases, but we have agreed on one elemental rule: Definitive text equals determinative text, the singular index of legislative will. In other words, ambiguity is a prerequisite for wielding the extratextual tools listed in the Code Construction Act. A mere 84 days ago, we held that "[w]hen

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[13] 325 S.W.3d at 637 ("When a statute's language is clear and unambiguous, it is *inappropriate* to resort to rules of construction or extrinsic aids to construe the language." (emphasis added) (quoting *Hughes*, 246 S.W.3d at 626)).

[14] *Sheshunoff*, 209 S.W.3d at 651–52 ("[W]hen a statute's words are unambiguous and yield a single inescapable interpretation, the judge's inquiry is at an end." (citation omitted)).

[15] *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." (citation omitted)).

[16] *Hughes*, 246 S.W.3d at 626 ("When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language.").

[17] *Entergy*, 282 S.W.3d at 437 ("When text is clear, text is determinative of [legislative] intent. This general rule applies unless enforcing the plain language of the statute as written would produce absurd results." (citations omitted)).

[18] *DeQueen*, 325 S.W.3d at 637 ("[B]ecause the Legislature expressly and unambiguously set out the method for resolving conflicts between the UCC and other statutes, it would be improper to go outside the language of the statute and use canons of construction to resolve the question.").

[19] *Molinet v. Kimbrell*, 2011 WL 182230, at *6 (Tex. Jan. 21, 2011) ("When a statute's language is clear and unambiguous it is inappropriate to resort to the rules of construction or extrinsic aids to construe the language." (quotation marks omitted)).

[20] A needed rule bites the dust.

a statute's language is nebulous and '[t]he point of disagreement lies between two plausible interpretations,' we resort to additional construction aids to divine the Legislature's intent"—and *only then* did we look to the Code Construction Act.[21] The precedential takeaway is that while we sometimes consult the Act's permissive tools, we do so only on tip-toe and only when faced with "unclear" language.[22] The springboard for diving into legislative history is ambiguity.

Our cases steadfastly decline the interpretive free-for-all that occurs when courts peek behind plain language. Instead we have opted for a simpler and less-manipulable principle: Clarity means finality, and judges should read the laws that govern our lives in a manner faithful to what those laws actually say. In other words, the Code Construction Act may provide us with a buffet of interpretive options. But smartly, we have been picky eaters. The Act's language is permissive: We *may* consider outside aids even absent ambiguity. The Court's rule, however, has been mandatory: We *shall not*, and doing so is forbidden.

Regrettably, today's departure from interpretive precedent is not limited to legislative history. The Court also considers an Insurance Commissioner report that while credit scoring, like all factors used to price insurance, might impose a disproportionate impact, it is not unfairly or intentionally discriminatory under the law. The Court claims to cite the Commissioner's 2005 report "more for evidence of the Texas Legislature's awareness of potential disparate impacts" than for the

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[21] *In re Smith*, 333 S.W.3d 582, 588 (Tex. 2011) (citations omitted). Another recent case further cemented our view that, notwithstanding the Act's open-ended language, we require an ambiguity predicate: "*If* we assume that both of [two] interpretations are reasonable . . . ." *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 356 (Tex. 2009) (emphasis added).

[22] *Pochucha*, 290 S.W.3d at 868 n.5 ("While the language in today's statute is somewhat unclear, thus justifying cautious use of secondary construction aids, we recently reaffirmed that such aids 'cannot override a statute's plain words.'" (citation omitted)).

Commissioner's reassuring construction that disparate-impact claims are not cognizable under the Insurance Code.[23] Three brief responses: (1) the Court justifies relying on the report by citing the Code *Construction* Act, which invites consideration of "administrative *construction* of the statute" in order "to determine the Legislature's intent";[24] (2) the Legislature was already mindful of disparate impact when it first authorized credit scoring two years earlier, according to the Court's own reliance on a 2003 House Research Organization bill analysis and also the Legislature's 2003 request for an interim study that would examine disparate impact in credit scoring;[25] and in any event (3) any renewed legislative "awareness" in 2005 (when two bills failed to ban credit scoring outright) is wholly irrelevant to what an earlier Legislature with different members intended in 2003 when it authorized credit scoring. It seems to me the Court discusses the report "more" because the Commissioner's no-liability construction confirms the Court's no-liability construction, rather than as a multi-page prelude to a single sentence regarding two bills unenacted by a subsequent Legislature.

Our reluctance to wield the Code Construction Act's extrinsic aids absent statutory ambiguity extends beyond legislative materials. The Act does invite judges to consider the "administrative construction of the statute" even if the statute by its terms is crystal clear. "Thanks but no thanks" has been our steadfast reply. This Court does not consider agency interpretations of unambiguous

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[23] __ S.W.3d at __.

[24] *See* TEX. GOV'T CODE § 311.023(6) (emphasis added).

[25] __ S.W.3d at __ (citing to House Research Org., Bill Analysis, Tex. S.B. 14, 78th Leg., R.S., 20 (May 21, 2003) and Act of June 2, 2003, 78th Leg., R.S., ch. 201, § 3.01, sec. 15(a), (b)(1), (b)(5)–(6), 2003 Tex. Gen. Laws 916, 920–21 (expired Mar. 1, 2005) (previously located at TEX. INS. CODE ANN. art. 21.49-2U, § 15 (West Supp. 2003))).

statutes. A generation ago, we articulated that "[i]f 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. If, on the other hand, the meaning of the provision be doubtful or ambiguous, the construction placed upon a statutory provision by the agency charged with its administration is entitled to weight."[26] Fast forward to just a few weeks ago, when we reaffirmed that principle, repeating that before we even *consider* the reasonableness of an agency's interpretation, much less grant it *deference*, "the [statutory] language at issue must be ambiguous; an agency's opinion cannot change plain language."[27] If there is no ambiguity, "that is the end of the inquiry."[28] Today, with whiplash-inducing speed, the Court says the opposite, that even *absent* ambiguity, it will consider an agency's construction of the statute—and not merely as noninterpretive "background," but rather, as the Court declares, "to determine the Legislature's intent."[29]

My respectful plea is for the Court to bring more predictability to its bread-and-butter work of statutory interpretation. As this case teaches, it is one thing to *state* consistent rules; it is another to *stick* to them. What are lower-court judges and litigants to do when early-2011's interpretive consensus suddenly becomes mid-2011's interpretive conflict? How are everyday Texans to order

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[26] *Calvert v. Kadane*, 427 S.W.2d 605, 608 (Tex. 1968) (citations omitted).

[27] *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 2011 WL 836827, at *4 (Tex. Mar. 11, 2011) (quoting *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006)).

[28] *Id.* at *3 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

[29] __ S.W.3d at __. This approach seems flatly at odds with the concurrence's embrace of our general rule that "extrinsic aids are inappropriate 'to construe' an unambiguous statute." *Id.* at __. *See also Citizens for a Safe Future & Clean Water*, 2011 WL 836827, at *12 (Tex. Mar. 11, 2011) (Jefferson, C.J., concurring) ("We do not defer to agency interpretations of unambiguous statutes.").

their affairs with certainty if the methodological goalposts shift to-and-fro from case to case? Interpretive clarity advances both stability and transparency, essential virtues that benefit legislators who draft statutes, agencies that implement them, courts that interpret them, and citizens who live under them.

II. In Today's Age of "Legisprudence"—Judges Construing Statutory Texts—Interpretive Consistency is Vital.

Methodology matters. The lion's share of modern-day appellate judging is "legisprudence"—interpreting statutes. Day by day, the universe of free-form, common-law judging shrinks, meaning the bulk of this Court's time is spent deciding what the Legislature's words mean. Hence the tumultuous statutory-interpretation wars, since *what* judges decide is often shaped by *how* judges decide. I believe our legal system, which erects a framework for broader society, serves the public best when it provides clear guidance, consistently applied.

Predictability matters. Vacillation occasioned by the absence of set interpretive rules (or variance from them) breeds confusion. When we say we are taking the Legislature at its word, Texans are entitled to take us at ours. Are our oft-stated rules of statutory interpretation fixed or are they fluid? Discarding our simple-but-settled rule barring secondary aids absent ambiguity raises the question of when exactly *does* the Court deem it appropriate to do what we have repeatedly branded as "inappropriate." Upon what basis will the Court determine that extratextual tools have a legitimate role even when the controlling statute is clear on its face? Honoring set interpretive rules recognizes that society operates "in the shadow of the law." Texans embroiled in legal disputes (or trying to avoid them) doubtless appreciate interpretive determinacy, which lets everyone know

where the Court stands—everyday Texans looking to conduct business, lawyers looking to advise them accurately, courts looking to decide cases consistently according to clear guidance, and lawmakers looking to draft laws with assurance of how they will be interpreted.

The Court holds, rightly, that the Insurance Code as written decides this case. That unambiguity pulls the plug on consulting legislative history, which is either impermissible (if used to affect meaning) or extraneous (if not used to affect meaning). Our precedent simply does not allow the Court to have it both ways.

III. Even if the Insurance Code *Were* Ambiguous, the Court Relies on Some Legislative Materials We Have Rejected as Unreliable.

Even if one reads the Insurance Code as nebulous, thus inviting guarded consideration of extrinsic materials, some of what the Court considers is troubling. Legislative materials are not created equal; some are more authoritative than others. We have not adopted an overarching legislative-history hierarchy to help separate wheat from chaff and guide our wary and infrequent reliance on such materials.[30] Even so, the Court errs in consulting two items that rank notoriously

[30] Once ambiguity opens the door to guarded use of legislative history, having a principled rank-order hierarchy strikes me as worthwhile. What materials are most authoritative? We have never tackled this issue comprehensively, but given the often contradictory content within legislative history, plus the propensity of lawyers to stress only those snippets that favor their side, it seems vital that courts set (and adhere to) standards that minimize contrivance and maximize reliability. Over the years a few judges and scholars have proposed various hierarchies, an exercise that depends at least in part upon a source's accessibility, relevance, and reliability. *See generally* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 295–307 (2000) [hereinafter "ESKRIDGE, AN INTRODUCTION TO STATUTORY INTERPRETATION"]; ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 36–41 (1997); FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 64–67 (2009) [hereinafter "CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION"]; Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 274–77 (2000); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (1987). It is important to note that such rank-ordering proposals all focus on federal and not state legislation. And while the proposals share some points of agreement—the items they deem most probative and least probative—they diverge somewhat on the wide middle of the reliability spectrum. All observers rank congressional conference-committee reports (a joint House-Senate explanation of the final compromise bill) the highest in terms of

low on the reliability scale: (1) the fact that two bills banning credit scoring died in committee,[31] and (2) a House Research Organization bill analysis summarizing the views of unidentified opponents of the credit-scoring bill.[32]

Most troubling is the Court's "perilous"[33] reliance on two failed bills in 2005 that would have banned credit scoring in pricing certain lines of insurance.[34] The Court states that given the bills' failure, it "can only conclude" that the Legislature did not intend to allow disparate-impact liability.[35] That is not so. A review of precedent "can only conclude" that interpreting language passed in 2003 through the prism of language unpassed in 2005 enjoys scant legal support.

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persuasiveness. *See, e.g.*, CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 64. However, there is no comparable document in Texas legislative practice. Our Legislature's version of a conference-committee report merely indicates section-by-section which version, House or Senate, the conference committee adopted. Unlike a federal conference-committee report, there is no explanatory commentary of what the bill intends to do. Reliability falls off sharply with items like statements from committee and floor proceedings, when one begins to fret more about attempts "to manipulate the statute," *id*. at 67, and suspect that material "might have been strategically planted in the record" to give the statute a favored gloss, ESKRIDGE, AN INTRODUCTION TO STATUTORY INTERPRETATION 304. Finally, most everyone agrees that one hits rock bottom on the reliability scale when one consider failed bills, the views of nonlegislator opponents/proponents, and post-enactment commentary.

[31] __ S.W.3d at __. The Court also cites to the Legislature's recodification of portions of the Insurance Code, including what is now Section 559.051, which, as the Court notes, "made no relevant changes to the Code." *Id*. at __. Variations in enacted text can lend helpful interpretive context, and nobody should quarrel with examining how an enacted statute changes over time. Such variations lend helpful interpretive context as they boast the imprimatur of the Legislature as a whole. *See Entergy*, 282 S.W.3d at 443 ("We give weight to the deletion of [an enacted] phrase . . . since we presume that deletions are intentional and that lawmakers enact statutes with complete knowledge of existing law.") (citation omitted). Put differently, this is the history of the legislation, not legislative history.

[32] __ S.W.3d at __.

[33] *District of Columbia v. Heller*, 554 U.S. 570, 590 (2008).

[34] __ S.W.3d at __ (citing Tex. S.B. 167, 79th Leg., R.S. (2005) and Tex. H.B. 23, 79th Leg., R.S. (2005)).

[35] __ S.W.3d at __.

First, "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress."[36] The United States Supreme Court reiterated this wariness just three months ago: "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."[37] And such reliance is "particularly dangerous . . . when it concerns, as it does here, a proposal that does not become law."[38]

The operative judicial inquiry is what did the Legislature *in 2003* mean by the credit-scoring language it voted into law, not what legislators *in 2005* thought their predecessors meant (or should have meant).[39] Thus, contrary to the Court's description, the two failed bills, as a factual matter, are undeniably not part of "[t]he legislative history of the credit scoring bill" from two years earlier.[40] Rather, they are akin to post-hoc evidence seeking to color our interpretation of earlier-passed legislation. Importantly, we have *never* permitted such items to enter our analysis,[41] even in what the concurrence would consider a "non-interpretive" and context-providing fashion. I would not

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[36] *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

[37] *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011).

[38] *LTV Corp.*, 496 U.S. at 650.

[39] *See Fogarty v. United States*, 340 U.S. 8, 14 (1950) ("If there is anything in these subsequent events at odds with our finding of the meaning of § 3, it would not supplant the contemporaneous intent of the Congress which enacted the Lucas Act.").

[40] __ S.W.3d at __.

[41] *E.g.*, *Entergy*, 282 S.W.3d at 443–44 ("Just as we decline to consider failed attempts to pass legislation, we likewise decline consideration of lawmakers' post-hoc statements as to what statute means.").

second-guess the settled wisdom that allowing bills filed in a subsequent legislative session to affect the meaning of an earlier-passed statute "would set a dangerous precedent."[42]

Second, the bills (identically worded companion bills) in no way *proposed* disparate-impact liability; rather they proposed to ban credit scoring outright. The bills never mentioned disparate impact one way or the other, much less expressly authorized such claims as do the Labor and Government Codes. Our unbroken precedent for 40-plus years (and United States Supreme Court precedent for just as long) rejects reliance on failed bills.[43] As recently as 2009, we reaffirmed that "we attach no controlling significance to the Legislature's failure to enact [legislation]."[44] A generation earlier, we recognized an age-old legislative truism, equally true today, that bills often die "for reasons wholly unrelated to the Legislature's view of what the original statute does or does not mean."[45] Legislative inaction, we thus held, "would afford a dubious distinction for drawing an inference of [l]egislative intent one way or the other."[46] Our unwavering position since then has been that divining legislative intent from dead bills requires naked "inference" involving "little more than conjecture."[47] For even longer, the United States Supreme Court has reiterated its "reluctan[ce] to

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[42] *Bruesewitz*, 131 S.Ct. at 1082.

[43] *See, e.g.*, *Tex. Emp't Comm'n v. Holberg*, 440 S.W.2d 38, 42 (Tex. 1969); *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988); *City of Milwaukee v. Illinois*, 451 U.S. 304, 332 n.24 (1981); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 33 (1979); *American Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416-418 (1967).

[44] *Entergy*, 282 S.W.3d at 443 (quoting *Holberg*, 440 S.W.2d at 42) (quotation marks omitted).

[45] *Holberg*, 440 S.W.2d at 42.

[46] *Id*.

[47] *See Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex. 1983).

draw inferences from Congress' failure to act."[48] Indeed, because legislative inaction is susceptible of multiple interpretations, even High Court decisions that have mined other types of legislative history have, in the same opinion, frowned upon attaching importance to failed bills, reasoning that "unsuccessful attempts at legislation are not the best of guides to legislative intent."[49] Most recently, the Court warned "[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process."[50] As a matter of law and logic, that peril seems even graver in this case, where the Court looks not to provisions deleted while the credit-scoring bill itself was being drafted, but rather two bills that failed years later. The Court offers no reason why such "evidence," rejected as untrustworthy in 2009, is suddenly trustworthy in 2011.

Of this there can be no doubt: Bills die in the Texas Legislature for reasons both innumerable and inscrutable—"there are many reasons for saying no."[51] Lending any weight to the fact that two bills "died in committee" two years later contravenes our unbroken precedent and also potentially pivots on something perhaps nonpivotal. It may be much ado about nothing, or much ado about something, but that something can never be known. It is less legislative history than legislative mystery.

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[48] *Brecht*, 507 U.S. at 632 (quoting *Schneidewind*, 485 U.S. at 306).

[49] *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 381 n.11 (1969).

[50] *Entergy*, 282 S.W.3d at 443 (quoting *Heller*, 554 U.S. at 590) (quotation marks omitted).

[51] REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 160 (1975). A bill may boast strong bipartisan and bicameral support yet fail on a technical parliamentary point of order. It may be squashed by a contrary committee chair. It may die a mysterious death in the House Calendars Committee. It may fall prey to rigid timetable deadlines. It may be held hostage as leverage to affect other legislation. It may have 20 votes in the Senate but not the traditional 21. It may get caught in inter-member crossfire. All to say, a bill has many off-ramps.

Also worrisome is the Court's reliance on a House Research Organization bill analysis and its summary of the views of the credit-scoring bill's unidentified detractors. HRO is a nonpartisan and independent department of the House with a well-earned reputation for impartiality and professionalism.[52] It provides a wide range of information on policy issues facing state government, and its myriad reports are undoubtedly helpful to individual legislators and their staff. But as HRO itself acknowledges, its publications "are not an official part of the legislative process nor an official expression of the views of the Texas House of Representatives."[53] By contrast, bill analyses prepared by a legislative committee are attributable to that committee (though often authored by legislative staff or outside interests who are promoting the bill). The bill analyses prepared by HRO and by legislative committees differ in timing, authorship, audience, content, and purpose, and only committee bill analyses are considered part of the formal legislative process.

In any event, the statements of bill opponents, like failed bills, are discredited indicators of statutory meaning. "Courts almost never rely on representations about legislation by opponents, who have every incentive to misstate the bill's effect."[54] Justice Frankfurter 63 years ago recognized the "common practice" (even then) by those "with their own axes to grind" manipulating the legislative record in order to assure "desired glosses upon innocent-looking legislation."[55] That same year,

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[52] House Research Organization, Texas House of Representatives, *About the House Research Organization*, available at http://www.hro.house.state.tx.us/about.aspx (last visited May 26, 2011) [hereinafter "House Research Organization, *About the House Research Organization*"].

[53] *Id.*

[54] ESKRIDGE, AN INTRODUCTION TO STATUTORY INTERPRETATION 304.

[55] *Shapiro v. United States*, 335 U.S. 1, 48–49 (1948) (Frankfurter, J., dissenting).

Justice Jackson similarly observed that "[i]t is a poor cause that cannot find some plausible support in legislative history."[56] That out-and-out untrustworthiness explains why, in the hierarchy of legislative material, "statements by opponents are among the least authoritative, as they are meant to defeat the bill in question and do not represent the considered and collective understanding of those . . . who passed the bill into law."[57] *Bryan v. United States*[58] is instructive on this point. In that case involving an ambiguous statute, the United States Supreme Court consulted selected bits of legislative history but drew a firm line at considering statements by bill opponents. The Court explained, "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation,"[59] because, "[i]n their zeal to defeat a bill, they understandably tend to overstate its reach."[60] It is revealing that even when courts delve into the recesses of legislative history, most pay no attention to bill opponents given "the well-recognized phenomenon of deliberate manipulation of legislative history."[61] And of course the more judges rely on it, the less reliable it becomes, as "technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative

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[56] Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1948).

[57] *Natural Res. Def. Council v. E.P.A.*, 526 F.3d 591, 605 (9th Cir. 2008) (citation and quotation marks omitted). *See also* CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 66 ("This legislative history is generally considered less reliable, because opponents may have an incentive to distort the bill to make it appear unreasonable, in order to gain allies for its rejection.").

[58] 524 U.S. 184 (1998).

[59] *Id.* at 196 (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)).

[60] *Id*. (quoting *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964)).

[61] *F.E.C v. Rose*, 806 F.2d 1081, 1090 (D.C. Cir. 1986).

history so that the Congress will appear to embrace their particular view in a given statute."[62] With good reason the laws of evidence are wary of records that are prone to being corrupted in order to posture for eventual litigation—"so are legislative histories, which often have become seedbeds for interested parties to plant pre-litigation amicus briefs."[63]

These doubts regarding authoritativeness are especially well-warranted when one understands the nature and preparation of HRO bill analyses, which, as HRO itself acknowledges, "are not an official part of the legislative process."[64] When a bill clears its House committee and heads for the floor, HRO prepares a bill analysis that, in part, summarizes the views of supporters and opponents. But importantly, when an HRO bill analysis speaks of "opponents," it is referring principally to *non*legislative opponents, the outside lobbyists and other third-party advocacy interests—plus everyday civic-minded Texans—who have weighed in for, on, or against a bill. HRO staff may listen to audio (or watch video) of the committee hearing, but if time is short they may not. HRO will contact those who registered at the hearing and solicit their two-cents' worth. But if a committee hearing is sparsely attended, HRO will reach out to a range of other activists and interest groups it surmises might have an interest in the bill, whether or not they ever formally weighed in. HRO will also gather online and other written advocacy materials from those who want to influence the bill's fate.

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[62] Starr, 1987 DUKE L.J. at 377.

[63] Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1019 (1992).

[64] House Research Organization, *About the House Research Organization*.

Finally, the Court's statement that the opponents' views indicate "that the Texas Legislature was aware of the possibility of a disparate impact"[65] is factually untrue. HRO is a House entity that prepares information for House members, just as the Senate Research Center provides information for senators. The Court indulges a naked inference that the Legislature as a whole had studied the HRO's summary of what certain unidentified opponents, who may not have even attended the committee hearing, had to say.

Unsuccessful bills and unsuccessful bill opponents—"I can think of no better example of legislative history that is unedifying and unilluminating."[66] I side with Justice Jackson, who believed, consistent with our precedent, that resort to legislative history "is only justified where the face of the Act is inescapably ambiguous."[67] As he elegantly explained: "Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are."[68] And even if citizens could afford the "cost of repeatedly examining the whole congressional history,"[69] they still "would not know any way of anticipating what would impress enough members of the Court to be controlling."[70] Thus, to allow legislative history to modify statutory meaning "is

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[65] __ S.W.3d at __.

[66] *Schwegmann Bros.*, 341 U.S. at 397 (Jackson, J., concurring).

[67] *Id*. at 395.

[68] *Id*. at 396.

[69] *Id*.

[70] *Id*.

to make the law inaccessible to a large part of the country."[71] I would not inflict another layer of expense and complexity where the Legislature has already spoken plainly.

IV. It is Perplexing Why The Court Abruptly Changes Interpretive Course in This Case.

Given our oft-professed allegiance to unambiguous language, it is difficult to understand the Court's decision to peek behind ambiguity-free text without asking a simple question: Why? What is distinctive about this case that warrants departing from our firm—and recently reaffirmed—maxim that extrinsic aids are "inappropriate" where the statute itself decides the case?

It is true that this case involves a sensitive public-policy matter, but we have not to this point altered our ordinary interpretive rules for controversial cases. Indeed, few cases since I joined the Court have stoked more rancorous debate than *Entergy Gulf States, Inc. v. Summers*,[72] our 2009 workers-compensation decision. There, Summers and several amici (including some legislators) implored the Court to embellish its analysis "by going beyond the statutory text and looking to extrinsic aides [sic] such as the Act's legislative history."[73] Given the Act's textual clarity, we declined, instead repeating our time-honored rule: "[W]e have been clear that we do not resort to such extrinsic aides [sic] unless the plain language is ambiguous."[74] As shown by *Entergy*, for all

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[71] *Id*. at 397.

[72] 282 S.W.3d 433 (Tex. 2009).

[73] *Id*. at 442.

[74] *Id*. (citing *Nash*, 220 S.W.3d at 917, and *Sheshunoff*, 209 S.W.3d at 652 n.4). The Court in *Entergy* did include a brief discussion of so-called legislative history but only after a threshold assumption of statutory ambiguity. And even then, we rejected outright any consideration of failed legislation (and of lawmakers' post-hoc statements). *Id*. at 442–44. Instead we credited only how enacted language had changed over time, which obviously is not "legislative history" but "the legislation's history." *Id*. at 443.

its sound and fury, sensitive cases have not desensitized us to our prior holdings. Even then, we chose methodological consistency over the view that certain controversies merit scrapping our settled rule that "[w]here text is clear, text is determinative,"[75] meaning "the judge's inquiry is at an end."[76]

So I remain flummoxed as to why the Court, which declares this case can be decided under the Insurance Code alone, instead blazes a new interpretive trail. Whatever the reason—and I hope it is not subject-matter sensitivity, as even disparate-impact cases require non-disparate treatment—differentiated standards no doubt confound litigants embroiled in other disputes who expect their cases will be reviewed according to consistent rules, consistently applied. Every case that arrives at this Court is consequential; every case deserves our most painstaking study; and every litigant must have confidence that his legal questions are being answered under unvarying "rule of law" standards from case to case.

Jurists of goodwill have diverse views regarding legislative history—when to use it and how to use it. And while I side with the textualists, I well understand the counterarguments. My concern today is focused narrowly on cases where the Legislature's words decide the case all by themselves. And my regret is the Court's abandonment of its text-minded moorings absent any showing, or even assumption, of textual ambiguity. Because the Insurance Code is clear, particularly when juxtaposed against the Labor and Government Codes, I would not look beyond it. If this statute *were* unclear, I would consider a sensible legislative-history hierarchy that, in part, would reject sources we have repeatedly decried as unreliable.

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[75] *Id. at* 437 (citations omitted).

[76] *Sheshunoff*, 209 S.W.3d at 652.

V. The Concurrence Rests Upon a Meringue-Like Distinction, That Context Can Be Divorced From Construction.

The concurrence labels as its "animating principle" the rejection of any interpretive role for legislative history when statutory text is clear.[77] That principle, one I welcome, stands in tension with the Code Construction Act, which invites courts to consult legislative history "[i]n *construing* a statute" and to do so "whether or not the statute is considered ambiguous on its face."[78] As I read CHIEF JUSTICE JEFFERSON's concurrence, Texas courts should steadfastly decline the Act's open-ended invitation to utilize extrinsic aids when construing unambiguous statutes. So far, so good. But then comes a potentially rule-swallowing exception: Such material can play a "non-interpretive" role, like providing context or "general background." This is a puzzling distinction, and one that handily shoehorns forbidden material into the mix.

First, in another case decided today, we reaffirm the truism that context is inseparable from construction: "Language cannot be interpreted apart from context."[79] They are indivisible, an elemental point applicable not just to legal language but to *all* language. A statute's words always reign supreme, but statutory meaning is not always found solely in strict literal parsing; it turns wholly on context. Modern textualism is not allergic to context, and I have dissented when I thought the Court was taking literalism too literally and adopting a wooden construction foreclosed by statutory context: "The import of language, plain or not, must be drawn from the surrounding

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[77] __ S.W.3d at __.

[78] TEX. GOV'T CODE § 311.023(3) (emphasis added).

[79] *TGS-NOPEC Geophysical Co. v. Combs*, ___ S.W.3d ___, ___ (Tex. 2011).

context," a self-evident rule rooted in common sense, Texas statutory law, and caselaw from both this Court and the United States Supreme Court.[80] Indeed, even the same word can mean diametrically opposite things depending on the context.[81] As Justice Scalia, textualism's staunchest and most prominent proponent, puts it, "In textual interpretation, context is everything."[82] That being true, a judge reading a statute must always consider "the surrounding statutory landscape"[83] and be mindful of context—but more specifically, *interpretive* context.

Granted, jurists of divergent philosophical stripes might disagree on the best *elements* of context and where they lead, but modern textualists agree that language cannot be isolated from its surrounding context. Indeed, even the word "context" must be read in context. It means one thing

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[80] *Hughes*, 246 S.W.3d at 632–33 & nn.6–9 (Willett, J., dissenting) (citations omitted).

[81] *Id*. at 632 n.6 (noting that the word "cleave" can mean either "to adhere" or "to divide").

[82] ANTONIN SCALIA, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 37 (Amy Gutmann ed., 1997) [hereinafter "SCALIA, A MATTER OF INTERPRETATION"]. The concurrence notes two occasions when Justice Scalia himself cited to legislative history. True enough, but both times reflect settled, if wary, use of legislative history by textualist judges who ordinarily eschew such material. Justice Scalia looked at legislative history (1) where literalism would inflict absurdity, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring), and (2) to resolve an ambiguity arising from a complex regime of interrelated statutes enacted over time—but importantly, he did so only after independently verifying a committee report's accuracy and persuasiveness through other, non-legislative history sources, *United States v. Fausto*, 484 U.S. 439, 444–45 (1998). The concurrence also tries to draw support from Professor Manning's observation that textualist judges, including Justice Scalia, sometimes consult extrinsic sources in their search for context. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 702 (1997). Yes, but the article must be read, like all things, in context. The article was speaking here of using "non-legislative history" sources to assign meaning to codified terms of art. Nobody disputes that "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947). But Professor Manning was referring to extrinsic sources beyond legislative history, like Justice Scalia's use of legal and general-usage dictionaries, treatises, and long-repealed statutes to construe a term embedded with technical meaning, *see Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting).

[83] *Presidio Ind. Sch. Dist. v. Scott*, 309 S.W.3d 927, 929–30 (Tex. 2010) ("Before parsing the language of § 21.307(a), a brief survey of the surrounding statutory landscape provides a helpful context for that section's use of the term 'party' . . . .").

when detailing a case's background facts and how it came before us, but something else when ascertaining textual meaning and explaining to readers how we reasoned our way to a conclusion. When construing even a facially clear statute that seems intuitively obvious, we may well look to related legislation plus other extra-statutory contextual cues to glean the text's accepted semantic import (grammatical conventions, treatises, dictionaries, specialized legal or technical usage, colloquial nuances, judicial interpretations from other jurisdictions, and so forth).[84] In other words, we tackle it much like the Court does today, minus the jolting digression into legislative history. That is, we seek *interpretive* context, a reading rooted in textual and structural evidence. So when we are construing statutes like the credit-scoring bill, we give precedence to semantic context (how a skilled user of words would read the statute); we do not consider or second-guess policy context (how well those words achieve the statute's apparent policy goals).[85] This approach, our precedent teaches, is more faithful to the Legislature's policymaking supremacy and more respectful of the complex and grueling hurdles that bills (and the compromises embedded within them) must scale to become law. In this case, as the Court ably explains, semantic context points to a clear, and therefore determinative, meaning. I would stop there.

Second, the Court nowhere adopts the context/construction distinction posited by the concurrence. CHIEF JUSTICE JEFFERSON assures readers that the Court "makes no attempt to

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[84] *See, e.g.*, *Molinet v. Kimbrell*, 2011 WL 182230, at *6–7 (Tex. Jan. 21, 2011) (looking to other semantic cues but declining to excavate legislative history when divining relevant statutory context); *DeQueen*, 325 S.W.3d at 635–37 (same); *Taylor v. Firemen's & Policemen's Civil Serv. Comm'n of Lubbock*, 616 S.W.2d 187, 189–90 (Tex. 1981) (same).

[85] *See* John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70 (2006).

construct the statute's meaning by looking at its history," and none of the cited tidbits are being used "to construe" the Insurance Code, "thus the Court follows our standard practice."[86] The Court itself, though, steers clear of the construction/context demarcation. Indeed, its foray into legislative history and other extrinsic material makes sense only as a method of construction, as an attempt to lend interpretive weight. The Court is aiming to give authoritative content to the meaning of Section 559.051, and it seems to concede as much. Most telling, it cites as authority for peeking at legislative history the tellingly titled Code *Construction* Act which speaks of "*construing* a statute . . ."[87] not "contextualizing a statute." (The concurrence parts company with the Court on this point, declaring that the Act's extrinsic aids, including legislative history, have no interpretive role when a statute is unambiguous.) Also revealing, the Court, in "determining whether the statute gives rise to a disparate impact theory of liability"[88]—in other words, *interpreting* the statute—cites three disparate-impact decisions from the United States Supreme Court that consulted legislative history, explicitly for *interpretive* purposes. In those cases, the High Court, like this Court, was trying to fortify its *interpretive* analysis, using legislative materials to divine a statute's meaning.[89] Such use

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[86] __ S.W.3d at __.

[87] TEX. GOV'T CODE § 311.023 (emphasis added).

[88] __ S.W.3d at __ (citing *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Gen'l Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

[89] The Court principally cites *Smith*, 544 U.S. at 238, to show that "courts have looked to a statute's legislative history when determining whether the statute gives rise to a disparate impact theory of liability." __ S.W.3d at __. Some courts may have done so, but not this one. In its certified question to us, the Ninth Circuit asks whether *Texas* law prohibits a credit-score factor from working a racially disparate impact, and I would answer the question applying ordinary Texas rules of statutory interpretation. In any event, as the Court today acknowledges, the legislative-history piece of *Smith* garnered only plurality, and not majority, support. Pre-*Smith* High Court cases consulted legislative history to determine the existence of disparate-impact liability under various antidiscrimination laws, but that approach lacked majority support in the Court's most recent disparate-impact decision.

is apparent in the final paragraph of Part II of today's opinion: "Given the [legislative materials]," the Court holds, "we can only conclude that the Legislature did not intend to create a cause of action for disparate impact discrimination."[90] That phrasing sounds remarkably like a Court that is construing a statute, not contextualizing one.

Third, the context/construction locution invites peculiar consequences. Under the concurrence's view, because the Court is merely using legislative history for background purposes, it is 100 percent free to rely on materials we have rejected as innately unreliable. The concurrence says we should not "blind ourselves to otherwise useful information."[91] That is precisely the point. We must be blind to material that cannot help us see. We have derided failed bills as the polar opposite of "useful"—useless to be precise. Similarly, the concurrence asks why we trust judges to make fair decisions after reciting compelling facts but not after looking at legislative history.[92] The dilemma in this case is not untrustworthy judges but, as our cases explain, untrustworthy evidence such as failed bills and off-the-record comments from unidentified detractors bent on derailing legislation.

Even if the Court *were* using legislative materials merely to set the legal stage and nothing more, why would that permit reliance on a subset of material that we have spent decades condemning

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The Court also attempts to justify its peek at legislative history "because the declared policy of the McCarran-Ferguson Act is to ensure that state legislatures are able to regulate the business of insurance without unintended federal interference." __ S.W.3d at __. I fail to see the relevance of this. If anything, the desire for minimal federal intrusion would seem to welcome application, not frustration, of our ordinary interpretive regime.

[90] __ S.W.3d at __.

[91] __ S.W.3d at __.

[92] __ S.W.3d at __.

as untrustworthy? Sound construction demands a sound foundation. Surely a "dubious"[93] and "perilous"[94] foundation amounting to "little more than conjecture"[95] provides a rickety basis for construction. Given that "context is everything" in textual interpretation,[96] I would expect the Court to be as insistent on reliable context as it is on reliable construction.

Fourth, the concurrence avers textualism is difficult to implement.[97] Far from it. Today's case is not a difficult one; the Court is unanimous on all but Part III.C. The Insurance Code, given its fair interpretive context, yields a ready answer. I believe it is exceedingly (and unnecessarily) more grueling to slog through inconclusive minutiae "not always distinguished for candor or accuracy"[98] and that often does more to confuse than to clarify.

When it comes to judicial opinion-writing, less is quite often more,[99] especially less evidence that cannot be trusted. Analysis based on clear text alone may be shorter, but it is no less complete. And it is more convincing, by definition, than analysis based on material we have previously decried as unauthoritative and prone to contrivance. Plus it avoids sending the disquieting message that clear text, despite our categorical assurances to the contrary, can never be determinative—"that,

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[93] *Holberg*, 440 S.W.2d at 42.

[94] *Entergy*, 282 S.W.3d at 443 (quoting *Heller*, 554 U.S. at 590).

[95] *Dutcher*, 647 S.W.2d at 950.

[96] SCALIA, A MATTER OF INTERPRETATION 37.

[97] __ S.W.3d at __.

[98] *Schwegmann Bros.*, 341 U.S. at 396 (Jackson, J., concurring).

[99] So says the author of a dissent longer than the majority. "Physician, heal thyself." *Luke* 4:23.

presumably under penalty of malpractice liability, the oracles of legislative history, far into the dimmy past, must always be consulted."[100] As Justice Jackson first lamented 60 years ago, this imposes on ordinary citizens a high price, supplanting clarity with opacity and accessibility with indeterminacy.[101]

I agree with CHIEF JUSTICE JEFFERSON that an appellate opinion "is not a mere recitation of legal standards and conclusions."[102] But I disagree with his suggestion that opinions provide factual background just to improve storytelling. The foremost reason we include relevant facts is to demonstrate we are exercising judicial power properly. Courts do not issue advisory opinions; we decide live, real-world disputes that arise from a given set of facts. We thus describe the underlying facts to show the nature of a live controversy, and in the common-law context to help future courts discern whether a legal principle fits the facts of other disputes.

* * *

The Court's textual analysis is clear and incisive, and I join it unreservedly. The meaning of the Insurance Code is apparent from its language, read in context, especially as contrasted with the Labor and Government Codes, both of which explicitly allow disparate-impact liability. All in all, though, I wish the Court were more allegiant to our longstanding interpretive precedent. We should treat similar cases similarly, not disparately. Given the rise of state legisprudence, we owe

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[100] *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

[101] *Schwegmann Bros.*, 341 U.S. at 397 (Jackson, J., concurring).

[102] __ S.W.3d at __.

interpretive clarity—and consistency—to the courts below us, the litigants before us, the citizens beside us, and the cases beyond us.

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Don R. Willett
Justice

OPINION DELIVERED: May 27, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0280

IN RE COMMITMENT OF SETH HILL, PETITIONER

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

PER CURIAM

A party selecting jurors for trial must be given latitude to intelligently use its peremptory challenges to seat a jury that, to the greatest extent possible, is free from bias. Here, because the trial court refused to allow two permissible lines of questioning, we reverse the court of appeals' judgment upholding the trial court's ruling and remand this case for a new trial.

This is an appeal from a civil commitment proceeding in which a jury found Seth Hill to be a sexually violent predator. *See* TEX. HEALTH & SAFETY CODE ch. 841 (providing for the civil commitment of certain violent sexual offenders). The State had the burden to prove that Hill (1) was a "repeat sexually violent offender" and (2) "suffer[ed] from a behavioral abnormality" that made him "likely to engage in a predatory act of sexual violence." *Id.* § 841.003. As such, much of Hill's trial focused on his sexual history, which formed the basis for the State's expert witness's conclusion that Hill suffered from a behavioral abnormality. During its pretrial deposition of Hill, the State explored Hill's sexual activity with other inmates in an all-male facility. In the deposition, Hill admitted to these acts. The State's expert testified at trial that "if somebody has heterosexual

preferences and then they later begin practicing homosexual acts, it infers that there is an instability within their personality which again, is more evidence of why I diagnosed [Hill] with a personality disorder."

During voir dire, Hill's attorney inquired, without objection, whether potential jurors could be fair to a person they believed to be a homosexual. Several stated that they would not be able to give a fair trial to such a person. The court then instructed Hill's attorney to terminate that line of questioning. When Hill's attorney attempted several more times to raise the issue, the trial court directed him not to ask a direct question about Hill's homosexuality. Subsequently, the court stated that further questions would have to be submitted in advance.

Hill's attorney then attempted to ask the panel whether, if the State proved that Hill had committed two or more violent sexual offenses, the potential jurors would convict Hill based on that evidence alone or would also require the State to prove the statute's second element—that Hill had a behavioral abnormality predisposing him to commit such acts. The State objected to this line of questioning, calling Hill's questions improper commitment questions, and the court sustained the objection. When Hill's attorney attempted to rephrase his question, he was again told that the question was prohibited. After the jury returned its verdict that Hill met the statutory criteria, the trial court signed a judgment, and the court of appeals affirmed. 308 S.W.3d 465, 485.

Litigants have the right to question potential jurors to discover biases and to properly use peremptory challenges. *See Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749-50 (Tex. 2006). This right is "constrained by reasonable trial court control." *Id.* at 750. Thus, refusals to allow lines of questioning during voir dire are reviewed under an abuse of discretion standard. *Id.* at 753-54.

However, the proper discretion inquiry turns on the propriety of the question: "a court abuses its discretion when its denial of the right to ask a proper question prevents determination of whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges." *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989). A party preserves error by a timely request that makes clear—by words or context—the grounds for the request and by obtaining a ruling on that request, whether express or implicit. TEX. R. APP. P. 33.1. Thus, in *Babcock*, we held that a party preserved error by asking a specific and proper question, stating the basis on which it sought to ask that question, and obtaining an adverse ruling from the trial court. 767 S.W.2d at 708.

Hill's sexual history was part of the State's proof of his alleged behavioral abnormality, yet the trial court refused questioning that went to the potential jurors' ability to give him a fair trial. This prevented Hill from discovering the potential jurors' biases so as to strike them for cause or intelligently use peremptory challenges. *See* TEX. GOV'T CODE § 62.105(4) (naming "bias or prejudice . . . against a party in [a] case" as grounds for disqualifying a juror).

Babcock was a medical malpractice case in which the plaintiff attempted to ask the venire panel whether the "liability insurance crisis" recently in the news had resulted in improper bias in any of the jurors. *Babcock*, 767 S.W.2d at 706-07. The trial court repeatedly denied requests to ask such questions. *Id.* at 707-08. We held that, while the facts of the lawsuit crisis would not be evidence at trial, the media coverage surrounding the crisis "ha[d] unquestionably created the potential for bias and prejudice," and, therefore, the plaintiff should have been permitted to ask questions delving into that potential bias. *Id.* at 708. We further held that the trial court abused its

discretion by forbidding those questions, and error was preserved. *Id.* at 709. We reversed and remanded for a new trial. *Id.*

The court of appeals did not reach the abuse of discretion issue because it held that Hill failed to preserve error. 308 S.W.3d at 471. However, the questions Hill asked were proper, and there was no need for him to rephrase because there were no defects for him to cure. Moreover, he made clear why he was entitled to ask the requested questions. The court instead ordered him to ask a question that did not address the issue of juror bias and then directed him to "move on" without asking any further questions on the topic. But the candid admissions of bias by the potential jurors, before the trial court suspended that line of questioning, establish both the propriety of the question and the trial court's abuse in denying Hill the right to ask it. As such, error was preserved. *Babcock*, 767 S.W.2d at 708; *Vasquez*, 189 S.W.3d at 758 (holding that a trial court "may not foreclose a proper line of questioning" where "the actual questions posed are proper").

The trial court rejected the second line of inquiry as improper commitment questions. This ruling was incorrect, however, because the "commitment" that the potential jurors were asked to make was legislatively mandated: they were asked whether they would require the state to prove both elements of a conjunctive statute. *See* TEX. HEALTH & SAFETY CODE § 841.003. Jurors swear an oath to render "a true verdict . . . according to the law . . . and to the evidence." TEX. R. CIV. P. 236. Implicit in that oath is a commitment to follow the law the Legislature enacted, and a party participating in jury selection may solicit from potential jurors that promise, essential to the empaneling of a fair jury. *See, e.g.*, *Wainwright v. Witt*, 469 U.S. 412, 419-20 (1985) (recognizing, in a criminal case, that jurors may be asked to commit to follow law and statute); *see also Edmonson*

v. Leesville Concrete Co., Inc., 500 U.S. 614, 630 (1991) ("Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders."). The trial court thus abused its discretion by refusing to permit the line of questioning. Hill preserved error by asking a proper question and receiving a direct ruling rejecting it. *See Vasquez*, 189 S.W.3d at 758 (to preserve error, a party must "adequately apprise the trial court of the nature of the inquiry" (quotations omitted)); *Babcock*, 767 S.W.2d at 708 (holding that a refusal to allow a question is an implicit ruling on a request to ask that question).

The trial court abused its discretion in rejecting these two lines of permissible questioning. Accordingly, without hearing oral argument, we grant the petition for review, reverse the court of appeals' judgment, and remand the case to the trial court for a new trial. TEX. R. APP. P. 59.1, 60.2(d).

OPINION DELIVERED: March 11, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0283

CHRISTOPHER N. EPPS AND LAURA L. EPPS, PETITIONERS,

v.

BRUCE FOWLER, JR. AND STEPHANIE L. FOWLER, RESPONDENTS

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

Argued February 3, 2011

JUSTICE LEHRMANN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE WILLETT, and JUSTICE GUZMAN joined.

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

Two years ago, we held that a plaintiff who obtained favorable jury findings but no damages was not entitled to attorney's fees under contractual language entitling a prevailing party to such fees. *Intercont'l Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 652 (Tex. 2009). Today, we consider whether a defendant is a prevailing party entitled to attorney's fees when the plaintiff nonsuits a claim without prejudice. We hold that such a defendant is not a prevailing party unless the court determines, on the defendant's motion, that the plaintiff took the nonsuit in order to avoid an unfavorable judgment. We also hold that, because a nonsuit with prejudice immediately

alters the legal relationship between the parties by its res judicata effect, a defendant prevails when the plaintiff nonsuits with prejudice. Because the trial court has not had the opportunity to determine whether the plaintiff nonsuited in order to avoid an unfavorable judgment, we reverse the court of appeals' judgment and remand the defendant's claim for attorney's fees under the contract to the trial court. Finally, we hold that the court of appeals erred by not remanding the case to allow the trial court to dispose of the Eppses' pending claim for sanctions under chapter 10 of the Civil Practice and Remedies Code, and accordingly remand for the trial court to dispose of that alternative claim if it determines that fees are not available under the contract.

I. Background

In 2004, Bruce and Stephanie Fowler purchased a house in Georgetown, Texas, from Laura and Christopher Epps. Two years later, the Fowlers allegedly discovered cracks in the house's sheetrock and evidence of past repairs. They concluded that the foundation was failing, and sued the Eppses for violations of the Deceptive Trade Practices Act, fraud, and negligent misrepresentation. The Fowlers claimed that the Eppses were aware of problems with the house's foundation and failed to disclose them at the time of the sale. The Eppses denied having knowledge of any defects in the foundation. They sought their attorney's fees as sanctions under Chapter 10 of the Civil Practice and Remedies Code on the ground that the Fowlers' claims were legally and factually groundless. Alternatively, they sought attorney's fees under section 17 of the earnest money contract signed by the parties, which provides that "[t]he prevailing party in any legal proceeding related to the contract is entitled to recover reasonable attorney's fees and all costs of

such proceeding incurred by the prevailing party."[1] The contract does not define the term "prevailing party."

According to the Eppses, the Fowlers failed to respond to discovery, including the Eppses' requests for admissions, and cancelled or postponed a number of depositions.[2] The Eppses moved for partial summary judgment, and the Fowlers responded with an expert report attached. The same day they filed their summary judgment response, the Fowlers filed a motion to substitute counsel, which was granted. The next day, the Fowlers' newly retained counsel filed a notice of nonsuit without prejudice. The parties proceeded to trial on the Eppses' contractual attorney's fees issue. At the trial, the Eppses expressly reserved their claim for fees as sanctions under Chapter 10.

Rather than dismissing the Fowlers' claims, the trial court rendered judgment that they take nothing and ordered that the Fowlers pay the Eppses' attorney's fees of $22,950. The judgment provided that "[a]ny relief not granted herein is expressly denied." The Fowlers appealed. The court of appeals modified the judgment to reflect that the Fowlers' claims were dismissed without prejudice. ___ S.W.3d ___, ___. It also reversed the portion of the judgment ordering that the Fowlers pay attorney's fees, reasoning that a favorable decision on the merits of a case is necessary to confer prevailing party status on a litigant. ___ S.W.3d at ___. We granted the Eppses' petition

[1] The contract is a widely used standard Texas Real Estate Commission form contract.

[2] There is evidence that several depositions of Bruce Fowler had to be rescheduled because he was working outside of the country. The requests for admission are not in the record before us.

for review to decide whether a defendant is a prevailing party when the plaintiff voluntarily nonsuits without prejudice. 54 Tex. Sup. Ct. J. 428 (Jan. 11, 2011).

II. Prevailing Party

Texas adheres to the American Rule with respect to attorney's fees. *KB Home*, 295 S.W.3d at 653. Under that rule, litigants may recover attorney's fees only if specifically provided for by statute or contract. *Id.* (citing *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669 (Tex. 2009). Thus, we must determine if the contract between the Fowlers and the Eppses authorized the trial court's award of fees in this case to the Eppses because they "prevailed."

Our primary concern when we construe a written contract is to ascertain the parties' true intent as expressed in the contract. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005) (citing *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003); *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)0. We may look to the entire agreement in an effort to give each part meaning. *Coker*, 650 S.W.2d at 393. In this instance, the agreement does not expressly define the term prevailing party, and no other portion of the agreement sheds light on the term's meaning. When a contract leaves a term undefined, we presume that the parties intended its plain, generally accepted meaning. *Valence Operating Co.*, 164 S.W.3d at 662; *KB Home*, 295 S.W.3d at 653. Accordingly, we give the term its ordinary meaning. Often, we consult dictionaries to discern the natural meaning of a common-usage term not defined by contract, statute, or regulation. *See Reyes v. City of Laredo*, 335 S.W.3d 605, 607 (Tex. 2010); *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999);

Guardian Life Ins. Co. of Am. v. Scott, 405 S.W.2d 64, 65 (Tex. 1966). But in this case, as in our controlling *KB Home* decision, we are interpreting a legal-usage term within a form contract, a term that many courts (including us less than two years ago) have explicated by examining how prevailing party is used statutorily.[3]

In *KB Home*, we held that a plaintiff who obtained a jury finding that the defendant had breached its contract but was awarded no damages was not a prevailing party. 295 S.W.3d at 655. We reasoned

> [w]hether a party prevails turns on whether the party prevails upon the court to award it something, either monetary or equitable. KB Home got nothing except a jury finding that Intercontinental violated the contract. . . . Nor do we perceive any manner in which the outcome materially altered the legal relationship between KB Home and Intercontinental.

Id.

A. Federal tests

As we did in *KB Home*[4] we find federal cases focusing on the meaning of prevailing party instructive.[5] In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and*

[3] In fact, the petitioner in *KB Home* argued that the case presented an issue that was likely to recur and thus be important to the state's jurisprudence because of the term's use in numerous contracts, including a differently numbered version of the Standard One To Four Family Residential Contract (Resale) Texas Real Estate Commission form that the parties entered into in this case. *See* Petitioner's Brief on the Merits at 5 n.12, *Intercont'l Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650 (Tex. 2009) (No. 07-0815).

[4] The dissent faults us for looking to federal cases to determine the parties' intent, but we applied a nearly identical analytical framework in *KB Home*, an opinion the dissent's author joined. And the dissent in *KB Home* raised almost the same objections as the dissent in this case. In following *KB Home*'s analysis, we simply treat all parties to a lawsuit the same, whether they are plaintiffs or defendants, as we are obligated to do.

[5] The Eppses take issue with the court of appeals' reliance on cases interpreting the term prevailing party as used in statutes. We agree that it might be improper to look to cases focusing on whether courts should exercise their discretion to award fees to a prevailing party, because those cases turn on legislative policy choices. *See, e.g.*, *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 420–21 (1978) (holding that

Human Resources, 532 U.S. 598 (2001), the Supreme Court considered whether a plaintiff who received neither a favorable judgment nor a consent degree, but whose lawsuit nevertheless caused the defendant to voluntarily change its conduct, was a prevailing party. The Court rejected the notion that a plaintiff whose lawsuit had served as the catalyst for a change in the defendant's conduct should be considered a prevailing party entitled to attorney's fees under the Fair Housing Act Amendments, 42 U.S.C. § 3613(c)(2), and the Americans with Disabilities Act, 42 U.S.C. § 12205, overruling several Circuit Court decisions. *Id.* at 601–02 (citing *Stanton v. S. Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 577, n.2 (1st Cir. 1999); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 546–50 (3d Cir. 1994); *Payne v. Bd. of Educ.*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski Cnty. Sch. Dist., # 1*, 17 F.3d 260, 263 n.2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951–52 (10th Cir. 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999)). In reaching that conclusion, the Court noted that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary" to confer prevailing party status on the plaintiff. *Id.* at 604 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)). A voluntary change in the defendant's conduct,

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defendant may be entitled to recover attorney's fees as prevailing party when a plaintiff voluntarily withdraws complaint if it establishes that the suit was groundless, because Congress "wanted to protect defendants from burdensome litigation having no legal or factual basis"). We see no error, however, in looking to cases considering the plain meaning of the term prevailing party. We note that the Eppses themselves rely on statutory cases.

by contrast, lacked the requisite "judicial imprimatur" to confer prevailing party status on the plaintiff. *Id.* at 605.

While *Buckhannon* involved a plaintiff who claimed to have prevailed because of the defendant's voluntary action, at least two Circuit Courts have applied its reasoning to defendants seeking attorney's fees as a result of plaintiffs' voluntary actions. In *Claiborne v. Wisdom*, the Seventh Circuit considered whether a defendant was a prevailing party after the plaintiff voluntarily moved to dismiss her claim. 414 F.3d 715 (7th Cir. 2005). Exercising the discretion afforded it by Rule 41(a)(2) of the Federal Rules of Civil Procedure,[6] the district court dismissed the claim with prejudice. *Id.* at 717. The Seventh Circuit affirmed. *Id.* at 719. The order "effect[ed] a material alteration of [the plaintiff's] legal relationship with the other parties, because it terminate[d] any claims [the plaintiff] may have had . . . arising out of this set of operative facts"; because the claims were dismissed with prejudice, they would be barred by res judicata or claim preclusion. *Id.*

Similarly, the Federal Circuit has held that a defendant was a prevailing party after the plaintiff filed a "Declaration and Covenant Not to Sue" on the eve of trial. *Highway Equip. Co. v. FECO, Ltd.*, 469 F.3d 1027, 1035–36 (Fed. Cir. 2006). In response to the declaration, the district court dismissed the plaintiff's claims with prejudice. *Id.* The Federal Circuit concluded that the defendant could be considered a prevailing party. *Id.* The dismissal with prejudice, which

[6] Rule 41 permits plaintiffs to dismiss their claims without a court order before the opposing party serves either an answer or a motion for summary judgment, or with the stipulation of all parties. FED. R. CIV. P. 41(a)(1)(A)(i), (ii). A dismissal under Rule 41(a)(1) is generally without prejudice. *Id.* 41(a)(1)(B). If it is too late to dismiss under Rule 41(a)(1), a plaintiff may still elect to move to dismiss, but may do so only by court order "on terms that the court considers proper." FED. R. CIV. P. 41(a)(2).

extinguished the plaintiff's ability to sue again on its claims, had "the necessary judicial imprimatur to constitute a judicially sanctioned change in the legal relationship of the parties." *Id.* at 1035.

In a case predating *Buckhannon*, cited by both parties, the Fifth Circuit considered whether a defendant was a prevailing party after the plaintiff voluntarily nonsuited his case with prejudice. *Dean v. Riser*, 240 F.3d 505 (5th Cir. 2001). The court held that a defendant is not a prevailing party under section 1988 of the Civil Rights Act unless the defendant can establish that the plaintiff dismissed in order to escape an unfavorable judgment on the merits. *Id.* at 511. The Fifth Circuit rejected the idea that the mere fact of dismissal, even with prejudice, was sufficient to confer prevailing party status on a defendant. *Id.* at 512. The court observed that the decision to nonsuit may well reflect a legitimate litigation strategy that

> reveals nothing about the merits of a plaintiff's case [and thus] does not warrant a conclusion that a defendant in such a case has prevailed. . . .
>
> . . . [A] plaintiff whose claim appeared meritorious at the onset may encounter various changes in his litigation posture during the unpredictable course of litigation. "Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation."

Id. at 510 (quoting *Christiansburg*, 434 U.S. at 423). Thus, the federal courts have recognized that a defendant may be a prevailing party when the plaintiff nonsuits in two situations: when a suit is dismissed with prejudice, and when the nonsuit is taken to avoid an unfavorable merits decision.

B. Texas nonsuit law

In Texas, plaintiffs may nonsuit at any time before introducing all of their evidence other than rebuttal evidence. TEX. R. CIV. P. 162. No court order is required. *Id.*; *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). A nonsuit terminates a case "from 'the moment the motion is filed.'" *Joachim*, 315 S.W.3d at 862 (quoting *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex. 2006) (per curiam)). At the same time, a nonsuit does not affect any pending claim for affirmative relief or motion for attorney's fees or sanctions. *Id.* at 863; TEX. R. CIV. P. 162. When a case is nonsuited without prejudice, res judicata does not bar relitigation of the same claims. *Klein v. Dooley*, 949 S.W.2d 307, 307 (Tex. 1997).[7]

C. When does a nonsuit alter the parties' legal relationship?

In *KB Home*, we held that a plaintiff who secured favorable jury findings but was awarded no damages was not a prevailing party because the plaintiff received no relief that materially altered the parties' legal relationship; the plaintiff's victory was simply illusory. *KB Home*, 295 S.W.3d at 652. By comparison, we have no doubt that a defendant who is the beneficiary of a nonsuit with prejudice would be a prevailing party. As the Fifth Circuit has observed, a dismissal or nonsuit with prejudice is "tantamount to a judgment on the merits." *Riser*, 240 F.3d at 509. The res judicata effect of a nonsuit with prejudice works a permanent, inalterable change in the parties' legal

[7] A plaintiff may not, however, take a nonsuit to avoid an unfavorable venue ruling. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 258 (Tex. 2008). Further, when a claimant nonsuits after an unfavorable partial summary judgment, the nonsuit is with prejudice as to the claims disposed of by the judgment. *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 854 (Tex. 1995).

relationship to the defendant's benefit: the defendant can never again be sued by the plaintiff or its privies for claims arising out of the same subject matter. *Joachim*, 315 S.W.3d at 862 (citing *Gracia v. RC Cola–7–Up Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984)). As such, we hold that a defendant is a prevailing party when a plaintiff nonsuits a case with prejudice.

In contrast, a nonsuit without prejudice works no such change in the parties' legal relationship; typically, the plaintiff remains free to re-file the same claims seeking the same relief. *Klein*, 949 S.W.2d at 307.[8] Like the plaintiff in *KB Home*, the Eppses did not prevail upon the court to award them anything, either monetary or equitable. Moreover, we doubt that the parties to this agreement intended that there could be more than one prevailing party. But construing the agreement to apply to a plaintiff who nonsuits without prejudice could potentially result in just that, as the Eppses' counsel acknowledged in oral argument: after the defendant is awarded attorney fees in an initial action, the plaintiff could simply re-file the exact same claims, litigate them to a favorable judgment, and thus also become a prevailing party. Further, for us to determine that a defendant prevails within the meaning of the parties' agreement any time a plaintiff nonsuits without

[8] In this case, the Eppses contend that limitations would have barred any claims the Fowlers may have filed in a new lawsuit. Without considering the merits of that contention, we agree with the court of appeals that the mere possibility that limitations would bar future suits does not effect a change in the parties' relationship that confers prevailing party status on a defendant. Limitations is an affirmative defense that must be pleaded and proven. *See KPMG Peat Marwick v. Harrison Cnty. Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999) (citing *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997)). Further, limitations may, in some circumstances, be subject to exceptions like fraudulent concealment and the discovery rule. *BP Am. Prod. Co. v. Marshall*, ____ S.W.3d ____, ____ (Tex. 2011). Until a defendant has secured a favorable ruling on a res judicata defense, there has been no material change in the parties' legal relationship

prejudice would require us to conclude that they sought to discourage all nonsuits.[9] As the Fifth Circuit noted, imposing attorney's fees on plaintiffs who take nonsuits regardless of the reason for or effect of the nonsuit "would penalize the plaintiff for doing precisely what should be done" and actually encourage plaintiffs to pursue claims that should be abandoned. *Riser*, 240 F.3d at 510. In construing the parties' agreement, it is reasonable to presume that they did not intend to encourage continued litigation of weak claims. But if, as the dissent suggests, any nonsuit will result in an award of attorney fees to the defendant, then a plaintiff may have the incentive to roll the dice and hope for a favorable judgment rather than accept an inevitable judgment for attorney's fees.

At the same time, it is logical to conclude that the parties intended to award attorney's fees to compensate the defendant when the plaintiff knowingly pursues a baseless action. It makes sense to conclude that the parties would have sought to "discourage the litigation of frivolous, unreasonable, or groundless claims" when a "calculating plaintiff . . . voluntarily withdraws his complaint 'to escape a disfavorable judicial determination on the merits.'" *Id.* (quoting *Marquart v. Lodge 837, Int'l Ass'n of Machinists and Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994)). That construction is consistent with the disfavor our cases have displayed toward nonsuits that are filed to circumvent unfavorable legal restrictions or rulings. *See, e.g.*, *In re Team Rocket, L.P.*, 256 S.W.3d 257, 260 (Tex. 2008); *In re Bennett*, 960 S.W.2d 35, 36 (Tex. 1997); *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 854 (Tex. 1995). Accordingly, in accord with *Riser*, we hold that a

[9] The Eppses maintain that section 17's purpose was to discourage the filing of frivolous claims. The agreement's language is not so narrow, however. If that were the provision's sole purpose, then it would award fees to a "prevailing defendant."

defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits.

The definition the Eppses propose—that a defendant prevails any time the plaintiff nonsuits—at first blush appears to promise simplicity of application. But the mere availability of fees, in itself, will almost inevitably expand the issues that must be resolved in a lawsuit. The amount and reasonableness of the fees will likely be the subject of continuing litigation, no matter how prevailing party is defined. And, while a bright-line definition under which a defendant *never* prevails when a nonsuit is without prejudice would reduce the triable issues, it would enhance the possibility that plaintiffs who pursue frivolous claims suffer no consequences and fail to reward defendants whose efforts cause their opponents to yield the playing field. Our review of federal district court decisions within the Fifth Circuit suggests that *Riser*'s prevailing party test has not spawned a large amount of satellite litigation. In the decade since *Riser* was decided, only a bare handful of cases have focused on whether a defendant is a prevailing party under that case. *See, e.g.*, *Barnes v. Sanchez,* NO. 3:07–CV–01184–M, 2011 WL 1831602, at *2 (N.D. Tex. May 10, 2011); *Hilborn v. Klein Indep. Sch. Dist.*, NO. H–09–840, 2010 WL 1463472, at *2 (S.D. Tex. Apr. 12, 2010); *Fox v. Vice*, NO. 2:06–CV–135, 2008 WL 4386880, at *3 (W.D. La. Sept. 22, 2008), *aff'd*, 594 F.3d 423 (5th Cir. 2010), *vacated on other grounds*, 131 S. Ct. 2205 (2011); *Butler v. MBNA Tech., Inc.*, NO. 3:02–CV–1715–H, 2004 WL 389101, at *5 (N.D. Tex. Mar. 1, 2004). Moreover, the cases suggest that the determination has been made largely based upon inferences drawn from

the course of events in the lawsuit; the federal courts have tended to place great weight upon the fact that a plaintiff's nonsuit has followed closely on the heels of a defendant's potentially dispositive motion. For example, in *Fox*, the court determined that the defendants were prevailing parties in light of the fact that the plaintiff nonsuited only after the defendants moved to dismiss after the plaintiff conceded that she had no federal claim. 2008 WL 4386880, at *3. And in *MBNA Technology*, the court noted that the plaintiff nonsuited only after the defendants moved for summary judgment, and that the timing of the dismissal suggested that the plaintiff's dismissal was not motivated by her failure to uncover evidence supporting her claims in discovery, but instead, was attributable to her desire to avoid an unfavorable judgment. 2004 WL 389101, at *5; *see also Barnes*, 2011 WL 1831602, at *2 (finding that the defendant was a prevailing party when the plaintiff moved to dismiss only after trial had commenced and the defendant had moved for dismissal); *Hilborn*, 2010 WL 1463472, at *3 (finding that defendants were prevailing parties when the plaintiff sought dismissal only after the defendants presented uncontested affidavits establishing that the plaintiff had no viable First Amendment claim).

In applying the test, courts should rely as far as possible on the existing record and affidavits, and resort to live testimony only in rare instances. *See Riser*, 240 F.3d at 511. A number of factors may support an inference that a plaintiff has nonsuited in order to avoid an unfavorable ruling. For example, as in *MBNA Technology*, if a plaintiff nonsuits only after a motion for summary judgment is filed, it may suggest that the plaintiff elected to do so in order to escape summary judgment. *See MBNA Tech., Inc.*, 2004 WL 389101. Further, a plaintiff's unexcused failure to respond to requests

for admissions or other discovery that could support entry of an adverse judgment may also indicate that a nonsuit was taken to foreclose that possibility. Similarly, a failure to timely identify experts or other critical witnesses could suggest that a nonsuit is neither tactical nor voluntary. And the existence of other procedural obstacles, such as the plaintiff's inability to join necessary parties, may also signal that the defendant has prevailed over the plaintiff. On the other hand, as we have noted, it is reasonable to presume that the parties did not intend to encourage continued litigation when discovery reveals previously unknown flaws in the plaintiff's claims. Accordingly, evidence that the suit was not without merit when filed may indicate that the defendant has not prevailed and is therefore not entitled to attorney's fees.

In this case, the record reflects that the trial court based its decision solely on the fact that the plaintiff nonsuited without prejudice. While the court of appeals' judgment reversing the trial court's award of fees is consistent with our holding today, no determination has been made whether the Fowlers nonsuited in order to avoid an unfavorable ruling.[10] Accordingly, we remand the case to the trial court to apply the standard we announce.

III. Remand for Consideration of Chapter 10 Remedy

The Eppses argue that, even if the court of appeals was correct in reversing the trial court's award of attorney's fees under section 17 of the earnest money contract, its judgment was erroneous.

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[10] Of course, parties may elect to define prevailing party any way they choose, *see Healthcare Cable Sys., Inc. v. Good Shepherd Gen. Hosp., Inc.*, 180 S.W.3d 787, 791 (Tex. App.—Tyler 2005, no pet.); *Alexander v. Cooper*, 843 S.W.2d 644, 647 (Tex. App.—Corpus Christi 1992, no writ), and could conceivably say that a defendant prevails any time a plaintiff nonsuits, with or without prejudice.

They maintain that the court of appeals erred by rendering judgment dismissing the Fowlers' claims with prejudice rather than remanding to allow the trial court to consider the Eppses' reserved claim for attorney's fees under chapter 10 of the Civil Practice and Remedies Code. The Fowlers contend that the Eppses waived that issue by failing to appeal the portion of the trial court's judgment denying all relief not expressly granted. We agree with the Eppses. The trial court's judgment recited that "[a]ny relief not granted herein is expressly denied." The Fowlers argue that the Eppses were required to appeal that portion of the judgment in order to be entitled to a remand. That argument fails for two reasons.

First, Rule 25.1(c) of the Rules of Appellate Procedure only requires a party who seeks to alter the trial court's judgment to file a notice of appeal. In this case, the judgment that the Eppses sought under chapter 10—$22,950 in attorney's fees—is the same as the judgment that was awarded under section 17 of the earnest money contract. Thus, the Eppses were not required to file a notice of appeal challenging the trials court's denial of fees under chapter 10. Understandably, the Eppses' focus in the brief they filed in the court of appeals was on the fees the trial court awarded under the contract. But they advised the court of their affirmative claim under chapter 10, and one of the issues the brief presented was whether "a trial court abuse[s] its discretion in awarding attorney fees after a plaintiff's nonsuit where [the] defendant . . . had an independent counterclaim for affirmative relief on file at the time of the nonsuit." The court of appeals was sufficiently apprised of the Eppses' contention that they would be entitled to a remand if the court reversed the contractual attorney's fees. *See generally Consol. Eng'g Co. v. S. Steel Co.*, 699 S.W.2d 188 (Tex. 1985).

Moreover, the court of appeals' disposition is inconsistent with Rule 162 of the Rules of Civil Procedure. Under that rule, a nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." The court of appeals' rendition of judgment dismissing the Fowlers' claims without prejudice without allowing the Eppses the opportunity for a hearing on their chapter 10 claims ran afoul of Rule 162.

IV. Conclusion

The court of appeals did not err in reversing the trial court's award of attorney's fees under section 17 of the earnest money contract, as the lower court awarded fees based solely on the Howards' nonsuit without prejudice. Because the trial court has had no opportunity to determine whether the Fowlers dismissed to avoid an unfavorable judgment, we vacate the court of appeals' judgment and remand the Eppses' contractual attorney's claim to the trial court. We also remand the Eppses' claim for fees under chapter 10 of the Civil Practice and Remedies Code.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0283

CHRISTOPHER N. EPPS AND LAURA L. EPPS, PETITIONERS,

v.

BRUCE FOWLER, JR., AND STEPHANIE L. FOWLER, RESPONDENTS

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

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

The Fowlers and the Eppses signed a contract agreeing that if either sued the other, the "prevailing party" would be entitled to recover reasonable attorney fees. The Fowlers sued the Eppses, but after the Eppses had incurred $22,950 in attorney fees defending the suit, the Fowlers suddenly nonsuited. Did the Eppses prevail?

Because the parties were undisputedly free to agree on what would happen in this situation, the answer depends entirely on what they meant when they signed the contract. "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument."[1] But the Court is not primarily concerned with, or even especially interested in, ascertaining the Fowlers' and the Eppses' intentions from the text of their contract.

[1] *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

The Court's primary concern is whether recovery of attorney fees from a plaintiff who nonsuits is good policy, and it presumes the Fowlers and the Eppses must have shared its view of the subject.

The Court begins, as it should, with the presumption that the Fowlers and the Eppses intended to give the word "prevailing" its ordinary meaning but then turns to federal case law for that meaning. The Court finds one case: the Fifth Circuit's 2001 decision in *Dean v. Riser*.[2] There, the issue was whether a defendant sued in a civil rights action was a prevailing party within the meaning of 42 U.S.C. § 1988(b) when the plaintiff's claim was nonsuited with prejudice.[3] The determinative consideration was "the general policies and competing interests that prompted Congress to enact [Title VII of the Civil Rights Act of 1964] authorizing district courts to award attorney's fees to prevailing parties in civil rights litigation."[4] The court finally concluded:

> The policy considerations surrounding the law of attorney's fees for prevailing civil rights litigants demand a flexible rule. It should empower trial courts to balance the concerns for encouraging vigorous enforcement of civil rights against discouraging frivolous litigation within the specific and unique context of each individual case. Accordingly, we hold that a defendant is not a prevailing party within the meaning of § 1988 when a civil rights plaintiff voluntarily dismisses his claim, unless the defendant can demonstrate that the plaintiff withdrew to avoid a disfavorable judgment on the merits.[5]

For two reasons, the federal cases the Court cites do not give guidance. First, the cases cited all deal with legislative policy reflected in public statutes, not with private parties' intentions in

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[2] 240 F.3d 505 (5th Cir. 2001).

[3] *Id.* at 506.

[4] *Id.* at 507.

[5] *Id.* at 511.

ordering their personal affairs by contract. The Court notes this problem, observing that "it might be improper to look to cases" construing statutes based on legislative policy choices for guidance in determining what private parties intended in a contract,[6] but then does it anyway. *Riser* could not be clearer in explaining that the availability of attorney fees there depended on policy considerations in the Civil Rights Act. There are no legislative policy choices involved in deciding what "prevailing party" means in a private agreement, even a standard form agreement like the one in this case. Second, nothing suggests that private parties like the Fowlers and the Eppses would have federal case law in mind in reaching an agreement that attorney fees should go to a prevailing party.

The place to look for the ordinary meaning of words is not federal case law but a dictionary.[7] According to *Webster's Third New International Dictionary*, to prevail means "to gain victory by virtue of strength or superiority : win mastery : TRIUMPH".[8] Now surely it is beyond argument that, policy considerations aside, when a plaintiff decides to abandon his lawsuit, the defendant, thereby relieved of the further worry and expense of defending himself, thinks he won. Common experience teaches that the challenger who forfeits, loses, and his opponent wins. Imagine the conversation between the Eppses and their lawyer: "Good news! The Fowlers dropped their suit." "Wow! So we won!" "No, you didn't win. The Fowlers just gave up." "But we said all along the

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[6] *Ante* at ___ n.3.

[7] The Court accuses me of hypocrisy, or at least a faulty memory, pointing out that I joined the majority in *Intercont'l Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650 (Tex. 2009), which considered case law in determining when a plaintiff is a prevailing party. But we held in *KB Home* that a plaintiff who sues for damages and recovers nothing does not prevail. The case law the Court cited only supported the dictionary meaning of "prevailing".

[8] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961).

case had no merit, and now they've effectively conceded it. We didn't win?" "Well, you have to understand that a federal case construing the Civil Rights Act has held that . . . ."

The Court's problem with the Eppses' common-sense, dictionary understanding of "prevailing" is that it "appears to promise simplicity of application."[9] The Court's notion of what it means to prevail has the virtue of complexity. The defendant prevails if the plaintiff takes a nonsuit with prejudice (because further suit would be barred by res judicata, an affirmative defense[10]), but not if the nonsuit is without prejudice, even if further action would be barred as if the nonsuit were with prejudice (by limitations, for example, another affirmative defense[11]), except when the nonsuit is taken to avoid an unfavorable judgment. It is impossible to think that parties like the Fowlers and the Eppses would ever have all this in mind when agreeing that a prevailing party should recover attorney fees.

The internal inconsistencies in this new test cannot be reconciled. One is between nonsuits of weak claims that should not be discouraged and nonsuits of claims to avoid unfavorable judgments that should be discouraged. The Court reasons that awarding attorney fees against a plaintiff who nonsuits a "weak claim[]" that "should be abandoned" would "'penalize the plaintiff for doing precisely what should be done'".[12] "At the same time," the Court concludes that attorney fees should be awarded against a plaintiff who "nonsuit[s] in order to avoid an unfavorable

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[9] *Ante* at ___.

[10] *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314 (Tex. 2006).

[11] *Id*.

[12] *Ante* at ___.

judgment."[13] What is the difference between a weak claim that should be abandoned, which can be nonsuited with impunity, and a claim that is likely to result in an unfavorable judgment, which cannot? Says the Court: "the determination has been made largely based upon inferences drawn from the course of events in the lawsuit."[14] In other words: there is none. Then why differentiate between them? The pieces of this puzzled ruling have no unifying principle but are supported instead by a somewhat cynical pragmatism: the defendant who is nonsuited without prejudice cannot recover attorney fees unless he is willing to continue litigating to prove that the plaintiff would have lost anyway. And so a contractual provision unquestionably intended to discourage unnecessary litigation is construed either to foment it or do nothing at all.

Another inconsistency is in the Court's differentiation between post-nonsuit litigation that is barred by res judicata and post-nonsuit litigation that is barred by limitations. The Court concludes that attorney fees may be awarded against the nonsuiting plaintiff in the former instance but not the latter. Why? Because, the Court explains, "the mere possibility that limitations would bar future suits does not effect a change in the parties' relationship that confers prevailing party status on a defendant."[15] But the bar of res judicata is also a "mere possibility" in the sense that both it and limitations are affirmative defenses that are waived if not raised. If either is successfully raised, the effect is the same: suit is barred. Yet the Court goes out of its way to treat them

[13] *Ante* at ___.

[14] *Ante* at ___.

[15] *Ante* at ___ n.6.

differently. As hard as it is to understand why the Court would differentiate between the two defenses, it is impossible to think the Fowlers and the Eppses did.

The Court doubts that the Fowlers and the Eppses intended for a defendant to be awarded attorney fees after a nonsuit without prejudice because the result could be two different prevailing parties if the plaintiff refiles the same suit and wins. But the difficulty the Court sees in this example is not avoided by sparing the nonsuiting plaintiff from an attorney fee award. In the Court's view, if the plaintiff nonsuits without prejudice a claim that is then barred by limitations, the defendant has not prevailed. But if the plaintiff refiles the same action, the defense is raised, and the defendant wins, has he prevailed? Of course. The Court does not avoid the difficulty it raises.

In reality, the difficulty the Court sees should not have been any problem at all for the Fowlers and the Eppses, had they thought about it before signing their contract. It is neither illogical nor unreasonable for parties to agree that a plaintiff who abandons litigation should make everyone whole, even if he tries again and wins. The law may afford a mulligan, but the parties can decide it should not be free. And if a prevailing attorney is to recover attorney fees, it makes perfect sense to award them to a defendant both when he is nonsuited, and again later when a second suit is dismissed based on res judicata or limitations.

Finally, the Court worries that to enforce a fee-shifting provision like the one in this case will result in satellite litigation over attorney fees. Usually, determining the amount of a party's reasonable attorney fees does not require much litigation. But the important point, here and throughout, is that any cause for concern belongs to the parties in reaching agreement, not to the Court in setting policy.

In the end, the Court forces parties who desire a broader fee-shifting agreement than it thinks is good policy to use clearer words than "prevailing party". "Just party" would only encourage more judicial subjectivism. I don't think "escaping party" would do it, because the nonsuiting plaintiff may be escaping the defendant's becoming a prevailing party. "Fortunate party" might work, though it's very general. Viewed from another angle, the provision might award fees to the "oppressed party", though it, too, is very general and also injects a moral tone. But if "prevailing" is not clear enough, probably no one word is. To be safe, parties will have to spell out their intentions in more detail. An agreement to shift attorney fees will require more attorney fees to draft. But it will be worth it.

"A court must be careful not to substitute its own view of what should have been intended for what *was* intended."[16] In accordance with the parties' agreement, I would award the Eppses reasonable attorney fees. Accordingly, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 26, 2011

[16] *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 321 (Tex. 2000) (Hecht, J., concurring) (emphasis in original).

IN THE SUPREME COURT OF TEXAS

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NO. 10-0294
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IN RE MICHAEL WOLFE, RELATOR

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ON PETITION FOR WRIT OF MANDAMUS
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PER CURIAM

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

"Individual citizens . . . have no right to maintain an ouster suit without being joined by a proper state official." *Garcia v. Laughlin*, 285 S.W.2d 191, 194 (Tex. 1955) (orig. proceeding) (writ denied on other grounds). The question in this mandamus proceeding is whether, without joinder of a proper state official, individual citizens may obtain pre-suit discovery under Rule 202, TEX. R. CIV. P., to investigate grounds for removal of a county official. We answer no and conditionally grant relief.

The Harris County Department of Education and four of its seven trustees, Angie Chestnut, Roy Morales, Jim Henley, and Debra Kerner (collectively, the Department), petitioned the district court under Rule 202 to order the deposition of another trustee, Michael Wolfe, in order to investigate suspected wrongdoing that might lead to a removal suit. The Department asserted that "[t]he substance of the testimony [it] expect[ed] to elicit . . . include[d] the reasons why, if any, Wolfe has failed to attend numerous meetings" and whether he "claim[ed] a homestead exemption

to which he was not entitled . . . ." Wolfe responded that the Department was "angry" with him "because he has not voted to increase the tax rate . . . and he has actively support[ed] certain candidates running against [other trustees] and he himself ran political campaigns against . . . Chestnut." Wolfe contended that only the county attorney had standing to seek discovery that might lead to his ouster because by statute, "[t]he county attorney shall represent the state in a proceeding for the removal of [a county] officer" other than himself or the district attorney. TEX. LOC. GOV'T CODE § 87.018(d). The trial court granted the petition and ordered Wolfe's deposition. The court of appeals denied Wolfe's petition for mandamus.

A "county officer[] may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law . . . ." TEX. CONST. art. V, § 24. A removal proceeding "is begun by filing a written petition . . . in a district court . . . ." TEX. LOC. GOV'T CODE § 87.015(a). "Any resident of this state who has lived for at least six months in the county in which the petition is to be filed and who is not currently under indictment in the county may file the petition." *Id.* § 87.015(b). But "[i]ndividual citizens have no private interest [in ouster] distinguishable from the public as a whole . . . ." *Garcia* , 285 S.W.2d at 194. Rather, "[t]he remedy of ouster is one which belongs to the state, in its sovereign capacity, to protect the interests of the people as a whole and guard the public welfare . . . ." *State ex rel. Dishman v. Gary,* 359 S.W.2d 456, 458 (Tex. 1962) (internal quotation marks omitted). Without joinder of the proper state official, the court does not have "jurisdiction to hear and determine the cause . . . ." *Garcia,* 285 S.W.2d at 194.

The State, the proper party to prosecute the ouster action against Wolfe that the Department allegedly anticipates, would be represented by the county attorney. TEX. LOC. GOV'T CODE § 87.018(d). The county attorney did not join the Department in petitioning for pre-suit discovery. The Department argues that the county attorney's joinder is not required because a Rule 202 proceeding is not a removal proceeding. But pre-suit discovery "is not an end within itself"; rather, it "is in aid of a suit which is anticipated" and "ancillary to the anticipated suit." *Office Emps. Int'l Union Local 277 v. Sw. Drug Corp.*, 391 S.W.2d 404, 406 (Tex. 1965). To prevent an end-run around discovery limitations that would govern the anticipated suit, Rule 202 restricts discovery in depositions to "the same as if the anticipated suit or potential claim had been filed." TEX. R. CIV. P. 202.5. In an ouster action, prosecuted in the State's name, the county attorney would control discovery from the official sought to be removed. The Department cannot obtain by Rule 202 what it would be denied in the anticipated action.

Rule 202 is not a license for forced interrogations. Courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule. The trial court here clearly abused its discretion in ordering Wolfe to testify regarding grounds for his removal from office without the request of the county attorney who must prosecute an ouster action for the State. An improper order under Rule 202 may be set aside by mandamus. *In re Jorden*, 249 S.W.3d 416, 420 (Tex. 2008). Accordingly, we grant Wolfe's petition, and without hearing oral argument, TEX. R. APP. P. 52.8(c), direct the trial court to vacate its order signed March 26, 2010, and dismiss this proceeding. We are confident the trial court will promptly comply, and our writ will issue only if it fails to do so.

Opinion Delivered: June 10, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0306

WILMA REEDY, R.N., PETITIONER,

v.

ELIZABETH POMPA AND NICHOLAS POMPA, III, AS PARENTS AND NEXT FRIENDS OF ANNICA POMPA, A MINOR, RESPONDENTS

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

PER CURIAM

After their daughter, Annica, was born with shoulder dysotica and other injuries at Cuero Community Hospital, a facility operated by DeWitt Medical District, her parents, respondents Elizabeth and Nicholas Pompa, sued petitioner Wilma Reedy, R.N., and others. Reedy moved to dismiss the suit under section 101.106(f) of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.106(f), claiming that the suit was based on conduct within the general scope of her employment at the hospital and could have been brought against the governmental unit.

The trial court denied the nurse's motion to dismiss, and Reedy brought an interlocutory appeal. The court of appeals affirmed. 310 S.W.3d 112, 119-20 (Tex. App.–Corpus Christi-Edinburg 2010). The court of appeals held that the nurse did not show that the Pompas' claim could have been brought against the hospital under the Act, a requirement of section 101.106(f). *Id.*

While this case has been pending on appeal, we have decided *Franka v. Velasquez*, ___ S.W.3d ___ (Tex. 2011), holding among other things that, for purposes of section 101.106(f), a tort action is brought "under" the Texas Tort Claims Act, even if the government has not waived its immunity for such actions. ___ S.W.3d at ___. In light of *Franka*, we grant Reedy's petition for review, and without hearing oral argument, reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings. TEX. R. APP. P. 59.1.

Opinion delivered: January 21, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0364

IN RE GUARANTY INSURANCE SERVICES, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

What happens when a law firm's efforts to screen a conflict fail, permitting a nonlawyer who worked on one side of a case at one firm to work on the other side of the same case at the opposing firm? Here, the trial court disqualified the second firm, reasoning there was a conclusive presumption that the nonlawyer had shared confidential information, despite evidence he had not. A divided court of appeals denied mandamus relief. 310 S.W.3d 630, 634. Given our prior decisions on the subject—particularly our recent decision in *In re Columbia Valley Healthcare System, L.P.*, 320 S.W.3d 819 (Tex. 2010) (orig. proceeding), issued four months after the court of appeals' decision below—we conclude disqualification was not warranted. Further, because the improper disqualification was a clear abuse of discretion for which there is no adequate remedy by appeal, mandamus relief is warranted. *See In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding) (describing when mandamus relief may issue); *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding) (granting mandamus in context of

improper disqualification). We conditionally grant mandamus relief and direct the trial court to vacate its disqualification order.

The nonlawyer in this story is paralegal Clyde Williams; the two firms are Godwin Pappas Langley Ronquillo, LLP (Godwin Pappas) and Strasburger & Price, LLP (Strasburger). Like many corporate battles, the litigation underlying this mandamus proceeding was a multi-suit affair. The lawsuit from which Strasburger was ultimately disqualified is suit number two in the litigation between Trans-Global Solutions, Inc. (Trans-Global) and Guaranty Insurance Services, Inc. (Guaranty). Trans-Global first sued Guaranty, an insurance agent, for allegedly failing to obtain appropriate insurance. Guaranty prevailed and brought suit number two (the underlying suit), seeking indemnity for the defense costs it incurred in the first suit. Strasburger represents Guaranty in the underlying suit. Trans-Global was first represented by Godwin Pappas in the underlying suit and is now represented by Kane Russell Coleman & Logan, PC (Kane Russell).

In July 2005, Williams began work as a paralegal at Godwin Pappas. While there, he billed a total of 6.8 hours in the underlying suit, reviewing the file to identify persons with knowledge of relevant facts, preparing an initial draft of a response to Guaranty's request for disclosures, assisting in document production, and communicating with opposing counsel. Williams left Godwin Pappas in November 2006. The attorneys handling the case left the firm in August 2008 for Kane Russell, taking the case with them.

In October 2008, Williams applied for a paralegal position at Strasburger. In his Employee Application, he identified Godwin Pappas as one of his previous employers, and Strasburger ran an initial conflicts check, which came back clear. At the firm's request, Williams also identified two

potential conflicts due to his previous work on matters in which Strasburger represented another party. Strasburger ran a separate conflicts check on those and restricted his access to documents related to them. Williams attested that he failed to identify the underlying suit as a potential conflict because he did not remember having billed any hours for it.

In addition to the conflicts check, the firm instructed Williams several times prior to his work on this case not to disclose confidential information he gained during his previous employment—specifically during his orientation, and through the Strasburger Employee Information Handbook and a confidentiality agreement. Williams signed the handbook and the agreement. Both required him to notify his supervising attorney immediately if he became aware of a matter on which he previously worked.

Williams started work at Strasburger in January 2009. At that point, the underlying suit was already underway. The trial court granted partial summary judgment in Guaranty's favor that March, determining Trans-Global was contractually obligated to indemnify Guaranty for the defense costs incurred during the first suit. In July 2009, Williams's supervising attorney at Strasburger asked him to organize the pleadings and discovery in this case. Williams again failed to recognize the conflict and to notify the supervising attorney of its existence. In September 2009, Williams affixed bates labels to documents produced to Trans-Global and attached redacting tape to passages highlighted by an attorney. In total, Williams billed about 27 hours on the case at Strasburger.

Emails between Strasburger and Kane Russell regarding routine discovery matters made reference to Williams as a Strasburger legal assistant. A Kane Russell attorney recognized Williams as a former Godwin Pappas employee and notified Strasburger of the conflict. Strasburger

immediately instructed Williams to discontinue working on the matter, not to view or access any documents related to the case, and not to disclose any information he had obtained during his employment with Godwin Pappas. Trans-Global moved to disqualify Strasburger. Though Trans-Global disputes this fact before our Court, the record is clear that Trans-Global conceded during the disqualification hearing that no confidences were actually shared.[1] After conducting that hearing, the trial court granted Trans-Global's motion and entered findings of fact and conclusions of law. In brief, it reasoned the journey was irrelevant when the final destination included a nonlawyer on both sides of the same case. It held that evidence Strasburger instituted a screening procedure for nonlawyers was immaterial under Texas law because the screening procedure did not prevent Williams from actually working on the opposite side of the case. Williams's actual work on opposite sides created a genuine threat of disclosure, which meant he was conclusively presumed to have shared confidential information, despite evidence he had not.

Guaranty unsuccessfully sought mandamus relief in the court of appeals, which essentially agreed with the trial court's analysis. While conceding Strasburger's screening procedures were "exemplary," it explained that those procedures, "however thorough, must actually be effective in order to rebut the presumption." 310 S.W.3d at 632 (citing *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 833 (Tex. 1994) (orig. proceeding)). It reasoned that "where a paralegal has actually been allowed to work on both sides of the same litigation, even the most exhaustive attempts at

[1] During the hearing, Trans-Global's counsel agreed when asked by the court if he took "[opposing] counsel at his word that in fact that's true, he did not get any confidential information from this paralegal?" The judge later reiterated, without objection from Trans-Global's counsel, that Trans-Global was "conceding that on the record . . . the only evidence I have is that no confidence was shared at the second law firm."

screening cannot be deemed effective" and concluded the trial court did not abuse its discretion. *Id.* at 633–34. A dissenting justice took the position that a nonlawyer's actual work on both sides of the case by itself did not mandate disqualification of the second firm. *Id.* at 634 (Waldrop, J., dissenting).

Our conflict-of-interest jurisprudence recognizes distinctions between lawyers and nonlawyers, their duties, and their likelihood of contact with confidential information. We have held that a lawyer who has previously represented a client may not represent another person on a matter adverse to the client if the matters are the same or substantially related. *In re Columbia*, 320 S.W.3d at 824. If the *lawyer* works on a matter, there is an *irrebuttable* presumption that the lawyer *obtained* confidential information during the representation. *Phoenix Founders*, 887 S.W.2d at 833. When the lawyer moves to another firm and the second firm represents an opposing party to the lawyer's former client, a second *irrebuttable* presumption arises—that the lawyer has *shared* the client's confidences with members of the second firm. *Id*. at 834. The effect of this second presumption is the mandatory disqualification of the second firm. *See id*. at 833–34.

But the rule is different for nonlawyers. A *nonlawyer* who worked on a matter at a prior firm is also subject to a *conclusive* presumption that confidences were *obtained*. *In re Am. Home Prods. Corp.*, 985 S.W.2d 68, 74 (Tex. 1998) (orig. proceeding); *Phoenix Founders*, 887 S.W.2d at 834. This rule serves "to prevent the moving party from being forced to reveal the very confidences sought to be protected." *In re Am. Home*, 985 S.W.2d at 74 (quoting *Phoenix Founders*, 887 S.W.2d at 834) (quotation marks omitted). However, the second presumption—that confidences were *shared* with members of the second firm—may be rebutted where nonlawyers are concerned.

Phoenix Founders, 887 S.W.2d at 835. As applies here, then, there is a conclusive presumption that Williams obtained confidential information, but Strasburger may be free to rebut the presumption that Williams shared those confidences with it. The issue is whether Strasburger can do so in this situation and, if so, whether it has.

> The only way to rebut the rebuttable presumption is:
>
> > (1) to instruct the legal assistant "not to work on any matter on which the paralegal worked during the prior employment, or regarding which the paralegal has information relating to the former employer's representation," and (2) to "take other reasonable steps to ensure that the paralegal does not work in connection with matters on which the paralegal worked during the prior employment, absent client consent."

In re Am. Home, 985 S.W.2d at 75 (quoting *Phoenix Founders*, 887 S.W.2d at 835). A simple, informal admonition to a nonlawyer employee not to work on a matter on which he worked before is not enough. *In re Columbia*, 320 S.W.3d at 826. And 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." *Id*. Thus, effective screening methods may be used to shield the employee from the matter in order to avoid disqualification. *Id.* at 824 (citations omitted).

But we have never said that ineffective screening measures merited automatic disqualification for nonlawyers. On the contrary, we have explained that in most cases, disqualification is not required provided "the practical effect of formal screening has been achieved." *Phoenix Founders*, 887 S.W.2d at 835 (citation omitted). In *In re Columbia*, we equated

this to "effective screening," and cited to the six *Phoenix Founders* factors that guide such an inquiry:

> (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.

320 S.W.3d at 824–25 (citing *Phoenix Founders*, 887 S.W.2d at 836). Whether screening actually works is not determinative. Instead, the "ultimate question in weighing these factors" is whether the second firm "has taken measures sufficient to *reduce* the potential for misuse of confidences to an *acceptable* level." *Phoenix Founders*, 887 S.W.2d at 836 (emphasis added).

We have also explained that knowledge of a conflict can be central to this analysis:

> The nonlawyer should be cautioned . . . that the employee should not work on any matter on which the employee worked for the former employer. . . . *When the new firm becomes aware of such matters*, the employing firm must also take reasonable steps to ensure that the employee takes no action and does no work in relation to matters on which the employer worked in the prior employment, absent client consent after consultation.

Grant v. Thirteenth Court of Appeals, 888 S.W.2d 466, 467–68 (Tex. 1994) (per curiam) (orig. proceeding) (emphasis added) (quoting ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1526 (1988)).

We reiterated the flexibility of this approach as well as the significance of knowledge in *In re Columbia*, which expounded upon the thrust of our prior holdings:

> Despite the screening measures used, the presumption of shared confidences becomes conclusive if: (1) information related 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 paralegal 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.

320 S.W.3d at 828. Because Williams actually worked on both sides of this case, the third scenario discussed in *In re Columbia* is implicated. Today we clarify, under that scenario: The presumption of shared confidences is *rebuttable* if the nonlawyer has actually performed work on the matter at a lawyer's directive and the lawyer reasonably should *not* know about the conflict of interest. Put differently, if the nonlawyer has actually worked on the matter, the presumption of shared confidences is *not rebuttable unless* the assigning lawyer should *not* have known of the conflict.

The question, then, is whether Williams's supervising attorney reasonably should have known that Williams worked on the same case at Godwin Pappas before coming to Strasburger. First, on this record, the supervising attorney reasonably should not have had such knowledge, rendering the presumption rebuttable. Second, Strasburger succeeds in rebutting this presumption. We discuss each in turn.

Prior to Williams's discovery by a Kane Russell attorney, there is no evidence Strasburger was ever notified of the conflict. Williams never informed Strasburger that he had worked on the suit. And the fact that he worked less than seven hours on the case certainly supports Williams's claim that he simply forgot he had engaged with the litigation; the fact that he willingly disclosed two other potential conflicts suggests he was not averse to disclosing potential conflicts.

Further, the conflicts check came back clear. Trans-Global argues Strasburger would have discovered the conflict but for its ineffective screening system. We have never required perfection

in screening conflicts. And as Strasburger points out, Trans-Global had changed representation, from Godwin Pappas to Kane Russell, since Williams had worked for the other side, and Godwin Pappas had itself changed names several times. Aside from its computerized conflicts check, Strasburger had specifically asked Williams to identify any conflicts of which he was aware. In addition, Trans-Global conceded that Strasburger's system was adequate during the oral hearing on the motion to disqualify, at one point stating, "we have no complaints about their screening procedure," and remaining mum when the trial court stated that Trans-Global had conceded that Strasburger's screening methods were sufficient to meet the *Phoenix Founders* and *In re American Home* standards. The failure of a screening method to actually screen a tainted party will not translate into disqualification where "the practical effect of formal screening has been achieved." *Phoenix Founders*, 887 S.W.2d at 835 (citation omitted). That effect was achieved here because there is no evidence the supervising attorney reasonably should have known about the conflict.

The screening was also effective under the fact-intensive, multi-factor inquiry of *Phoenix Founders*. There was undoubtedly a substantial relationship between the former and current matters—they stemmed, after all, from the same litigation. However, it is worth noting that by the time Williams first worked on the case as a Strasburger employee in July 2009, summary judgment had limited the scope of the matter, leaving only the determination of the amount of attorney fees from the first suit and whether fees could be recovered in the second indemnity suit. The other factors further indicate effective screening.[2] Almost two years passed between Williams's exit from

[2] Because the parties point to no evidence in the record as to the size of either firm, we do not include this factor in our analysis.

Godwin Pappas and his application to Strasburger; another three months after that passed before he gained employment there; and another six months after that went by before he actually worked on the case. Only one person—Williams—is presumed to have confidential information, and Williams's minimal work on the case (less than 34 hours across both firms) also suggests effective screening. Finally, the evidence indicates that Strasburger took numerous measures, discussed below, to prevent and later to address the danger of disclosure.

Strasburger clears the hurdles to presumption-rebuttal erected by *In re American Home* and *Phoenix Founders*. At the outset, via his orientation, the Strasburger Employee Information Handbook, and the confidentiality agreement, Strasburger instructed Williams not to engage with matters on which he had worked previously. Those documents also directed Williams to notify his supervising attorney immediately if he realized a conflict. Strasburger also took other reasonable steps to ensure Williams did not work on matters from his prior employment. Specifically, it had in place formal, institutionalized screening procedures, which even the court of appeals noted were "nothing if not thorough." 310 S.W.3d at 633. The trial court similarly noted Strasburger had "presented evidence that it had instituted a screening procedure for nonlawyers," and even Trans-Global itself stated "we have no complaints about their screening procedure." Strasburger also presented evidence that it strictly adhered to its formal screening process when it hired Williams. When Williams identified two closed matters on which he had worked and in which Strasburger had also been involved, Strasburger removed his access to those files. Strasburger also ran a conflicts check based on Williams's previous employers, and it revealed no additional conflicts. Williams signed a confidentiality agreement, certifying that he disclosed the existence of any conflict of

interest of which he was aware at the time. He also acknowledged receiving, reading, and signing the Employee Information Book, which informed him of his duty to keep confidential information obtained during his previous employment.

Further, Williams attested that upon discovering the conflict, Strasburger instructed him not to work further on this case, not to access related documents, and not to disclose any information. While such a restriction is not a stand-alone requirement for rebutting the presumption, these additional steps further distinguish this case from others where we have disqualified firms for a nonlawyer's actual work on both sides of a case. For example, in *In re Columbia*, the paralegal had similarly performed limited work on both sides of the same case. 320 S.W.3d at 823. But the second law firm did not have any formal screening measures in place and, upon realizing a conflict existed, did not immediately remove the nonlawyer's access to the case. *Id*. In fact, the supervising attorney asked the nonlawyer to work on the case even after the conflict came to light. *Id*. Strasburger's efforts after discovering the conflict parallel and reinforce its thorough attempts to preempt the conflict in the first place.

For these reasons, and without hearing oral argument, *see* TEX. R. APP. P. 52.8(c), we conditionally grant mandamus relief and direct the trial court to vacate its order granting the motion to disqualify. We are confident the trial court will comply, and the writ will issue only if it does not.

OPINION DELIVERED: July 1, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0366

IN RE JOHN DOES 1 AND 2, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

JUSTICE MEDINA did not participate in the decision.

In this mandamus proceeding we hold that a court may not order pre-suit discovery by agreement of the witness over the objections of other interested parties without making the findings required by Rule 202.4(a) of the Texas Rules of Civil Procedure.

Philip R. Klein owns PRK Enterprises, Inc. and Klein Investments, Inc. The two corporations (collectively "PRK") operate or have operated a blog called The Southeast Texas Political Review. Two anonymous bloggers called Operation Kleinwatch and Sam the Eagle Weblog (collectively "relators") have criticized Klein extensively. Relators subscribe to Blogger.com, a subsidiary of Google, Inc. (collectively "Google"), which hosts them on the Internet. PRK petitioned the district court under Rule 202 to order discovery from Google of relators' identities in anticipation of a lawsuit by Klein and PRK against relators for copyright law violations, defamation, and invasion of privacy. The alleged bases for such causes of action are contained in the following five sentences of the petition:

> [Relators] have been engaged in a pattern of libel and defamation per se, invasion of privacy, and use of copyrighted images (both facial and voice image), without permission. The purpose of these websites are to disparage, harass and cause injury to [PRK], as well as to [Klein] personally. These websites host significant, false information, and invade the privacy of [PRK] throughout the website. For example, without limitation, the website Operation Klein Watch, contains false information on legal proceedings that do not involve either [Klein] individually or [PRK], falsely represent that judgments have been taken against [PRK] and/or [Klein] individually, falsely identify a bankruptcy proceeding, also identify lawsuits that do not involve [PRK] and/or [Klein] individually. Additionally, this website identifies all members of [Klein's] family, for no apparent purpose other than to invade their privacy.

Klein did not join in the petition. The petition named Google and relators as defendants.

After being served, Google agreed with PRK that it would respond to a subpoena duces tecum.[1] Accordingly, PRK did not ask for a hearing on the petition. Federal law generally prohibits a "cable operator" like Google from disclosing a subscriber's personally identifiable information without its consent. 47 U.S.C. § 551(c)(1). But there is an exception if disclosure is ordered by a

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[1] The subpoena duces tecum commanded production of documents described as follows:

"1. Any and all identifiers, user account IP addresses, user access Email Addresses, user entry logs, user posting logs, registered user information, account access IP addresses and/or any identifying descriptors for the following blogspots for the previous year:

a) http://samtheeagleusa.blogspot.com/
b) http://operationkleinwatch.blogspot.com/
c) http://www.notthisonetoojacques.blogspot.com/

"2. To identify all parties, persons, or entities responsible for the website http://operationkleinwatch.blogspot.com and http://samtheeagleusa.blogspot.com.

"3. Identify all persons, parties or entities who provide contributions of money or literary substance to these websites.

"4. Identify all persons, parties or entities who posted comments on these websites and/or have provided financial support to these websites.

"5. Identify all persons, parties or entities who are in any way affiliated with, or connected with in any capacity, these websites."

court with notice to the subscriber. *Id*. § 551(c)(2)(B). Google gave relators notice of its receipt of the subpoena.[2]

Relators moved to quash the subpoena, arguing that the petition's allegations were insufficient to show that PRK had a cause of action against relators, and that their identities are constitutionally protected from disclosure. PRK responded, arguing that the information sought was not constitutionally protected, and moved to compel discovery. PRK argued that to obtain the requested discovery, it should not be required to do more than assert a cause of action. PRK's motion was no more specific than their petition with respect to the bases for claims against relators. After a brief hearing, at which relators did not appear, the trial court denied relators' motions and granted PRK's. The court of appeals denied mandamus relief.

Relators argue that the trial court abused its discretion by failing to comply with Rule 202. Rule 202.4(a), "Required Findings," states:

> The court must order a deposition to be taken if, but only if, it finds that:
>
> (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or
>
> (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

TEX. R. CIV. P. 202.4(a). The trial court did not make either of these findings.

PRK argues that compliance with Rule 202 was excused because of its agreement with Google. It is true that "[e]xcept where specifically prohibited, the procedures and limitations set

[2] We do not address whether Google complied with the federal statute.

forth in the rules pertaining to discovery may be modified in any suit by agreement of the parties . . . ." TEX. R. CIV. P. 191.1. But PRK and Google were not the only parties to the proceeding. Rule 202.3(a) requires that "all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit" be served with the petition and given notice of hearing. TEX. R. CIV. P. 202.3(a). PRK asserted that relators would be defendants in the anticipated lawsuit, and by their motions to quash, relators made an appearance in the proceeding. PRK and Google could not modify the procedures prescribed by Rule 202 by an agreement that did not include relators.

Nor can the required findings be implied in support of the trial court's order compelling discovery. For one thing, PRK made no effort to present the trial court with a basis for the findings. Not only are the allegations in its petition and motion to compel sketchy, they mostly concern possible causes of action by Klein, who is not a party to the proceeding. To justify noncompliance with the requirements of Rule 202, PRK relies entirely on its agreement with Google. More importantly, however, Rule 202 expressly requires that discovery may be ordered "only if" the required findings are made. The rule does not permit the findings to be implied from support in the record. The intrusion into otherwise private matters authorized by Rule 202 outside a lawsuit is not to be taken lightly. One noted commentator, Professor Lonny Hoffman, has observed that there is "cause for concern about insufficient judicial attention to petitions to take presuit discovery" and that "judges should maintain an active oversight role to ensure that [such discovery is] not misused". *Access to Information, Access to Justice: The Rule of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 273–74 (2007). We agree.

The trial court clearly abused its discretion in failing to follow Rule 202. Rule 202.5 provides that use of a deposition may be restricted or prohibited "to prevent abuse of this rule", but that remedy for noncompliance affords relators no relief from their complaint that their identities not be disclosed. Thus, relators are entitled to mandamus relief. *In re Jorden*, 249 S.W.3d 419, 420 (Tex. 2008) (orig. proceeding) (party to Rule 202 proceeding has no adequate remedy on appeal if court abused its discretion in ordering discovery that would comprise procedural or substantive rights).

The trial court is directed to vacate its order dated January 29, 2010, and to grant relators' motions to quash. We are confident that the trial court will promptly comply, and the writ will issue only if it fails to do so.

Opinion delivered: April 15, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0383

IN RE B.T., A JUVENILE

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this mandamus proceeding, we consider whether the juvenile court abused its discretion when it did not obtain a complete diagnostic evaluation of a juvenile prior to a hearing to transfer the juvenile to adult criminal court. The Family Code mandates a "complete diagnostic study," and the psychologist who performed this report emphasized it was incomplete. We hold the trial court abused its discretion, a determination the State does not dispute, and we conditionally grant the petition for writ of mandamus.

B.T. is a 17-year-old charged with murdering his teacher. In 2009, the State filed a petition for discretionary transfer urging the juvenile court to order B.T. tried as an adult. Under Family Code Section 54.02(a), the "juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court for criminal proceedings if" certain conditions are met. Section 54.02(a)(3) authorizes transfer to criminal court if, among other requirements, the juvenile court determines "after a full investigation and a hearing" that there is probable cause to believe the child committed the alleged offense and "because of the seriousness

of the offense alleged or the background of the child the welfare of the community requires criminal proceedings." Section 54.02(d) provides that "[p]rior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." Section 54.02(f) provides that the juvenile court, in making the transfer decision, shall consider several factors, including "the sophistication and maturity of the child," "the record and previous history of the child," and "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court."

In accordance with the Family Code, the juvenile court commissioned Dr. Emily Fallis to perform a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense, and to assess his background, his sophistication and maturity, his record and previous history, the prospects of adequate protection of the public, and the likelihood of his rehabilitation by use of procedures, services, and facilities currently available to the juvenile court. Dr. Fallis's preliminary evaluation concluded B.T. suffered from a mental disease or defect that substantially impaired his capacity to understand the charges against him and the proceedings in juvenile court, and to assist in his own defense. Dr. Fallis stated she would "not proffer an opinion regarding [B.T.'s] capacity to be adjudicated as an adult until he is fit to proceed." The report recommended that B.T. receive inpatient psychiatric treatment "in order to help him attain a minimal level of fitness to proceed" and be reevaluated with regard to the State's transfer motion. Dr. Fallis therefore submitted a report she specifically stated was incomplete.

Based on Dr. Fallis's recommendations, the juvenile court committed B.T. to Vernon State Hospital for 90 days, where he underwent treatment and counseling until he was deemed fit to proceed by Dr. Stacey Shipley. The juvenile court then set B.T.'s transfer hearing for May 13, 2010, even though Dr. Fallis's report remained incomplete.

B.T. and the State *jointly* urged the court to delay the hearing to await completion of the diagnostic study. The court refused, believing it had sufficient information to proceed under Section 54.02(d). At the time, the juvenile court possessed Dr. Fallis's partial report, medical records from Vernon State Hospital by Dr. Shipley, and an evaluation of B.T. by Dr. Paul Andrews from an unrelated juvenile proceeding in 2007. B.T.'s counsel objected that the materials merely addressed B.T.'s fitness to proceed and did not comprise the "complete diagnostic study" required by statute. The court ignored this objection, explaining: "I think I've got before me so much information of an evaluative nature, psychological evaluations and that sort of thing, that I think I've got before me what I would consider a complete diagnostic study." B.T. filed a motion requesting the court reconsider its ruling and await the complete diagnostic study. The court denied this motion on May 10, 2010.

B.T. sought mandamus relief and requested an emergency stay from the court of appeals. The court of appeals stayed the juvenile-court proceedings but ultimately denied mandamus relief. B.T. now seeks relief from this Court.

Our mandamus-review standards are well settled. Mandamus relief is proper to correct a clear abuse of discretion when there is "no adequate remedy by appeal." *In Re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (citations omitted). "A trial court has no 'discretion'

in determining what the law is or applying the law to the facts." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). "Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *Id.* (citations omitted).

B.T. wants us to direct the juvenile court to (1) vacate its May 3 order that the complete diagnostic report is unnecessary; (2) vacate its May 10 order denying B.T.'s Motion for Reconsideration; (3) enjoin any attempt to conduct a transfer hearing without the finished report. This Court has already stayed the transfer hearing pending our decision on mandamus relief.

B.T. argues the juvenile court abused its discretion when it proceeded without the requisite study. Interestingly, the State does not oppose mandamus relief, sharing B.T.'s concern that a complete assessment has not been completed. The State notes "[t]he trial court appears to have abused its discretion in not allowing completion of a mandatory diagnostic study required before [B.T.] can stand trial as an adult for stabbing his teacher to death." The State is understandably risk-averse: "Given the severity of the charge, the State has an interest in assuring that the law is complied with before a decision is made that Relator should stand trial as an adult."

The primary issue presented is whether the juvenile court erred in concluding the information it already possessed was sufficient, despite Dr. Fallis's caution that further evaluation was required to finish the report. We conclude the juvenile court abused its discretion in proceeding without the complete diagnostic study.

Based on a plain reading of Section 54.02(d), the juvenile court is required to "order and obtain" a "complete diagnostic study" before the hearing. Neither the Legislature, this Court, nor the Court of Criminal Appeals has defined "complete diagnostic study" for purposes of Section

54.02. One court of appeals has described a complete diagnostic study as one that "bears upon the maturity and sophistication of the child and relates to the questions of culpability, responsibility for conduct, and ability to waive rights intelligently and assist in the preparation of a defense." *L.M. v. State*, 618 S.W.2d 808, 811 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (citations omitted). It is the "qualitative content of a diagnostic study, rather than a mere quantitative 'check-list' of included items, [that] is the paramount concern." *Id.* at 811–12.

Some courts of appeals have held a trial court did not abuse its discretion where it relied upon materials that did not clearly constitute a complete diagnostic report, but instead contained a variety of psychological evaluations and records. *See I.L. v. State*, 577 S.W.2d 375, 376 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (study included an intelligence test completed one year prior to hearing, a social evaluation and investigation, monthly progress reports during a one-year stay at the juvenile detention center, a psychiatric examination conducted less than one month prior to the hearing, and testimony from an examining psychiatrist at the hearing that "no further testing was needed and that a complete diagnostic study had been made"); *R.K.A. v. State*, 553 S.W.2d 781, 783 (Tex. Civ. App.—Fort Worth 1977, no writ) (study that was "very comprehensive" included reports from three doctors, the supervisor of intake at the juvenile detention center, and a probation officer, and an evaluation prepared from daily observations by a juvenile department program director and a staff member); *Vasquez v. State*, No. 03-99-00664-CR, 2000 WL 795328, at *1 (Tex. App.—Austin June 22, 2000, no pet.) (study included "a juvenile probation officer's summary, a psychological evaluation, a psychiatric evaluation, a physical examination, and . . . an elementary

school record"); *L.M.*, 618 S.W.2d at 811–12 (psychological testing for a study was ordered and obtained by the trial judge but not entered into evidence due to the juvenile's objections).

B.T.'s case is distinguishable from these cases. While a trial court has discretion to determine whether a diagnostic study is in fact complete, no appellate court has upheld a case where the commissioned report itself declares it is insufficient. The State candidly concedes the awkwardness: "it is troubling to the State that the record as it currently stands contains evidence that the only § 54.02(d) diagnostic study ordered by Judge Getz states on its face that it was not completed due to Relator's unfitness to proceed."

The three fitness reports the juvenile court deemed sufficient under Section 54.02(d) contain detailed information regarding B.T.'s background, his treatment, his history of behavioral issues, the various evaluation and testing he has undergone, his diagnoses, and his understanding of the alleged murder and the surrounding circumstances. Each report, however, deals solely with the matter of B.T.'s fitness to proceed. A juvenile is unfit to proceed if "as a result of mental illness or mental retardation[, he] lacks capacity to understand the proceedings in juvenile court or to assist in [his] own defense." TEX. FAM. CODE § 55.31(a). After a motion to determine fitness to proceed is filed, the court may, in making its determination, consider the motion, supporting documents, professional statements of counsel, and witness testimony, and also make its own observation of the child. *Id.* at (b). In contrast, the "complete diagnostic study" for a transfer hearing calls for a far more comprehensive analysis, as described above. The juvenile court here violated Section 54.02(d) by substituting the Vernon State Hospital report and Dr. Andrews's two-year-old report for a reevaluation and complete report by Dr. Fallis.

B.T. has no plausible appellate remedy. While a "defendant may appeal an order of a juvenile court certifying the defendant to stand trial as an adult and transferring the defendant to a criminal court under Section 54.02," TEX. CODE CRIM. PROC. art. 44.47(a), any such appeal—a criminal matter governed by the Code of Criminal Procedure and the Texas Rules of Appellate Procedure, *id*. at (c)—must be joined with the defendant's appeal of any criminal-court conviction or order of deferred adjudication, *id.* at (b). That is, B.T. can appeal his transfer—but only after he has been convicted (or placed on deferred adjudication) in adult court. By this time, 17-year-old B.T. likely will have turned 18, and juvenile adjudication may be unavailable. *See In re N.J.A.*, 997 S.W.2d 554, 557 (Tex. 1999). The State notes candidly the potential for wasted judicial resources:

> Absent a finished report from Dr. Fallis . . . the State believes that Relator might have a meritorious claim on appeal from any conviction as an adult in this case. A claim . . . could result in having [to] start the entire certification process all over again. . . . Allowing this case to remain infected with potential reversible error when an order from the Court could innoculate the proceedings from that error seems to run contrary to the intent of the Family Code and the interest of justice. The State would certainly have no objection should the Court conclude that the purpose and intent of the law would be better served by having Judge Getz order a more complete diagnostic study.

The Family Code by its terms requires that a complete diagnostic study be requested *and* received. The juvenile court clearly abused its discretion in denying B.T.'s motion to delay the transfer hearing until Dr. Fallis completed her facially incomplete report.

Accordingly, without hearing oral argument, we conditionally grant the writ of mandamus and direct the juvenile court to vacate (1) its May 3 order denying the parties' joint request to delay the transfer hearing until Dr. Fallis finalizes her report, and (2) its May 10 order denying B.T.'s

motion for reconsideration. TEX. R. APP. P. 52.8(c). We are confident the trial court will comply, and the writ will issue only if it does not.

OPINION DELIVERED: October 1, 2010

IN THE SUPREME COURT OF TEXAS

NO. 10-0434

½ PRICE CHECKS CASHED, PETITIONER,

v.

UNITED AUTOMOBILE INSURANCE COMPANY, RESPONDENT

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

Argued February 3, 2011

JUSTICE GUZMAN delivered the opinion of the Court.

Article 3 of the Uniform Commercial Code (UCC)[1] establishes a comprehensive scheme governing the procedures, liabilities, and remedies pertaining to negotiable instruments, including checks.[2] As part of that scheme, when a bank dishonors a check, the drawer[3] of the check is

[1] Texas's version of the UCC is codified in the Business and Commerce Code, and employs the term "chapter" rather than "article." Throughout this opinion, we use the term "article" rather than "chapter" because that is the term used in the UCC.

[2] Article 3's definition of a negotiable instrument includes a check. *See* TEX. BUS. & COM. CODE § 3.104(a), (c), (f).

[3] A check's drawer is the one who signs or is otherwise identified as a person ordering payment. *Id.* § 3.103(a)(5).

obligated to pay the amount of the check to the check's holder[4] according to its terms at the time it was issued. TEX. BUS. & COM. CODE § 3.414(b).[5] Neither section 3.414, nor any other provision of the UCC, provides for the recovery of attorney's fees in those circumstances. But a general statute for civil suits—Texas Civil Practice and Remedies Code section 38.001(8)—allows a claimant to recover attorney's fees in a suit on a contract. The intersection of these two statutes frames the issue before us—specifically, whether a holder of a dishonored check may recover attorney's fees under section 38.001(8) in an action against a check's drawer under section 3.414.

Here, the check's holder successfully sued the drawer for breach of its obligation to pay a dishonored check under section 3.414, and was awarded attorney's fees under section 38.001(8). The court of appeals reversed, concluding that section 38.001(8) did not apply to the holder's suit because the claim was "purely statutory" rather than contractual. We must determine whether a suit by a check's holder against its drawer under section 3.414 is a claim on a contract to which section 38.001(8) applies. We conclude that it is. Accordingly, we reverse the court of appeals' judgment and remand to the trial court for a determination of attorney's fees.

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[4] A holder is a "person in possession of a negotiable instrument that is payable either to bearer or to an identified person." *Id.* § 1.201(b)(21)(A).

[5] Section 3.414(b) specifically provides:

> (b) If an unaccepted draft is dishonored, the drawer is obliged to pay the draft (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 3.115 and 3.407. The obligation is owed to a person entitled to enforce the draft or to an indorser who paid the draft under Section 3.415.

Id. § 3.414(b). A check's holder is "a person entitled to enforce" the draft. *Id.* § 3.301. Section 3.414 does not apply to a cashier's check or other draft drawn on the drawer. *Id.* § 3.414(a).

I. Background

As part of an automobile insurance agreement, respondent United Automobile Insurance Company (UAIC), the check's drawer, issued a check for $1,288.64 payable to "Patrick Bretton, Brandy Bretton and DBD Motor Co., Inc." The Brettons and a representative of DBD Motor endorsed the check, and the Brettons cashed the check at 1/2 Price Checks Cashed (Half-Price), at which point Half-Price became the holder of the check. Half-Price endorsed the check and deposited it with its own bank. When Half-Price's bank presented the check to UAIC's bank—the drawee—for acceptance, however, UAIC's bank dishonored the check by refusing payment, and the check was returned to Half-Price marked "Refer to Maker."[6] Half-Price notified UAIC of its claim and requested payment. But UAIC denied liability and refused to pay.

Half-Price brought the instant suit in a Dallas County justice court, asserting breach of contract on the basis of the obligation owed by the drawer of a check under Texas Business and Commerce Code section 3.414. Half-Price further requested attorney's fees, contending that its claim was on a contract under Texas Civil Practice and Remedies Code section 38.001(8). The justice court granted Half-Price summary judgment for the amount of the check, statutory returned check fees, and attorney's fees. UAIC appealed de novo to the county court at law, where Half-Price again was granted summary judgment. The county court at law awarded Half-Price damages of $1,279.98, court costs of $97.00, attorney's fees of $2,995.00, and set post-judgment interest at five percent. UAIC appealed the attorney's fees issue to the court of appeals, which reversed the county

[6] UAIC's bank appears to have dishonored the check because the signature of DBD Motor's representative was partially covered by Half-Price's stamp.

court at law on that issue, but affirmed the court's judgment in all other respects. Relying on its previous decision in *Time Out Grocery v. Vanguard Group, Inc.*, 187 S.W.3d 41 (Tex. App.—Dallas 2005, no pet.), the court of appeals concluded that section 38.001(8) does not apply to an action on a dishonored check under section 3.414 because such a claim is "purely statutory" and is not a claim on a contract. 310 S.W.3d 197, 199.

Half-Price petitioned this Court for review of the attorney's fees issue. We granted review to determine whether a claim by a check's holder against the drawer under section 3.414 is a claim on a contract to which section 38.001(8) applies.[7]

II. Discussion

A. Is a Holder's Section 3.414 Claim Against a Drawer a Contractual Claim to Which Section 38.001(8) Applies?

Texas adheres to the American Rule for the award of attorney's fees, under which attorney's fees are recoverable in a suit only if permitted by statute or by contract. *See, e.g.*, *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 120 (Tex. 2009); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006).[8] Texas Civil Practice

[7] Because this suit originated in a justice court and was appealed de novo to a county court at law, we briefly address our jurisdiction. We generally lack jurisdiction over a suit "appealed from a county court or from a district court when, under the constitution, a county court would have had original or appellate jurisdiction of the case." TEX. GOV'T CODE § 22.225(b)(1). Several exceptions apply to the limits established in section 22.225(b)(1), however, including when one court of appeals holds differently from a prior decision of another court of appeals or of this Court. *See id.* § 22.225(c). As we will discuss later, the courts of appeals have reached conflicting decisions on the issue of whether a prevailing claimant in a suit under section 3.414 may recover attorney's fees under section 38.001(8). *Compare, e.g.*, *Time Out Grocery*, 187 S.W.3d at 44, *with, e.g.*, *Barham v. Sugar Creek Nat'l Bank*, 612 S.W.2d 78, 80 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). Thus, we possess jurisdiction over Half-Price's petition for review.

[8] The opposite rule is the English Rule, in which a court may award attorney's fees to the prevailing party in a suit. *See* Jennifer M. Smith, *Credit Cards, Attorney's Fees, and the Putative Debtor: A Pyrrhic Victory? Putative Debtors May Win the Battle But Nevertheless Lose the War*, 61 ME. L. REV. 171, 187 (2009); David T. Schaefer, Note, *Attorney's Fees for Consumers in Warranty Actions—An Expanding Role for the U.C.C.?*, 61 IND. L.J. 495, 497–98

and Remedies Code section 38.001 is one of several statutes modifying the American Rule. It provides, in relevant part:

> A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: . . . (8) an oral or written contract.

TEX. CIV. PRAC. & REM. CODE § 38.001(8).[9] The Legislature instructs us to construe section 38.001 "liberally . . . to promote its underlying purposes." *See id.* § 38.005.[10] Although Chapter 38 does not explain its "underlying purposes," there are at least two reasons for allowing a claimant to recover attorney's fees on a contract suit. First, a wronged claimant may recover the full amount of her damages—including costs in having to litigate the suit—from the wrongdoer, so that she is made whole. *See Shook v. Walden*, 304 S.W.3d 910, 922 (Tex. App.—Austin 2010, no pet.). And,

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(1986).

[9] As we discussed in *Medical City*, the Legislature enacted the legislation on which section 38.001 is based over 100 years ago. *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 58 (Tex. 2008) (citing Act of Mar. 13, 1909, 31st Leg., R.S., ch. 47, § 1, 1909 Tex. Gen. Laws 93, 94). The legislation did not initially include general contract claims, but was amended several times over the years to expand its reach, most recently in 1977 when the Legislature added "suits founded on oral or written contracts" to the claims for which recovery of attorney's fees was authorized. *Id.* at 59 (citing Act of Apr. 25, 1977, 65th Leg., R.S., ch. 76, § 1, 1977 Tex. Gen. Laws 153, 153–54). Article 2226—the predecessor statute to Chapter 38—was nonsubstantively recodified as Chapter 38 in 1985. *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, secs. 1.001, 38.001–.006, § 9, 1985 Tex. Gen. Laws 3242, 3244, 3278–79, 3322 (current version at TEX. CIV. PRAC. & REM. CODE §§ 1.001, 38.001–.006). Throughout this opinion, for ease of reference, we will refer to Chapter 38 and its provisions when citing references to former article 2226.

[10] Chapter 38 originally did not provide for a liberal construction, and was construed strictly by the courts. *See, e.g.*, *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962) (observing that Chapter 38 is to be strictly construed since it allows for the recovery of attorney's fees and is penal in nature). However, two years after section 38.001 was amended to include contract claims, the Legislature enacted legislation requiring a liberal construction of Chapter 38. *See Med. City*, 251 S.W.3d at 59 (citing Act of June 6, 1979, 66th Leg., R.S., ch. 314, § 1, 1979 Tex. Gen. Laws 718, 718). Since then, in line with the Legislature's instruction, we have construed the statute liberally. *See, e.g.*, *id.* at 59; *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981).

second, a party with a small but valid contract claim[11] is more likely to hazard bringing suit since the claimant may recover attorney's fees if successful, even if the potential amount of attorney's fees is greater than the amount of the contract.[12] Section 38.001's establishment of a one-way fee shift means that a claimant does not risk having to pay the defendant's attorney's fees if the suit is unsuccessful. *See* TEX. CIV. PRAC. & REM. CODE § 38.001.

To recover attorney's fees under section 38.001, a claimant must meet several prerequisites. The claimant must: (1) plead and prevail on a claim for which attorney's fees are permitted under section 38.001, (2) be represented by an attorney, (3) present the claim to the opposing party or his agent, and (4) demonstrate that the opposing party did not tender payment within thirty days after the claim was presented. *See id.* §§ 38.001, .002. Additionally, Chapter 38 excludes various types of contracts from its reach—specifically, certain contracts issued by insurers. *See id.* § 38.006. Here, Half-Price was represented by an attorney, presented its claim to UAIC, and established that UAIC did not tender payment within thirty days. Further, Half-Price is not suing on an excluded insurance contract. Thus, our sole inquiry in determining if Half-Price may collect attorney's fees is whether its suit is a claim on a contract to which section 38.001(8) applies.

As a threshold matter, we decide whether a check is a contract. We conclude that it is. It is settled law that a check—as a type of negotiable instrument—is a formal contract, a rule established

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[11] Chapter 38 does not provide for a monetary floor as to the amount of a contract subject to section 38.001's application. *See* TEX. CIV. PRAC. & REM. CODE §§ 38.001–.006.

[12] *See* Smith, *supra* note 8, at 188 (noting that some scholars have criticized the American Rule as denying access to the courts for low-income litigants and those with small claims); Elizabeth Stone Miller, Comment, *Article 2226 and Suits on Insurance Contracts: Who Pays the Attorney's Fees?*, 36 BAYLOR L. REV. 197, 210 (1984) ("The statue provides that in every contract, from a simple agreement by telephone to a complicated construction contract, there is the potential for the recovery of attorney's fees upon prevailing in a suit for breach.").

not only in treatises[13] but also the common law of this state[14] and other states.[15] A negotiable instrument is "an unconditional promise or order to pay a fixed amount of money," TEX. BUS. & COM. CODE § 3.104(a), a definition that fits squarely within the meaning of a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty," *see* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).[16] The drawer of a check has a clear obligation to pay the holder of a dishonored check under section 3.414. *See* TEX. BUS. & COM. CODE § 3.414; FRED H. MILLER & ALVIN C. HARRELL, THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES § 1.03 (practitioner's ed. 2002) ("A negotiable instrument is a contract. The contractual nature of a negotiable instrument is evident in the case of a promissory

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[13] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 6 (1981); RESTATEMENT OF CONTRACTS § 7 (1932); 22 RICHARD A. LORD, WILLISTON ON CONTRACTS § 60:1 (4th ed. 2002) ("[N]egotiable instruments . . . constitute formal contracts or sets of contracts."); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 16 (4th ed. 2001); 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 10.21 (rev. ed. 1996).

[14] *See, e.g.*, *Castilleja v. Camero*, 414 S.W.2d 424, 427 (Tex. 1967) ("Checks are governed by the same conflicts rules as are contracts, [thus] . . . these checks were contracts to be performed in Texas and governed by Texas law."); *Ettl v. Rowe*, 462 S.W.2d 386, 387–88 (Tex. Civ. App.—El Paso 1970, no writ) (refuting assertion that a check is not a contract in writing, and applying statute of limitations for written contracts or instruments to a claim on a check); *McDonough v. Zamora*, 338 S.W.2d 507, 514 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.) ("Actions upon negotiable instruments are contract actions."); *Metro. Loan Co. v. Reeves*, 236 S.W. 762, 762–63 (Tex. Civ. App.—San Antonio 1922, no writ) (referring several times to check as "contract"); *Schenck v. Foster Bldg. & Realty Co.*, 215 S.W. 877, 879 (Tex. Civ. App.—Beaumont 1919, no writ) ("Negotiable instruments are universally held to be contracts and subject to the same rules of construction.").

[15] *See, e.g.*, *Video Trax, Inc. v. Nationsbank, N.A.*, 33 F. Supp. 2d 1041, 1054 (S.D. Fla. 1998), *aff'd*, 205 F.3d 1358 (11th Cir. 2000); *Williams v. State*, 333 So. 2d 613, 613–14 (Ala. 1976); *Roff v. Crenshaw*, 159 P.2d 661, 662 (Cal. Dist. Ct. App. 1945); *Blair v. Davis*, 281 So. 2d 247, 249 (Fla. Dist. Ct. App. 1973); *Byrd Printing Co. v. Whitaker Paper Co.*, 70 S.E. 798, 800 (Ga. 1911); *Buono v. Nardella*, 182 N.E.2d 142, 143–44 (Mass. 1962); *Diemar & Kirk Co. v. Smart Styles, Inc.*, 134 S.E.2d 134, 136 (N.C. 1964); *Reeves v. Jurney*, 225 S.E.2d 615, 616 (N.C. Ct. App. 1976); *First Nat'l Bank & Trust Co. of Tulsa v. Price*, 103 P.2d 103, 105 (Okla. 1940).

[16] *See also* MURRAY, *supra* note 13, § 2 ("We distinguish those promises that the law enforces from those that it does not enforce by calling the former 'contracts' . . . . [T]wo elements of a contract . . . are critical: (1) It involves an undertaking or commitment (promise) that something shall or shall not be done in the future; and (2) the law sanctions such undertaking or commitment and puts its cohesive machinery behind it.").

note, where there is an express promise to pay. But it is also true of drafts, where the promise to pay is implied . . . . Article 3 thus constitutes a special body of legal rules governing the particular kinds of contracts called negotiable instruments.").

The parties dispute, however, whether a claim by an endorsee holder of a check against a drawer under section 3.414 is a contractual claim.[17] UAIC contends that while a suit by a payee against a check's drawer is undoubtably contractual in nature, a suit by a holder like Half-Price is merely a statutory claim inasmuch as the holder and drawer never entered into a contract with each other. The premise for UAIC's distinction is that a drawer (as the person writing the check) and a payee (as the person named as the recipient of the check) are both parties to the contract, while a holder is not identified anywhere within the four corners of the check and must instead seek relief under section 3.414 rather than the common law of contracts.

Whether a suit on a check is contractual, thus allowing for the recovery of attorney's fees under section 38.001(8), has recently divided the courts of appeals. Until the Dallas Court of Appeals' *Time Out Grocery* opinion, the courts of appeals that examined this issue held that such a suit is contractual in nature.[18] But in 2005, the Dallas Court of Appeals held that a claim under

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[17] When a payee is in possession of a negotiable instrument, the payee is a holder under the UCC's definition of a holder. *See* TEX. BUS. & COM. CODE § 1.201(b)(21)(A) (defining holder as a "person in possession of a negotiable instrument that is payable either to bearer or to an identified person"). For the sake of simplicity in our discussion, however, we will refer to payee and holder distinctly, with the understanding that our reference to a holder is to an endorsee holder of the instrument.

[18] *See Cmty. Nat'l Bank v. Channelview Bank*, 814 S.W.2d 424, 427 (Tex. App.—Houston [1st Dist.] 1991, no writ) (concluding that because a cashier's check is a written contract in which the drawer impliedly agrees to pay the face value to any authorized holder, check's holder was entitled to attorney's fees under section 38.001(8)); *Barham*, 612 S.W.2d at 80 (concluding that because holder's claim against payee under section 3.414 was a suit on a contract, payee was entitled to attorney's fees under section 38.001(8)); *Guardian Bank v. San Jacinto Sav. Ass'n*, 593 S.W.2d 860, 863 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (holding that "a cashier's check is a written

section 3.414 is statutory rather than contractual, and thus the holder was not entitled to attorney's fees under section 38.001(8). *Time Out Grocery*, 187 S.W.3d at 44–45. In reaching this holding, the court concluded that a check does not meet the requirements for the formation of a contract under the common law. *Id.* at 44. The court further distinguished previous court of appeals' opinions that had approved section 38.001(8) attorney's fees for claims on checks, observing that (1) the *Time Out Grocery* suit involved an ordinary, rather than a cashier's, check, and (2) the claimant sued the drawer rather than the payee. *Id.*[19]

UAIC implicitly concedes that some of the reasoning in *Time Out Grocery* was flawed, specifically (1) the court's rationale that a formal contract must meet the same formation requirements as a simple contract in order to be considered a contract,[20] and (2) the court's attempt to distinguish a cashier's check from an ordinary check.[21] However, UAIC continues to argue that

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contract with the maker impliedly agreeing to pay to any authorized holder the face value stated therein," and thus "one entitled to recover under the terms of that contract would also be entitled to recover reasonable attorney's fees" under section 38.001(8)).

[19] In addition to the instant case, the San Antonio Court of Appeals reached a similar result in a case by a holder against a drawer under section 3.414, also relying on *Time Out Grocery*. *See Zamora v. Money Box*, No. 04-08-00549-CV, 2009 WL 2050207, at *3–4 (Tex. App.—San Antonio July 15, 2009, pet. denied) (mem. op.).

[20] As noted, the *Time Out Grocery* court concluded that a check is not a contract because it does not meet certain formation requirements for simple contracts, such as mutual assent. *Time Out Grocery*, 187 S.W.3d at 44. UAIC has conceded that a check is a formal contract, which includes unique formation requirements inapplicable to simple contracts. *See* 1 WILLISTON ON CONTRACTS § 1:1 (4th ed. 2007) (discussing how the requirements for informal or simple contracts, such as consideration and mutual assent, "are generally inapplicable to formal contracts").

[21] A cashier's check is a specialized type of check that differs from an ordinary check in that the bank issuing the check is both the drawer and drawee of the check. TEX. BUS. & COM. CODE § 3.104(f), (g). However, in the context of section 38.001(8), there is no real distinction between the obligation of a drawer of a cashier's check as compared to that of a drawer of an ordinary check. *Compare id.* § 3.412 (establishing obligation of issuer of cashier's check to pay person entitled to enforce the draft), *with id.* § 3.414 (establishing obligation of drawer of check to pay person entitled to enforce the draft).

a suit by a holder against a drawer under section 3.414 lacks a contractual basis, albeit on grounds that the holder is not explicitly identified within the four corners of the check. We disagree and conclude that a suit on a check under section 3.414 is a suit on a contract, whether it is brought by a holder or a payee. We accordingly disapprove *Time Out Grocery* and its progeny.

Contrary to UAIC's assertion, the drawer of a check enters into a contract in which the drawer unconditionally promises to pay not only the payee, but also a subsequent holder of the instrument. Because the check itself is the contract, it embodies the full agreement between the parties, as manifested by the drawer's signature on the check; in signing the check, the drawer contractually obligates itself to pay the amount of the instrument to the instrument's holder. *See* 22 RICHARD A. LORD, WILLISTON ON CONTRACTS § 60:1 (4th ed. 2002).[22] When a check is appropriately transferred to another person by endorsement, the transfer vests in the transferee any right of the transferor to enforce the check. *See* TEX. BUS. & COM. CODE §§ 3.201, .203. Thus, the drawer's obligation extends not just to the payee, but also to any downstream holder of the instrument. The crux of a claim under section 3.414—whether brought by a payee or holder—is that the drawer possesses an obligation to pay the check according to its terms in the event the drawer's bank dishonors the instrument. *See id.* § 3.414(b); WILLIAM H. LAWRENCE, UNDERSTANDING NEGOTIABLE INSTRUMENTS AND PAYMENT SYSTEMS § 4.02 (2002) ("The [drawer's] signature

[22] *See also Diemar*, 134 S.E.2d at 136–37 ("A check is a contract within itself. By the act of drawing and delivering [a check] to the payee, the drawer commits himself to pay the amount of the check in the event the drawee refuses payment upon presentment."); Barry L. Zaretsky, *Contract Liability of Parties to Negotiable Instruments*, 42 ALA. L. REV. 627, 635 (1991) ("[T]he drawer is the party to whom the person entitled to enforce the instrument will look when enforcing the obligation. . . . The drawer contracts to pay the amount of the draft if it is not paid by the drawee . . . .").

constitutes the outward manifestation of an intent to be bound that subsequent parties are reasonably entitled to rely upon . . . . These consequences have their legal support in the Article 3 contracts."). And when a drawer does not honor that obligation and the holder sues the drawer, the suit is on the instrument—and thus the contract—itself. *See* LAWRENCE, *supra*, §§ 4.02–.03 ("A lawsuit brought on the instrument is premised on contract liability arising from the defendant's signature . . . . In the absence of an explicit disclaimer, everyone who signs a negotiable instrument promises to pay it. This promise is a significant part of the conceptual basis for recognizing liability on the instrument as contractual liability."). Article 3's identical remedies for payee and holder when suing the drawer for a dishonored instrument further evidences the infirmity of UAIC's distinction. *See* TEX. BUS. & COM. CODE § 3.414(b).

Section 3.414's codification of a drawer's obligation to pay a holder does not alter our conclusion. Article 3 is based on the common law of contracts regarding negotiable instruments—specifically the law merchant.[23] The law merchant was codified as the Uniform Negotiable Instruments Law (NIL) beginning in 1896, and was eventually adopted by every state, including, in 1919, Texas. 22 WILLISTON ON CONTRACTS § 60:1; ROY RYDEN ANDERSON ET AL., ANDERSON, BARTLETT & EAST'S TEXAS UNIFORM COMMERCIAL CODE ANNOTATED § 3.101 cmt. (2007). Article 3 is the successor of the NIL. 22 WILLISTON ON CONTRACTS § 60:1.

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[23] *See, e.g.*, 22 WILLISTON ON CONTRACTS § 60:1; ROY RYDEN ANDERSON ET AL., ANDERSON, BARTLETT & EAST'S TEXAS UNIFORM COMMERCIAL CODE ANNOTATED § 3.101 cmt. (2007) ("Texas common law of negotiable instruments was based on the law merchant."); Donald W. Garland, *A New Law of Negotiable Instruments: Revised Article 3 of the UCC*, 109 BANKING L.J. 557, 557 (1992) (discussing article 3's roots in English law from the 1700s); Lary Lawrence, *What Would Be Wrong with a User-Friendly Code?: The Drafting of Revised Articles 3 and 4 of the Uniform Commercial Code*, 26 LOY. L.A. L. REV. 659, 659–60 (1993) (observing that article 3 of the UCC is based on the Uniform Negotiable Instruments Law, which, in turn, is based on English common law).

Even before the codification of the law merchant in the NIL, and certainly before the codification of article 3, this Court observed that a check is a contract, and treated suits on checks as suits on contracts. *See Yale v. Ward*, 30 Tex. 17, 23 (1867) ("[The drawer's] contract under the law merchant is, that if the drawee shall not accept the bill [of exchange] when presented, or shall not pay it when it becomes payable, and the holder shall give him due notice thereof, then he will pay the amount of the bill."). A holder's ability to sue on the instrument, as codified in section 3.414, is equally a common law principle. As early as 1758, in the seminal English commercial paper case, *Miller v. Race*, a holder could sue and recover for the amount of a dishonored instrument. *See Miller v. Race*, (1758) 97 Eng. Rep. 398 (K.B.) 401–02; 1 Burr. 452, 458 (establishing holder in due course rule, which allows a holder who obtains the negotiable instrument for value, in good faith, and without notice of any claims or defenses, the entitlement to enforce the promise to pay).[24] These deep roots in the common law are reflected in article 3's provision of many common law contract defenses in the event of suit. *See, e.g.*, TEX. BUS. & COM. CODE § 3.303(b) (allowing drawer a defense if the instrument is issued without consideration); *id.* § 3.305(a) (providing that the obligor of a negotiable instrument has many defenses available for simple contracts).[25] Indeed, the UCC explicitly provides that it is to be supplemented by principles of law, including the law merchant and the law relative to capacity to contract, unless displaced by the UCC's specific provisions. *See id.* § 1.103(b). Thus, section 3.414 does not convert what is a common law contractual obligation into a purely statutory

[24] *See also, e.g.*, *Goodman v. Simonds*, 61 U.S. 343, 365 (1857) (observing that bona fide holder of negotiable instrument may recover on that instrument); *Weathered v. Smith*, 9 Tex. 622, 625–26 (1853) (same).

[25] Of course, many of these contract defenses are abrogated under article 3 if the holder of the instrument is a holder in due course. *See, e.g.*, TEX. BUS. & COM. CODE §§ 3.302, .305(b).

one. As a tool of commerce, a check would be meaningless if, in the absence of a statute, a drawer was burdened with no contractual obligation to pay the amount of a dishonored check to the holder of the instrument.

Further, under the economic loss rule, we have held that a claim sounds in contract when the only injury is economic loss to the subject of the contract itself. *See Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 61 (Tex. 2008) ("'When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract.'") (quoting *Am. Nat'l Petroleum Co. v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274, 282 (Tex. 1990)). Here, Half-Price's damages are solely based on its economic loss due to UAIC's failure to pay the amount of the dishonored check—the fact that Half-Price sued pursuant to a statutory provision does not negate the reality that its damages sound in contract.[26]

Because we conclude that a holder's suit against a drawer under section 3.414 is contractual, the remaining question is whether section 38.001(8) applies to such a suit. Section 38.001 applies to a claim for "an oral or written contract." TEX. CIV. PRAC. & REM. CODE § 38.001(8). As discussed above, a check is a formal contract. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 6. Importantly, section 38.001(8) does not distinguish between formal contracts and other types of

[26] We note that *Time Out Grocery* has been criticized for many of the reasons discussed above. *See* 13 BRADFORD STONE ET AL., WEST'S LEGAL FORMS: COMMERCIAL TRANSACTIONS § 3.4 (3d ed. 2007 & Supp. 2010) ("The requirements for a negotiable instrument at §§ 3-103 and 3-104 make clear that an instrument represents a contractual obligation to pay money. In addition, Article 1 § 1-103(b) makes clear that the UCC is built on the foundation of contract law and other common law principles. So it is puzzling to see a case like *Time Out Grocery* . . . where the court held that the drawer's obligation to pay a check under § 3-414 was not a 'contract,' at least within the meaning of Tex. Civ. Prac. & Rem. Code § 38.001. This case can only be considered incorrect and aberrational. The Dallas court repeated the same error in *United Auto. Ins. Co. v. 1/2 Price Checks Cashed*.") (internal citations omitted); John Krahmer, *Commercial Transactions*, 59 SMU L. REV. 1013, 1030–31 (2006).

contracts, nor between codified contract claims as compared to those that have not been codified. Section 38.001(8) does not narrow its scope to claims for breach of contract, nor differentiate between different types of contracts: it merely applies to claims on written or oral contracts. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(8).[27] Chapter 38 provides an express exclusion for certain insurance contracts, but not for contracts involving financial instruments.

In *Medical City*, we held that attorney's fees were available under section 38.001(8) for an article 2 breach of express warranty claim, concluding that "a claim based on an express warranty is, in essence, a contract action" in that it "involves a party seeking damages based on an opponent's failure to uphold its end of the bargain." *See Med. City*, 251 S.W.3d at 58, 61. We further noted that a breach of express warranty claim, while distinct from a breach of contract claim, is a "creature of contract" and is "contract-based." *Id.* at 60–61. The same is true here: though perhaps not a traditional breach of contract claim, Half-Price has brought a claim that is "contract-based." *See id*. at 61.

Finally, as we have noted, the Legislature instructs us to construe section 38.001 liberally, not strictly, to promote its underlying purposes. *See* TEX. CIV. PRAC. & REM. CODE § 38.005; *see also Med. City*, 251 S.W.3d at 59 (noting that courts are to construe section 38.001 liberally to promote its underlying purposes); *Preload Tech., Inc. v. A.B. & J. Constr. Co.*, 696 F.2d 1080, 1094–95 (5th Cir. 1983) (applying section 38.001(8) to promissory estoppel claim given liberal construction afforded under that section). Applying section 38.001 here would do just that—it would allow a

[27] As a general matter, we further note that section 38.001 lists general types of claims, as opposed to specific causes of action. *See* TEX. CIV. PRAC. & REM. CODE § 38.001 (allowing recovery of attorney's fees on claims for "rendered services," "performed labor," "furnished material," "killed or injured stock," and so forth).

plaintiff with a small but valid contract claim to recoup its full amount of damages, a principle in line with the UCC's direction to "liberally" administer the remedies in the Code so that "the aggrieved party may be put in as good a position as if the other party had fully performed." TEX. BUS. & COM. CODE § 1.305(a). Here, Half-Price conclusively proved UAIC's contractual liability on the check as a matter of law, as well as its claim for attorney's fees. By its plain terms, we hold that section 38.001(8) applies to Half-Price's contract claim brought pursuant to section 3.414.

B. Does Applying Section 38.001(8) to a Section 3.414 Claim Disrupt Article 3's Statutory Scheme?

UAIC argues that even if the plain language of section 38.001(8) applies to a holder's claim under section 3.414, we should decline to apply it here in order to avoid disrupting article 3's statutory scheme. UAIC correctly contends that the resolution of this issue is governed by the intersection of our opinions in *Southwest Bank*, *JCW Electronics*, and *Medical City*, cases which concerned the propriety of importing external statutory provisions into the UCC.

In *Southwest Bank*, we held that Texas Civil Practice and Remedies Code Chapter 33's proportionate responsibility statute did not apply to an article 3 conversion claim. *Sw. Bank v. Info. Support Concepts, Inc.*, 149 S.W.3d 104, 111 (Tex. 2004). In reaching this holding, we observed that article 3 establishes a "comprehensive and carefully considered allocation of responsibility among parties to banking relationships," and contains its own comparative negligence provisions. *Id.* at 107. To import Chapter 33 into article 3, we reasoned, would upset that article's comprehensive liability scheme and "[do] violence" to the UCC. *Id.* at 110.

Conversely, in *JCW Electronics*, we *did* apply Chapter 33 to an article 2 breach of implied warranty tort claim. *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 707 (Tex. 2008). We distinguished *Southwest Bank* by stating: "Unlike UCC article 3, article 2 does not undertake a comprehensive fault scheme." *Id.* at 706. We therefore concluded that because article 2 does not contain a fault allocation scheme relevant to breach of implied warranty claims, Chapter 33 could apply without disrupting the UCC. *See id.* at 706–07.

Finally, as discussed above, we held in *Medical City* that section 38.001(8) attorney's fees were available to a plaintiff who prevailed on an article 2 breach of express warranty claim. *Med. City*, 251 S.W.3d at 61, 63.

In aggregate, these cases establish the rule that it is legitimate to apply a non-UCC statutory provision to a claim brought under the UCC, so long as doing so does not "ignore the UCC itself and thwart its underlying purpose." *JCW Elecs.*, 257 S.W.3d at 709 (Jefferson, C.J., concurring) (quoting *Sw. Bank*, 149 S.W.3d at 111). UAIC contends applying section 38.001(8) here would violate this rule—that it would disrupt article 3's "comprehensive and carefully considered allocation of responsibility among parties to banking relationships," in the same manner applying Chapter 33 to an article 3 conversion claim would have done in *Southwest Bank*. *See Sw. Bank*, 149 S.W.3d at 107. We disagree.

Compelling reasons existed for the disparate results in *Southwest Bank* and *JCW Electronics*, both of which involved tort actions, that are inapplicable to *Medical City* and this case. First, *Southwest Bank* and *JCW Electronics* concerned whether importing external proportionate liability statutory provisions would disrupt the UCC's comprehensive *fault and liability* scheme. *Medical City*

and the instant case, on the other hand, bear on the particular *remedy* of attorney's fees. Attorney's fees do not dictate fault or liability—they are awarded as a remedy *after* a party has been determined liable on a contract claim. Both article 2 and article 3 create detailed and comprehensive frameworks for contract remedies. *Compare* TEX. BUS. & COM. CODE §§ 2.701–.725 (providing remedies for both sellers and buyers, including consequential damages, nonmonetary remedies, specific performance, and so forth), *with id.* §§ 3.401–.420. Nonetheless, in *Medical City*, we applied section 38.001(8) to an article 2 contract claim so that the claimant could recover attorney's fees in addition to the appropriate measure of damages for breach of express warranty. *Med. City*, 251 S.W.3d at 63. The same result is warranted here. Attorney's fees under section 38.001(8) are, in essence, an *additional* remedy so that a prevailing plaintiff may recoup the cost of trying a case and do not generally interrupt the measure of damages for a particular claim; thus, to permit the recovery of attorney's fees here, as in *Medical City*, does not disrupt the relevant remedies provisions of the UCC.

Second, the causes of action in *Medical City* and the instant case both touch on provisions of the UCC that are silent as to attorney's fees, a similarity that was not present in *Southwest Bank* and *JCW Electronics*. In *Southwest Bank*, applying Chapter 33 would have disrupted article 3's liability scheme because that article specifically set forth its own unique comparative negligence structure. *JCW Electronics*, on the other hand, implicated an article of the UCC that was silent as to comparative negligence. This distinction implicitly led to the disparate results in those cases, and is a difference starkly absent when comparing this case to *Medical City*. Here, as was true in *Medical City*, the relevant statutory provision is silent on the issue of attorney's fees, and so to import section 38.001(8) would not disrupt any element of that provision. Thus, to be clear, we do not today state

that section 38.001(8) may always apply to a UCC contract claim. If, for example, a provision allowed for the recovery of attorney's fees, but in a manner more restrictive than section 38.001(8), a plaintiff could not circumvent that limitation by recovering attorney's fees under section 38.001(8). The question to be answered in each instance is whether allowing a plaintiff to recover attorney's fees under section 38.001(8) would "[do] violence" to a particular UCC article's statutory scheme. *See Sw. Bank*, 149 S.W.3d at 110.

Article 3's concern with banking relationships does not dictate a different result. We have previously allowed for section 38.001(8) attorney's fees in an article 5 letter of credit case, even though a letter of credit is a financial instrument issued by a bank, with no apparent disturbance to banking relationships. *See Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984). Further, the UCC allows for damages not only specifically provided by the Code, but also by "other rule of law." *See* TEX. BUS. & COM. CODE § 1.305(a). This provision extends to all portions of the UCC, including those articles concerning banking relationships.

UAIC next directs us to statutes from other states where attorney's fees are specifically provided for in suits involving dishonored checks.[28] UAIC contends that these statutes, each representing complex policy judgments, signify that the Texas Legislature deliberately intended as a policy matter *not* to allow for the recovery of attorney's fees for dishonored checks in this state. But

[28] Most states have not enacted legislation specifically allowing for attorney's fees in suits on a dishonored check. Those that have tend to do so in cases of "bad checks" and employ differing circumstances and remedies for recovery. *See, e.g.*, FLA. STAT. ANN. § 68.065 (West 2005) (allowing for attorney's fees when check dishonored for insufficient funds or due to stop payment on the check); N.J. STAT. ANN. § 2A:32A-1 (West 2010) (recovery of attorney's fees limited to check that is dishonored due to insufficient funds or because maker does not have account with drawee).

these legislative enactments are not instructive here. As we have concluded, under the laws of this state and our precedent, section 38.001(8) applies to Half-Price's claim by its plain terms, and to do so would not disrupt article 3. *See* TEX. CIV. PRAC. & REM. CODE §§ 38.001(8), .005; *Med. City*, 251 S.W.3d at 63. And, in any event, decisions from other jurisdictions support our—and not UAIC's—conclusion. Other courts, including the Fifth Circuit, have allowed general attorney's fees provisions outside of the UCC to apply to a contract action under the UCC, including a contract action under article 3.[29] The UCC should be construed to promote uniformity with other jurisdictions. *See In re King-Porter Co.*, 446 F.2d 722, 732 (5th Cir. 1971); *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."). Our interpretation furthers this goal.

UAIC finally argues that the existence of other provisions in the UCC that expressly provide for attorney's fees in suits concerning financial instruments—specifically section 5.111(e) for letters of credit—suggests that the Legislature did not intend to allow for attorney's fees in section 3.414.[30] We are not persuaded. As discussed above, we have previously allowed a plaintiff to recover

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[29] *See Voest-Alpine Trading USA Corp. v. Bank of China*, 288 F.3d 262, 267–68 (5th Cir. 2002) (applying section 38.001 to a letter of credit claim); *Tex. Nat'l Bank v. Sandia Mortg. Corp.*, 872 F.2d 692, 698–99 (5th Cir. 1989) (applying section 38.001(8) to contract action arising out of article 9 of the UCC); *First Nat'l Bank of Ariz. v. Cont'l Bank*, 673 P.2d 938, 943–44 (Ariz. Ct. App. 1983) (awarding attorney's fees under Arizona statute authorizing the recovery of attorney's fees to the prevailing party in any contested action arising out of a contract to plaintiff's article 3 claim); *Sawgrass Builders, Inc. v. Realty Coop., Inc.*, 323 S.E.2d 243, 245 (Ga. Ct. App. 1984) (applying general statutory provision allowing plaintiff to recover expenses of litigation in contract actions to article 3 claim); *Seattle-First Nat'l Bank v. Kim*, 684 P.2d 773, 775 (Wash. Ct. App. 1984) (in holder's article 3 suit against endorser for a dishonored check, holding that attorney's fees were recoverable under general statute authorizing the recovery of attorney's fees in civil actions for claims of $10,000 or less). *But see E. Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co. of Baytown*, 593 F.2d 598, 604 (5th Cir. 1979) (declining to award attorney's fees in letter of credit case without discussion of applicability of section 38.001(8), a result the Fifth Circuit later refused to follow in *Voest-Alpine*, 288 F.3d at 267–68).

[30] Under section 5.111(e), a prevailing party in a suit on wrongful dishonor of a letter of credit may recover attorney's fees. TEX. BUS. & COM. CODE § 5.111(e).

attorney's fees under section 38.001(8) in a UCC contract action, both in *Medical City* (article 2) and *Temple-Eastex* (article 5). Moreover, section 5.111(e)'s allowance for attorney's fees says little about the Legislature's reason for not specifically providing for attorney's fees in section 3.414. Section 5.111, unlike section 38.001, allows a *prevailing party* to recover attorney's fees, not merely a *prevailing claimant* as in section 38.001. *Compare* TEX. BUS. & COM. CODE § 5.111(e), *with* TEX. CIV. PRAC. & REM. CODE § 38.001. Because section 5.111(e) establishes a different rule from section 38.001, it is just as likely that the Legislature enacted section 5.111(e) to displace section 38.001's one-way fee shift where letters of credit are concerned, but remained satisfied as to section 38.001's application to a claim arising under section 3.414.[31]

In sum, we conclude that allowing a holder who has prevailed on a section 3.414 contract claim to recover attorney's fees under section 38.001(8) does not disrupt article 3.

III. Conclusion

We hold that Half-Price's section 3.414 claim is a suit on a contract to which section 38.001(8) applies, and applying section 38.001(8) to the claim does not disrupt article 3's statutory

[31] On a similar note, UAIC contends that to apply section 38.001(8) to a section 3.414 contract action would work an illogical result since such a plaintiff would be in a better position suing under section 3.414, which does not expressly provide for attorney's fees, than a plaintiff suing under section 5.111(e), which does provide for attorney's fees. Section 5.111(e) adopts the English Rule for attorney's fees. Thus, a plaintiff suing for a letter of credit runs the risk of exposure to attorney's fees if the plaintiff does not prevail. It appears that the article 5 drafting committee adopted this mandatory fee-shift as a trade-off for not imposing consequential damages on banks in letters of credit cases. *See* Sandra Stern, *Varying Article 5 of the UCC by Agreement*, 114 BANKING L.J. 516, 529–30 (1997). In Texas, this result is tempered by discretionary, rather than mandatory, attorney's fees. *See* TEX. BUS. & COM. CODE § 5.111(e). Given this background, we do not agree that applying section 38.001(8) to Half-Price's claim would work an illogical result: articles 5 and 3 are distinct articles of the UCC, involving entirely different types of financial instruments and entirely different discussions and negotiations in the drafting process.

scheme. We therefore reverse the court of appeals' judgment and remand the case to the trial court for a determination of attorney's fees.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: June 24, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0460

IN RE ALICE M. PUIG IN HER INDIVIDUAL CAPACITY AND IN HER CAPACITY AS THE INDEPENDENT ADMINISTRATRIX OF THE ESTATE OF ALICIA PRIETO PUIG, AND CHARLES B. PUIG, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this case, we are asked to grant mandamus relief to correct a district court's denial of a plea to the jurisdiction. The plea challenged the district court's jurisdiction to determine the ownership of a ranch allegedly owned, in part, by an estate undergoing administration in a county court at law. Under our precedent, the issue here is one of dominant, not exclusive, jurisdiction. The proper method for contesting a court's lack of dominant jurisdiction is the filing of a plea in abatement, not a plea to the jurisdiction as the relators filed here. *See Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247–48 (Tex. 1988). Because the district court did not abuse its discretion in denying the relators' plea to the jurisdiction, we deny the petition for writ of mandamus.

In 1990, a corporation called Puig Bros. obtained title to the Webb County ranch in question. All of the Puig Bros. corporate shares were owned by Luis F. Puig, Jr. and his six children, Louis F. Puig, III, Robert J. Puig, Edward G. Puig, Alice M. Puig, Charles B. Puig, and Thomas A. Puig.

In 1999, Luis filed for divorce from the children's mother, Alicia Prieto Puig. In the divorce, Alicia counterclaimed but did not join Puig Bros. as a party. When the divorce was granted in 2003, the trial court determined that Puig Bros. was operated as Luis's alter ego and disregarded it as a corporate entity. Upon division of the community estate, Alicia was awarded a 60% ownership interest in the ranch.

Alicia, a resident of Fort Bend County, passed away shortly after the divorce and left a will naming her daughter, Alice Puig, independent administratrix and sole beneficiary of her estate. Because Fort Bend County lacks a statutory probate court, Alice filed her mother's will for probate in a Fort Bend county court at law and was duly issued letters of administration. In the course of her duties as administratrix of her mother's estate, Alice repeatedly called upon her father to execute documents transferring partial ownership of the ranch to Alicia's estate, but he refused to do so. The Fort Bend county court held Luis in contempt and issued an order appointing a master in chancery to act as his attorney-in-fact for the purpose of executing the required deed. The attorney-in-fact executed a special warranty deed, referred to here as the Harbour Deed, which transferred a 60% ownership interest in the ranch to Alicia.

After the Harbour Deed was properly recorded in the Webb County real property records, Louis, Robert, and Edward Puig, and Puig Bros. itself (collectively, the real parties in interest) filed suit against Alice and Charles Puig (collectively, the relators) in a Webb County district court. Based on Alicia's failure to join Puig Bros. as a party to the divorce proceeding, the declaratory judgment suit sought to void the Harbour Deed, to quiet title, and to declare the real parties the rightful owners of title to the ranch. Following the initiation of the real parties' suit, Luis passed

away. The relators filed a plea to the jurisdiction and a motion to transfer venue to the Fort Bend county court in which the administration of Alicia's estate was pending. Despite the fact that the Fort Bend county court had already exercised jurisdiction over Alicia's estate, the Webb County district court denied the plea to the jurisdiction. The relators then filed a petition for writ of mandamus in the court of appeals, which was denied. *In re Puig*, No. 04-10-00197-CV, 2010 WL 2184336, at *1 (Tex. App.—San Antonio June 2, 2010, orig. proceeding) (mem. op.). We granted the relators' motion to stay the underlying Webb County district court proceedings pending our consideration of the relators' mandamus petition.

When counties lack a statutory probate court, as Fort Bend County does, § 4 of the Texas Probate Code provides statutory county courts with the same general jurisdiction as statutory probate courts.[1] Act of June 19, 1993, 73rd Leg., R.S., ch. 957, § 4, 1993 Tex. Gen. Laws 4081, 4161, *repealed by* Act of June 19, 2009, 81st Leg., R.S., ch. 1351, § 12(h), 2009 Tex. Gen. Laws 4273, 4279; *see* TEX. GOV'T CODE § 25.0811 (listing statutory county courts in Fort Bend County); *cf. Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 505 (Tex. 2010) (citing *Palmer v. Coble Wall Trust Co.*, 851 S.W.2d 178, 180 n.3 (Tex. 1992)). This jurisdiction includes the ability to "transact all business appertaining to estates subject to administration" as well as "the power to hear all matters incident to an estate." Act of May 14, 2001, 77th Leg., R.S., ch. 63, § 1, 2001 Tex. Gen. Laws 104, 105, *repealed by* Act of June 19, 2009, 81st Leg., R.S., ch. 1351, § 12(h), 2009 Tex. Gen. Laws

[1] In 2009, the Texas Legislature repealed §§ 4, 5, and 5A(a) of the Probate Code. Act of June 19, 2009, 81st Leg., R.S., ch. 1351, § 12(h), 2009 Tex. Gen. Laws 4273, 4279. Because this case was filed before the effective date of the repeal, both parties agree that prior law applies here. *See also id.* at § 12(i) (stating that actions filed before the effective date of the Act are "governed by the law in effect on the date the action was filed").

4273, 4279; Act of June 19, 1993, 73rd Leg., R.S., ch. 957, § 4, 1993 Tex. Gen. Laws 4081, 4161 (repealed 2009). Section 5A(a) of the Probate Code provides a non-exclusive list of matters qualifying as "appertaining to" and "incident to" an estate administered in a statutory county court, including: "all actions for trial of title to land . . . and for the enforcement of liens thereon[,] . . . all actions for trial of the right of property[,] . . . and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons." Act of June 19, 1993, 73rd Leg., R.S., ch. 957, § 6, 1993 Tex. Gen. Laws 4081, 4161 (repealed 2009). When a matter raised in a separate lawsuit is not expressly mentioned in the Probate Code's definition of matters appertaining and incident to an estate, we have employed the "controlling issue" test to determine whether the matter meets that definition. *See In re SWEPI, L.P.*, 85 S.W.3d 800, 805–06 (Tex. 2002) (orig. proceeding). Under the controlling issue test, "a suit is appertaining to or incident to an estate when the controlling issue is the settlement, partition, or distribution of an estate." *Palmer*, 851 S.W.2d at 182 (internal quotations omitted); *see In re SWEPI*, 85 S.W.3d at 805–06.

The controlling issue presented in the real parties' Webb County suit undoubtedly involves the settlement, partition, and distribution of Alicia's estate. The petition seeks a declaratory judgment to void the Harbour Deed. The real parties also seek to quiet title in the ranch by asking the district court to remove the cloud on Puig Bros.' title created by recordation of the Harbour Deed, which they allege was invalid due to the master in chancery's lack of authority to execute the deed and the fact that Puig Bros. did not authorize the conveyance to Alicia. Lastly, the petition includes a trespass to try title claim, which requests that the court "enter judgment [in favor of the real parties] for title to and possession" of the ranch. Actions for trial of title to land are specifically

listed in § 5A(a) as "appertaining to" and "incident to" estates. Act of June 19, 1993, 73rd Leg., R.S., ch. 957, § 6, 1993 Tex. Gen. Laws 4081, 4161 (repealed 2009). More importantly, at the heart of each of these causes of action lies one common issue: ownership of the ranch. *See* TEX. CIV. PRAC. & REM. CODE § 37.004(a) (providing declaratory judgment as a means by which parties interested under a deed may obtain a judicial determination of the instrument's validity); TEX. PROP. CODE § 22.001 (stating that "a trespass to try title action is the method of determining title to lands"); *Thomson v. Locke*, 1 S.W. 112, 115 (Tex. 1886) (explaining that the goal of a suit to quiet title is to clear title to property from clouds or encumbrances). The outcome of the real parties' suit will determine the validity of Alicia's ownership interest in the ranch, and accordingly, whether that interest may be distributed to the beneficiary of Alicia's estate. Therefore, because the issues raised in the Webb County suit are appertaining and incident to Alicia's estate, the Fort Bend county court has power to hear those issues.

When the jurisdiction of a county court sitting in probate and a district court are concurrent, the issue is one of dominant jurisdiction. *Wyatt*, 760 S.W.2d at 248 (explaining that when a suit may be properly filed in more than one county, the court in which the suit is first filed attains dominant jurisdiction) (citing *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974) (orig. proceeding)). Because the administration of Alicia's estate was initiated well before the real parties filed their Webb County lawsuit, the Fort Bend county court clearly attained dominant jurisdiction over Alicia's estate and all matters appertaining and incident thereto. *See Bailey v. Cherokee Cnty. Appraisal Dist.*, 862 S.W.2d 581, 586 (Tex. 1993) ("[T]he court in which suit is first filed acquires dominant jurisdiction to the exclusion of coordinate courts."). Several courts of appeals have expanded our

holding in *Bailey* to mean that a county court sitting in probate attains exclusive jurisdiction over matters appertaining and incident to the estate once administration is opened there. *See, e.g.*, *Hailey v. Siglar*, 194 S.W.3d 74, 79–80 (Tex. App.—Texarkana 2006, pet. denied); *Howe State Bank v. Crookham*, 873 S.W.2d 745, 749 (Tex. App.—Dallas 1994, no writ). However, we have never explicitly reached such a conclusion. Accordingly, as the law now stands, the only basis for having the real parties' lawsuit heard in the Fort Bend county court is that court's dominant jurisdiction.

When, as here, two courts have concurrent jurisdiction to determine inherently intertwined issues, filing a diliatory plea in abatement is the proper method for drawing a court's attention to another court's possible dominant jurisdiction. *See, e.g.*, *Mower v. Boyer*, 811 S.W.2d 560, 563 n.2 (Tex. 1991) (discussing pleas in abatement filed to call a second court's attention to the dominant jurisdiction previously acquired by another court); *Wyatt*, 760 S.W.2d at 247–48 (explaining that it is proper to file a plea in abatement when two inherently interrelated cases are filed in different counties); *cf. Speer v. Stover*, 685 S.W.2d 22, 23 (Tex. 1985) (per curiam) (holding that pleas to the jurisdiction are properly pled to alert a court to its lack of subject matter jurisdiction). The issues presented here are inherently intertwined because Alicia's estate will remain open until all claims against it are settled and all assets distributed. *See Pugh v. Turner*, 197 S.W.2d 822, 826 (Tex. 1946). Alicia's ownership interest in the ranch may not be distributed until all of the claims presented in the real parties' Webb County lawsuit are adjudicated and the validity of her interest is determined.

Because the issue is one of dominant, rather than exclusive, jurisdiction the relators should have filed a plea in abatement. The district court's denial of the relators' plea to the jurisdiction,

therefore, did not constitute an abuse of discretion depriving the relators of an adequate appellate remedy. *See Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985). We note that the improper denial of a plea in abatement may, on occasion, warrant mandamus relief. *See, e.g.*, *Curtis*, 511 S.W.2d at 266–68. Pleas in abatement are incidental rulings, the denial of which ordinarily does not support mandamus relief. *See Abor*, 695 S.W.2d at 567.[2] But when a court issues an "order which actively interferes with the exercise of jurisdiction" by a court possessing dominant jurisdiction, mandamus relief is appropriate. *Id.*; *see Perry v. Del Rio*, 66 S.W.3d 239, 258 (Tex. 2001) (granting mandamus relief to direct a district court to move a trial setting so that another court that already exercised jurisdiction over different cases involving nearly identical issues, parties, and witnesses could first consider those cases); *Curtis*, 511 S.W.2d at 266–68 (granting mandamus relief directing a judge to sustain a plea in abatement in a child custody suit where one court attempted to exercise jurisdiction with respect to the children, despite the fact that dominant jurisdiction had previously been established in another court). Because the Webb County district court did not commit a clear abuse of discretion in denying the relators' plea to the jurisdiction, any further inquiry into the relators' appellate remedy is unnecessary. Accordingly, the relators' petition for writ of mandamus is denied.

OPINION DELIVERED: July 1, 2011

[2] Although we recognize that our holding in *Abor* has been interpreted by other courts as creating a paradoxical problem, this issue was not raised or briefed by the parties here. *See, e.g.*, *Coastal Oil & Gas Corp. v. Flores*, 908 S.W.2d 517, 518–19 & n.1 (Tex. App.—San Antonio 1995, orig. proceeding). Therefore, we do not address it today.

IN THE SUPREME COURT OF TEXAS

NO. 10-0524

ST. DAVID'S HEALTHCARE PARTNERSHIP, L.P., LLP D/B/A ST. DAVID'S HOSPITAL AND ST. DAVID'S COMMUNITY HEALTH FOUNDATION, PETITIONERS,

v.

GENARO ESPARZA, JR.,RESPONDENT

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

PER CURIAM

In this case, we decide whether a patient's claim against a hospital for injuries suffered when he slipped and fell on a lubricating gel that fell to the floor of his hospital room during or immediately after a bladder scan is a health care liability claim. We hold that it is. Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court with instructions to dismiss Esparza's claims and for further proceedings consistent with this opinion.

Genaro Esparza was admitted to St. David's Hospital for acute kidney failure and his doctor ordered bladder scans (ultrasounds of the bladder). On the day of the incident, the attending nurse allegedly used "copious amounts of lubricating gel" for the scan. After the nurse left, Esparza got up to use the bathroom in his hospital room and slipped on the gel that fell on the floor during or after the scan. He sued the hospital asserting negligence and premises liability. Esparza did not file

an expert report, and the hospital filed a motion to dismiss under section 74.351 of the Code. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a), (b) (requiring expert report within 120 days of filing suit and mandating dismissal if no report is served). The trial court denied the hospital's motion and the court of appeals affirmed. ___ S.W.3d ___, ___. The court of appeals relied on our now-withdrawn opinion in *Marks v. St. Luke's Episcopal Hospital* in holding that Esparza's claims were not health care liability claims. No. 07-0783, 2009 WL 2667801 (Tex. Aug. 28, 2009), *withdrawn*, 319 S.W.3d 658 (Tex. 2010). The court also cited *Harris Methodist Fort Worth v. Ollie* for the same proposition. 270 S.W.3d 720, 726–27 (Tex. App.—Fort Worth 2008), *vacated*, ___ S.W.3d ___ (Tex. 2011) (per curiam).

In this Court, the hospital argues that the court of appeals erred by holding litigation over a dangerous condition caused by a health care provider—a nurse[1]—during the provision of health care—performance a bladder scan[2]—was not a health care liability claim. Esparza responds that the court of appeals correctly determined that his claims were based on premises liability because they were not directly related to or inseparable from the hospital's rendition of care. We disagree.

The Texas Medical Liability Act (TMLA) 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 or professional or administrative services directly related to

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[1] *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(12)(A)(i) (defining a health care provider as a person or entity "duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including [] a registered nurse").

[2] *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10 (defining health care as "any act or treatment performed or furnished, or that should have been performed or furnished . . . to or on behalf of a patient" during the patient's medical care, treatment, or confinement).

> health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005).

Whether a claim falls within the scope of section 74.001(a)(13) is not determined from the form of the plaintiff's pleadings. *See Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010). Rather, the underlying nature of the claim determines whether it is subject to the statutory requirements of the TMLA. *Id.*; *see also Ollie*, ___ S.W.3d at ___. Esparza's claim stemmed from the nurse's performance of the doctor-ordered scan and her failure to properly dispose of the gel used in the procedure. Moreover, both the prescribed procedure and its performance were directly related to Esparza's treatment, and thus an integral and inseparable part of his health care. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10),(13); *Diversicare*, 185 S.W.3d at 854–55.

In its evaluation of the merits in this case, the trier of fact would need to be informed of hospital procedures on safely disposing of gloves covered with a slippery substance after a medical procedure. Accordingly, the underlying nature of Esparza's suit was a health care liability claim against the hospital for which an expert report would be required.

We hold that the alleged negligence in permitting the gel to fall and remain on the floor of Esparza's room, causing his fall, is inseparable from the procedures for the disposition of gloves in a hospital. Esparza's claims are properly classified as health care liability claims because they arose from a departure from accepted standards "that should have been performed or furnished" by St. David's during Esparza's "medical care, treatment, or confinement." TEX. CIV. PRAC. & REM. CODE

§ 74.001(a)(10),(13). The trial court should have dismissed Esparza's claim for failure to comply with the expert report requirements of the TMLA, and the court of appeals erred in holding otherwise. We grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and remand the case to the trial court with instructions to dismiss Esparza's claims and for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 59.1, 60.2(d).

OPINION DELIVERED: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0581

O. LEE TAWES, III, APPELLANT,

V.

DORIS BARNES, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF LEON MCNAIR BARNES, DECEASED, APPELLEE

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued November 9, 2010

JUSTICE GREEN delivered the opinion of the Court.

In this case, which arose from an oil and gas lessor's claim for unpaid royalties, we consider the construction and application of a Working Interest Unit Agreement (WIUA) and a Joint Operating Agreement (JOA). The issues come to us on certified questions from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit asks first whether the lessor here, either as a third-party beneficiary or through privity of estate, can enforce the WIUA and JOA to recover unpaid royalties from an investor who consented to the drilling of two wells on a pooled gas unit, but did not operate the wells. *See In re Moose Oil & Gas Co.*, 613 F.3d 521, 531 (5th Cir. 2010). Pursuant to Article 5, Section 3-c of the Texas Constitution and Texas Rule of Appellate Procedure

58.1, we answer this question in the negative, and therefore do not reach the Fifth Circuit's remaining certified questions.

I. Background

Moose Oil & Gas Company acquired several oil, gas, and mineral leases in Lavaca County (collectively, the Baker Lease). Moose sold a portion of its working interest in the Baker Lease to a group of investors (the Moose Assignees), including O. Lee Tawes, III. The owners of the land adjoining the Baker Lease, Leon M. Barnes, now deceased, and his wife, Doris Barnes, executed an oil and gas lease (the Barnes Lease) to American Exploration Company. Through a series of assignments, Dominion Oklahoma Texas Exploration & Production, Inc. eventually succeeded to American's interest as the Barneses' lessee.

In preparation for a contemplated joint drilling venture on the lands covered by the Baker and Barnes leases, Dominion, Moose, and the Moose Assignees, including Tawes, signed a WIUA and a JOA. These unambiguous agreements, referred to here collectively as the Dominion-Moose Agreements, provided for the initial drilling of one gas well. Beyond the drilling of the initial well, the JOA permitted any party to the Dominion-Moose Agreements to propose additional drilling operations. In the event a dispute arose regarding the likelihood that an additional well would actually produce in paying quantities, the JOA allowed any party to protect itself from the risk and expense associated with the proposed additional drilling by going non-consent, or opting out of participating in the operation. These risks would then be borne by the consenting parties in exchange for the non-consenting parties' temporary relinquishment of their "interest in the [non-consent] well and share of production therefrom." After a specified period of time, each non-consenting party's

interest in the non-consent well would revert back to that party so that its ownership interest in the well would be the same as if it had participated in the drilling from the outset.

The WIUA provides in relevant part:[1]

PROVISION III

LEASE BURDENS

> Each Party hereto shall bear and be responsible for their own lease burdens including, but not limited to their Lessor's royalty, overriding royalty along with any and all other royalty burdens which may have been created by the party contributing the lease or leases to this Working Interest Unit.

PROVISION IV

OPERATIONS

> [Dominion] is designated Operator of the Working Interest Unit which will be governed by the Operating Agreement attached hereto . . . .

PROVISION VI

LEASE RENTALS

> Rentals, shut-in payments, or minimum royalties which may become due on leases committed hereto shall be paid by the contributor of the lease to the Working Interest Unit. It is the obligation of the contributing Lessee to maintain its own lease or Leases subject to this Agreement.

Dominion and Moose utilized the American Association of Petroleum Landmen's (AAPL) Form 610-1982 Model Form Operating Agreement as the basis for their JOA making several minor modifications to the standard terms. The JOA provides in relevant part:

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[1] We have replaced Louis Dreyfus Natural Gas Corporation, the original operator designated by the WIUA, with Dominion, who acquired Louis Dreyfus's interest as lessee of the Barnes lease when the companies merged in 2001.

ARTICLE III.

INTERESTS OF PARTIES

. . . .

B. Interests of Parties in Costs and Production:

> Unless changed by other provisions, all costs and liabilities incurred in operations under this agreement shall be borne and paid, and all equipment and materials acquired in operations on the Contract Area shall be owned, by the parties as their interests are set forth in [the WIUA].

ARTICLE VI.

DRILLING AND DEVELOPMENT

. . . .

B. Subsequent Operations:

. . . .

2. Operations by Less than All Parties:

. . . .

The entire cost and risk of conducting such operations shall be borne by the Consenting Parties in the proportions they have elected to bear . . . . Upon commencement of operations for the drilling . . . of any such well by Consenting Parties in accordance with the provisions of this Article, each Non-Consenting Party shall be deemed to have relinquished to Consenting Parties, and the Consenting Parties shall own and be entitled to receive, in proportion to their respective interests, all of such Non-Consenting Party's interest in the well and share of production therefrom until the proceeds of the sale of such share . . . shall equal the total of the following:

a) 100% of each such Non-Consenting Party's share of the cost of any newly acquired surface equipment . . . plus 100% of each such Non-Consenting Party's share of the cost of operation of the well commencing with first production and continuing until each such Non-Consenting Party's relinquished interest shall revert to it . . . ; and

b) 400% of that portion of the costs and expenses of drilling . . . and 400% of that portion of the cost of newly acquired equipment in the well . . . .

. . . .

During the period of time Consenting Parties are entitled to receive Non-Consenting Party's share of production, or the proceeds therefrom, Consenting Parties shall be responsible for the payment of all production, severance, excise, gathering and other taxes, and all royalty, overriding royalty and other burdens applicable to Non-Consenting Party's share of production . . . .

. . . .

ARTICLE VII.

EXPENDITURES AND LIABILITY OF PARTIES

C. Payments and Accounting:

Except as herein otherwise specifically provided, Operator shall promptly pay and discharge expenses incurred in the development and operation of the Contract Area pursuant to this agreement and shall charge each of the parties hereto with their respective proportionate shares upon the expense basis provided in Exhibit "C". Operator shall keep an accurate record of the joint account hereunder . . . .

. . . .

E. Rentals, Shut-in Well Payments and Minimum Royalties:

Rentals, shut-in well payments and minimum royalties which may be required under the terms of any lease shall be paid by the Operator and billed to the Joint Account. . . .

In July 1998, Dominion and Moose, acting for itself and on behalf of Tawes and the other Moose Assignees, formed the pooled gas unit (the Baker Unit) contemplated at the time they executed the Dominion-Moose Agreements.[2] Of the total 640 pooled acres, the Barnes Lease comprised approximately 54% of the land. Initially, the Dominion-Moose Agreements designated Dominion as the operator of all wells drilled on the Baker Unit. After the initial well, David Baker No. 1, was successfully drilled, Moose proposed drilling two additional gas wells, the Baker-Barnes No. 1 and No. 2 wells. Tawes and Moose consented to the proposed additional drilling, while Dominion opted to go non-consent. Because non-consenting parties cannot act as operators, Moose replaced Dominion as the operator of the two non-consent wells.

In addition to bearing all costs associated with drilling the non-consent wells, JOA Article VI.B.2 required the consenting parties to pay the royalties which would have been owed to the lessors of leases contributed to the Baker Unit by the non-consenting parties had they consented to the additional operations from the beginning. This provision, which we refer to as the JOA Royalty Provision, is principally at issue here.

The parties do not dispute that Barnes owns a 9.675% royalty in each well drilled on the Baker Unit. In 2000, Barnes, individually and as the independent executrix of her late husband's estate, commenced an action against Moose and Dominion in a Lavaca County state district court seeking to recover an additional 8.241% or, 17.916% total, royalty on the Baker-Barnes No. 1 and No. 2 non-consent wells. In response to Barnes's suit, Dominion filed a counterclaim and joined

[2] See the attached Appendix for a diagram of the parties' interests and participation in the drilling operations occurring on the Baker Unit.

Tawes and the other Moose Assignees. In 2002, Dominion removed the entire action to the United States Bankruptcy Court for the Southern District of Texas, Houston Division, after Moose filed a voluntary Chapter 7 bankruptcy petition. The bankruptcy court appointed an operator to replace Moose and ordered all proceeds from production on the non-consent wells to be placed in suspense accounts. At a February 2002 foreclosure sale, Tawes acquired Moose's undivided working interest in the Baker Unit as well as in the non-consent, Baker-Barnes No. 1 and No. 2 wells. In September 2003, the bankruptcy court granted a partial summary judgment in favor of Barnes, holding Dominion liable for $291,846.00—the unpaid amount of Barnes's undisputed 9.675% royalty on the Baker-Barnes No. 1 and No. 2 wells. Dominion then sought contribution from Moose, Tawes, and the other Moose Assignees. Barnes, however, continued to pursue her claims against Dominion for the full 17.916% royalty she claimed she was owed on each Baker Unit well. Before her claims against Dominion proceeded to trial, Barnes reached a settlement with Dominion and all consenting parties in which Dominion agreed to pay Barnes a sum of money in return for Barnes and the settling consenting parties' dismissal of claims against Dominion. Tawes declined to participate in the settlement. Barnes, therefore, sought to recover the balance of her remaining unpaid royalties from Tawes.

After considering the merits of Barnes's claims against Tawes, the United States Bankruptcy Court determined that as a JOA signatory, Tawes became obligated under the terms of the JOA Royalty Provision to perform Dominion's duty of paying Barnes the lessor's royalty owed to her pursuant to the Barnes Lease. *Moose Oil & Gas Co. v. Dominion Ok. Tex. Exploration & Prod., Inc.* (*In re Moose Oil & Gas Co.*), 347 B.R. 868, 874 (Bankr. S.D. Tex. 2006). Based on this conclusion,

the bankruptcy court found Tawes liable to Barnes, as a third-party beneficiary of the Dominion-Moose Agreements, for her unpaid royalties. *Id.* From this decision, Tawes appealed to the United States District Court for the Southern District of Texas. The federal district court affirmed the bankruptcy court's decision, concluding that Barnes qualified as a third-party beneficiary of the Dominion-Moose Agreements because the JOA Royalty Provision expressly obligated Tawes, as a consenting party, to pay the royalties previously owed by Dominion to Barnes. *Tawes v. Barnes*, No. V-06-123, 2008 WL 905209, at *10, 17 (S.D. Tex. Mar. 31, 2008). Following the federal district court's holding, Tawes appealed once more, this time to the United States Court of Appeals for the Fifth Circuit, resulting in the certified questions of law now before us:

> 1. Does Barnes have any right [to] enforce the [Dominion-Moose Agreements]—the WIUA and JOA—between Dominion, Moose . . . and the Moose Assignees, including Tawes, to recover unpaid royalties, between the date of first production and February 2002, of Baker-Barnes Nos. 1 & 2 wells under what we have called the "Royalty Provision" of the JOA, either as a third-party beneficiary of the WIUA and JOA or by virtue of having privity of estate with Tawes?
>
> . . . .
>
> 2. If Barnes may enforce the [Dominion-Moose Agreements], does the WIUA prevent Barnes from recovering from Tawes?
>
> . . . .
>
> 3. If Tawes, as a Consenting Party, is responsible for royalties under the JOA, does the JOA Royalty Provision change the agreement within the JOA such that Tawes is responsible for all of Barnes'[s] unpaid royalty jointly and severally, or does the JOA limit Tawes'[s] liability for unpaid royalty to the extent of his interest in the two wells at issue between the date of first production and February 2002?

In re Moose Oil & Gas Co., 613 F.3d at 531.

II. Discussion

In claiming she is entitled to recover unpaid royalties from Tawes, Barnes relies heavily on the language found in the JOA Royalty Provision. She first contends that, based on that language, she qualifies as a third-party beneficiary to the Dominion-Moose Agreements. Alternatively, she asserts that the privity of estate she shares with Tawes supports her ability to enforce the Dominion-Moose Agreements. We address each argument in turn.

A. Third-Party Beneficiary

A third party may enforce a contract it did not sign when the parties to the contract entered the agreement with the clear and express intention of directly benefitting the third party. *MCI Telecomms. Corp. v. Tex. Util. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999). When the contract confers only an indirect, incidental benefit, a third party cannot enforce the contract. *Id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 315 (1981); 13 WILLISTON ON CONTRACTS § 37:19, at 124–25 (4th ed. 2000) ("An incidental beneficiary acquires no right either against the promisor or the promisee by virtue of the promise."). Traditionally, Texas courts have maintained a presumption against third-party beneficiary agreements. *Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501, 503–04 (Tex. 1975) ("[W]e must begin with the presumption that parties contract for themselves . . . ."); *Standard Accident Ins. Co. v. Knox*, 184 S.W.2d 612, 615 (1945). Therefore, in the absence of a clear and unequivocal expression of the contracting parties' intent to directly benefit a third party, courts will not confer third-party beneficiary status by implication. *MCI*, 995 S.W.2d at 651.

To determine whether Dominion and Moose expressed a clear intent to directly benefit Barnes, we must interpret the Dominion-Moose Agreements, which both parties agree are unambiguous. *Id.* at 650. The construction of an unambiguous contract is a question of law for the court, which we may consider under a de novo standard of review. *See Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d. 248, 252 (Tex. 2009); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). When discerning the contracting parties' intent, courts must examine the entire agreement and give effect to each provision so that none is rendered meaningless. *Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006); *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002) (per curiam). "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Coker*, 650 S.W.2d at 393. All doubts must be resolved against conferring third-party beneficiary status. *See MCI*, 995 S.W.2d at 652.

Barnes claims that the JOA Royalty Provision directs Tawes, as a consenting party, to pay the royalties owed to her pursuant to her oil and gas lease with Dominion. Because the payment of royalties to Barnes would satisfy a legal duty owed by Dominion, her lessee, Barnes argues she received a direct, non-incidental benefit, and therefore qualifies as a third-party beneficiary. Tawes responds that the parties to the Dominion-Moose Agreements relied on the JOA to govern the relationships between the operators and non-operators of wells drilled on the Baker Unit. By allocating general expenses among the parties consenting to the drilling of additional, non-consent wells, Tawes asserts that the JOA Royalty Provision was not intended to directly benefit any lessor of a Baker Unit lease, but to provide clarity to the operator who must keep an accurate record of

accounting. We consider Tawes's position to be more accurate and conclude that the parties did not intend to directly benefit Barnes. Rather, any benefit received by her was merely incidental.

As Tawes's contentions recognize, JOAs are "contract[s] typical to the oil and gas industry whose function is to designate an 'operator, describe the scope of the operator's authority, provide for the allocation of costs and production among the parties to the agreement, and provide for recourse among the parties if one or more default in their obligations.'" *Seagull*, 207 S.W.3d at 344 n.1 (quoting 3 ERNEST E. SMITH & JACQUELINE L. WEAVER, TEXAS LAW OF OIL AND GAS § 17.3 at 17-7 (2d ed. 2006)). JOAs govern operations involving great financial risk and are therefore utilized for the purpose of shielding non-operators, like Tawes, "from liability for all costs or other obligations incurred in conducting the operations." 3 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 17.1, at 377 (1996); *see Hill v. Heritage Res.*, 964 S.W.2d 89, 112 (Tex. App.—El Paso 1997, pet. denied). We deduce from the oil and gas industry's customary purpose for using JOAs, and from the plain language of the JOA at issue here, that neither Dominion nor Moose included the JOA Royalty Provision with the intention of directly benefitting any lessor of a Baker Unit lease. *See Luling Oil & Gas Co. v. Humble Oil & Ref. Co.*, 191 S.W.2d 716, 724 (1946) ("'Not only are we to construe this contract as a whole but since it is one peculiar to the cotton export trade, and somewhat indefinite or inconsistent in its terms, we may interpret it in the light of the custom of the business . . . .'" (quoting *Perry & Co. v. Langbehn*, 252 S.W. 472, 474 (1923))).

For instance, WIUA Provisions III and VI, quoted above, provide that Baker Unit lessees must maintain and prevent their respective leases from terminating by paying royalties and other

expenses, such as rentals and shut-in payments. The plain language of these WIUA provisions makes clear that Dominion, as the contributor of the Barnes Lease to the Baker Unit, was ultimately responsible for paying its lessor, Barnes, the royalties from production owed to her pursuant to the terms of the Barnes Lease. *See Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, No. 05-1076, 2011 WL 1226100, at *12 (Tex. 2011) ("[T]echnical words are to be interpreted as usually understood by persons in the business to which they relate, unless there is evidence that the words were used in a different sense."). Because the royalties Barnes seeks arise of out production from one of the non-consent wells, we must also look to the provisions of the JOA which discuss operations conducted without the consent of all parties.[3]

Article III.B of the JOA states that unless otherwise provided, each party will be charged with the costs and liabilities associated with drilling Baker Unit wells as their interests are set forth in the WIUA. Article VI.B.2, the JOA Royalty Provision, provides an exception to this general accounting scheme: When less than all parties consent to the drilling of additional wells, the responsibility for payment of "all production, severance, excise, gathering and other taxes, and all royalty, overriding royalty and other burdens applicable to Non-Consenting Party's share of production" shifts to the consenting parties only. JOA Article VII provides the operator of non-consent wells an accounting procedure which directs it to charge all costs and expenses incurred in drilling to a joint account so that the consenting parties may be billed with their respective proportionate shares. Along with the general cost items contained in the Royalty Provision, Article

[3] Provision IV of the WIUA expressly incorporates the terms of the JOA into the WIUA so that the operation of the Baker Unit is governed simultaneously by both agreements.

VII directs operators to bill additional types of operating expenses to the joint account, including: ecological and environmental charges, rentals and royalties, labor costs, employee benefits, material and transportation costs, service fees, equipment and facilities charges, damages and losses to joint property, legal expenses, taxes, insurance fees, abandonment and reclamation costs, communications fees, and other expenditures directly benefitting the joint property. As a matter of common understanding, each of these categories of expense would accrue and become payable to different people and entities. *See Exxon Corp.*, 2011 WL 1226100, at *12. Aside from the generalized categories of expense the JOA Royalty Provision obligates consenting parties to pay, Article VII's detailed breakdown of the operational costs associated with drilling adds further clarification to the types of expenses operators may bill to the consenting parties' joint account.

In relation to the two non-consent wells at issue here, Moose served not only as operator, but also as a consenting party. As operator, Moose assumed responsibility for, among other things, paying all lessors of Baker Unit leases, including Barnes, royalties accruing on production from the non-consent wells it operated. Such royalty payments would then be billed to the joint account to be split proportionately among Moose, Tawes, and the other consenting parties. The Dominion-Moose Agreements demonstrate that the clear intent of the signatories thereto was to allocate responsibilities for the payment of operating expenses for the specific purpose of maintaining each Baker Unit lease, not to directly benefit Barnes.

Finally, denial of Barnes's third-party beneficiary claim comports with established Texas case law. The Fifth Circuit, while addressing this issue, found the facts of this case to lie somewhere between our opinions in *Stine v. Stewart*, 80 S.W.3d 586 (Tex. 2002), and *MCI*

Telecommunications Corp. v. Texas Utilities Electric Co., 995 S.W.2d 647 (Tex. 1999). In *MCI*, we interpreted a fiber optic cable installation contract between a railroad company and a telecommunications provider to determine whether the contract conferred third-party beneficiary status on a utility company that had previously installed transmission poles along the same portion of railway. *Id.* at 648–49. The contract at issue prohibited the telecom provider from acting in a manner that would interfere with the utility company's prior existing rights in the railway. *Id.* at 649. However, the contract also contained a provision stating "neither this Agreement, nor any term or provision hereof, . . . shall be construed as being for the benefit of any party not in signatory hereto." *Id.* at 649–50. We concluded that the protections provided to the utility company were merely an incidental benefit and determined that the contract's specific denial of conferring any benefits upon third parties showed the signatories' clear intent "that there be no third-party beneficiaries to the contract." *Id.* at 651–52.

In *Stine*, we addressed a similar issue—whether a mother qualified as a third-party beneficiary to her daughter and son-in-law's agreement incident to divorce. *Id.* at 588. The agreement disposed of the couple's marital property and included a detailed plan by which the couple would repay a loan taken from the mother to purchase their home. *Id.* We determined that the agreement contained the requisite clear and unequivocal language of intent to directly benefit a third party, because it provided for the repayment of a specific amount of money to the mother from a specific source of income—proceeds from the sale of the couple's home. *Id.* at 590. Further, the agreement referenced a promissory note held by the mother which demonstrated the husband and wife's desire to satisfy the existing legal obligation they owed to the mother. *Id.*

These provisions directly benefitted the mother, so we held that she was entitled to enforce the agreement as a third-party beneficiary. *Id.*

We do not find it determinative that the 1982 version of the AAPL's Model Form JOA used here does not expressly waive third-party liability like the contract at issue in *MCI*. *See Coker*, 650 S.W.2d at 393 (stating that when construing a contract to determine parties' intent, no single provision is given controlling effect). Instead, the controlling factor is the absence of any sufficiently clear and unequivocal language demonstrating an intent to directly benefit Barnes or any other would-be beneficiary of the contract. The Dominion-Moose Agreements here clearly lack such required language. Moreover, unlike the divorce agreement in *Stine*, the JOA here does not, as the Fifth Circuit states, identify a "specific, limited group of individuals" to which the consenting parties owe an obligation. *Compare In re Moose Oil & Gas Co.*, 613 F.3d at 528, *with Stine*, 80 S.W.3d at 588. To the contrary, the JOA Royalty Provision refers only to consenting and non-consenting parties generally. In addition, the JOA Royalty Provision does not identify a specific sum which the consenting parties must pay to a certain person or entity. As discussed above, the JOA accounting procedure for non-consent wells directs Moose, as operator of the non-consent wells, to bill a wide variety of expenses to the consenting parties' joint account. This accounting procedure ensures that all lessors of Baker Unit leases, not Barnes alone, would receive royalties from production realized on the non-consent wells.

Although we recognized in *Stine* that it is not necessary for a third-party beneficiary agreement to be executed solely for the would-be beneficiary's benefit, we determined that the contract there referred to the third-party beneficiary with sufficient specificity to illustrate a clear

intent to repay a debt owed. 80 S.W.3d at 591–92. The generalized nature of the JOA Royalty Provision, coupled with the JOA's all-encompassing accounting scheme for non-consent wells, lacks the specificity necessary to directly benefit a third-party beneficiary to the Dominion-Moose Agreements. *See id.* at 591; *Brown v. Fullenweider*, 52 S.W.3d 169, 170 (Tex. 2001) (per curiam) (holding that a decree of divorce was not a third-party beneficiary agreement in favor of one party's attorney because the decree did not name the attorney and merely allocated responsibility for the payment of his fees, along with other financial obligations, between the parties). As derived from our analysis of the unambiguous language of the Dominion-Moose Agreements in light of both oil and gas industry standards and customs and Texas case law, we conclude that Dominion and Moose clearly intended to allocate responsibility for the payment of many categories of expenses in the context of drilling non-consent wells. Accordingly, any benefit Barnes derived by way of the JOA Royalty Provision was merely incidental and not enough to entitle her to the third-party beneficiary status she seeks. Therefore, Barnes may not enforce the Dominion-Moose Agreements under this theory of recovery.

B. Privity of Estate

Relying on our opinion in *Amco Trust, Inc. v. Naylor*, 317 S.W.2d 47 (1958), Barnes next asserts that she and Tawes share privity of estate due to Tawes's assumption, as a consenting party, of Dominion's obligation to pay the royalties owed to her pursuant to the Barnes lease. Barnes's reliance on *Amco Trust* is misplaced, however, and we conclude that she and Tawes are not in privity of estate by virtue of his assumption of Dominion's duty to pay her royalties under the JOA Royalty Provision.

"Liability to . . . [a] lessor for the payment of rent or the performance of other lease covenants may arise from either privity of contract or privity of estate." *Id.* at 50. Privity of estate arises between an assignee of a lessee's entire interest in a lease and the original lessor. *Id.* An assignment creating privity of estate occurs when a lessee executes an instrument conveying his entire estate and interest under a lease to a subsequent lessee so that the original lessee retains no reversionary interest in the lease whatsoever. *See Westland Oil Dev. Corp. v. Gulf Oil Corp*, 637 S.W.2d 903, 905, 910–11 (Tex. 1982) (concluding that privity of estate existed between two parties by virtue of their "area of mutual interest agreement" which was "in the nature of a contract to convey interests in oil and gas leases"); *Davis v. Vidal*, 151 S.W. 290, 292 (1912) ("[T]he general rule as to what constitutes an assignment of a lease as distinguished from a sublease . . . is that the instrument must convey the whole term, leaving no interest or reversionary interest in the grantor."). The payment of royalties on production to a lessor is a covenant running with lands covered by an oil and gas lease. *See Lone Star Gas Co. v. Mexia Oil and Gas, Inc.*, 833 S.W.2d 199, 202 (Tex. App.—Dallas 1992, no writ) ("Privity of estate is the foundation of the assignee's liability on covenants that run with the land."); 3 SUMMERS OIL AND GAS LAW § 29:7, at 529 (3d ed. 2008) ("An oil and gas lessee does not escape his duties to perform the covenant[] of [paying royalties owed under] the lease by assignment, even though the assignee may also incur the duty of [its] performance, for the lessee is bound by virtue of his contract with the lessor."). Therefore, when privity of estate exists between an assignee of an oil and gas lessee's entire leasehold interest and the original oil and gas lessor, the assignee must pay the lessor's royalties as required by the oil and gas lease. *See* 3 SUMMERS OIL AND GAS LAW § 29:7, at 529 (3d ed. 2008).

As noted above, in the oil and gas industry, JOAs are used for the primary purpose of allocating costs and revenues from production amongst the parties to the agreement, not to permanently transfer ownership interests in pooled oil and gas leases. *See Seagull*, 207 S.W.3d at 344 n.1; *see also* J. David Heaney, *The Joint Operating Agreement, the AFE and COPAS —What They Fail to Provide*, 29 ROCKY MTN. MIN. L. INST. 743, 748–49 (1989) (discussing the frequently overlooked and unanticipated effect of operating agreements as documents of title). Here, the JOA signed by Dominion, Moose, and the Moose Assignees, including Tawes, is no different. Article III.B of the JOA specifically states, "Nothing contained in this [contract] shall be deemed an assignment or cross-assignment of interests covered hereby." Moreover, the JOA provides a method for calculating the duration of time consenting parties may temporarily own non-consenting parties' interests in the well. Thus, the period of time during which the JOA grants consenting parties temporary ownership of non-consenting parties' share of production (in return for payment of royalties to the non-consenting parties' lessors) is limited. Upon the expiration of this specified period of temporary ownership, the JOA contemplates that ownership of the working interest in the non-consent wells reverts back to the non-consenting parties. Therefore, the terms of the Dominion-Moose Agreements make clear that by opting to go non-consent as to the Baker-Barnes Wells No. 1 and No. 2, Dominion did not assign its interest as Barnes's lessee to Tawes or any other consenting party. Rather, Dominion retained a reversionary interest in the non-consent wells. Because Tawes, as a consenting party, received no permanent interest in the Barnes Lease, privity of estate does not exist between Barnes and Tawes. *See Amco Trust*, 317 S.W.2d at 50; *Davis*, 151 S.W. at 292 (determining that a lessee who reserved to itself the ability to pay rent to its lessor in

the event its subsequent lessee failed to do so retained a sufficient interest in the lease so that only a sublease occurred, not an assignment).

Barnes looks past the JOA's disclaimer of assignments and insists that privity of estate arose when Tawes consented to the drilling of the Baker-Barnes Wells No. 1 and No. 2 and assumed the duty, previously held by Dominion, of paying the royalties accruing on production from those wells to Barnes. What Barnes appears to describe as a new theory of privity by assumption, we rather see as a convoluted restatement of privity of contract. Barnes relies on our statement in *Amco Trust* that a sublessee "is not liable to the lessor . . . unless he assumes or otherwise binds himself to perform [some obligation]." 317 S.W.2d at 50. But Barnes takes this language out of context, because we were not discussing privity of estate, but describing how two parties may reestablish liability between themselves once their privity of contract is extinguished. *See id.* ("There is no privity of contract between the lessor and a sublessee, and the latter is not liable to the lessor on the covenants of the lease, unless he assumes or otherwise binds himself to perform the same."). This statement of law is unrelated to the creation of privity of estate between the two parties at issue here.

Barnes is not a signatory to either of the Dominion-Moose Agreements; therefore, privity of contract does not exist between her and Tawes. *See id.* (privity of contract exists between parties to a specific contract). Further, Tawes never specifically assumed Dominion's prior duty of paying Barnes the royalties accruing from production on the non-consent wells. *See Regency Advantage Ltd. P'ship v. Bingo Idea-Watauga, Inc.*, 936 S.W.2d 275, 278 (Tex. 1996) (per curiam); *Davis*, 151 S.W. at 294 (holding that a sublessee who agreed to pay a certain amount of rent on a certain date but did not obligate himself to pay that amount to the lessor directly, did not assume liability for the

lessor's unpaid rents); *see also Lone Star Gas Co.*, 833 S.W.2d at 201 ("There must be some express promissory words, or words of 'assumption,' on the part of the assignee." (quoting 4a CORBIN ON CONTRACTS § 906, at 632 n.1 (1951))). It is this same lack of clear and unequivocal assumptive language that prevents Barnes from recovering her unpaid royalties as a third-party beneficiary to the Dominion-Moose Agreements. Where a theory of recovery based on third-party beneficiary status fails, so too must a privity of contract theory, no matter how artfully constructed. *See* 9 CORBIN ON CONTRACTS § 47.6, at 142 (2007) ("If the assignee contracts with his assignor to discharge the duties of the assignor to the third party, the third party is an intended beneficiary of that contract."); 13 WILLISTON ON CONTRACTS § 37:1, at 7 (4th ed. 2000) ("Over time, however, through legislation and judicial decision, the traditional common-law view [on needing privity to recover on a contract] was abandoned, and however achieved, an exception to the need for privity was developed through the doctrine of third party beneficiaries."). Because Tawes, as a consenting party, did not permanently acquire Dominion's interest in the non-consent wells, and because Tawes did not otherwise contractually assume a duty to pay royalties accruing on production from the non-consent wells directly to Barnes, we hold that the parties do not share any privity which allows Barnes to enforce the Dominion-Moose Agreements to recover her unpaid royalties from Tawes.

III. Conclusion

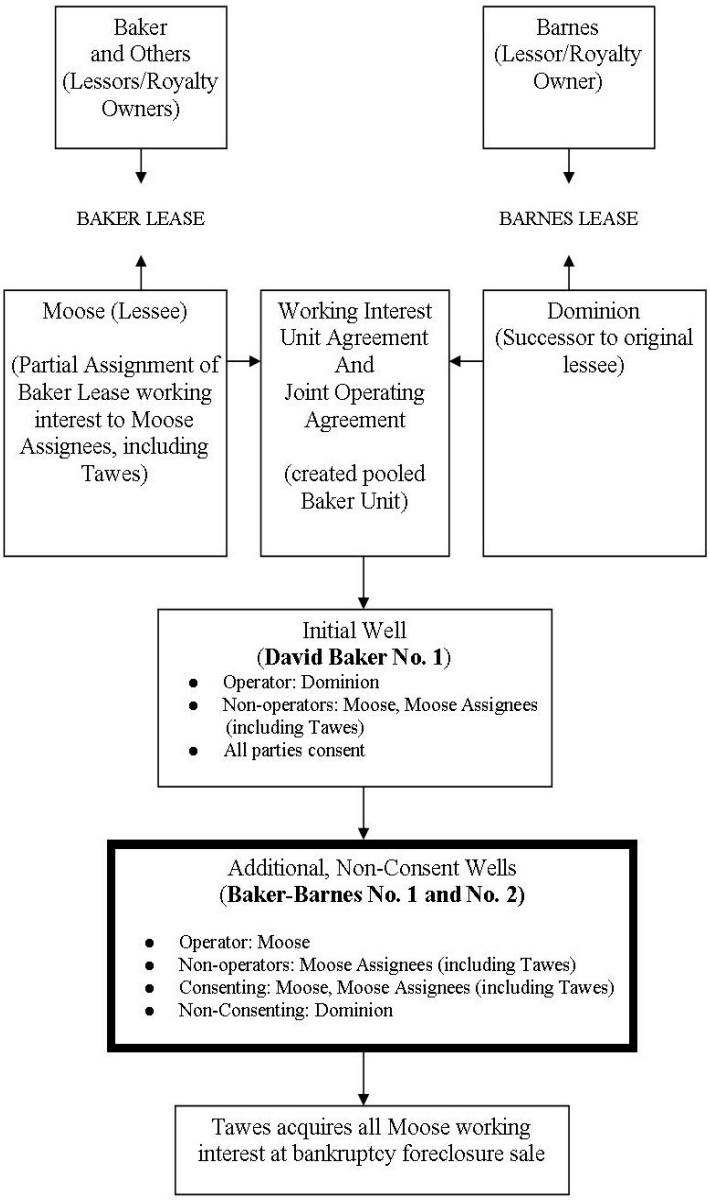
In response to the Fifth Circuit's first certified question, we conclude that Barnes has no right to enforce the Dominion-Moose Agreements as a third-party beneficiary or by way of privity of estate. Because Barnes cannot enforce the Agreements here and necessarily lacks a right of

recovery against Tawes, it is immaterial whether Tawes would be jointly and severally liable for the unpaid royalties owed Barnes. We therefore do not address the remaining certified questions.

_____
Paul W. Green
Justice

OPINION DELIVERED: April 15, 2011

APPENDIX


Baker and Others (Lessors/Royalty Owners)
Barnes (Lessor/Royalty Owner)
BAKER LEASE
BARNES LEASE
Moose (Lessee)
(Partial Assignment of Baker Lease working interest to Moose Assignees, including Tawes)
Working Interest Unit Agreement And Joint Operating Agreement
(created pooled Baker Unit)
Dominion (Successor to original lessee)
Initial Well
(David Baker No. 1)
Operator: Dominion
Non-operators: Moose, Moose Assignees (including Tawes)
All parties consent
Additional, Non-Consent Wells
(Baker-Barnes No. 1 and No. 2)
Operator: Moose
Non-operators: Moose Assignees (including Tawes)
Consenting: Moose, Moose Assignees (including Tawes)
Non-Consenting: Dominion
Tawes acquires all Moose working interest at bankruptcy foreclosure sale

IN THE SUPREME COURT OF TEXAS

NO. 10-0592

JOHN GANIM, PETITIONER,

v.

J. FAROUK (FRANK) ALATTAR, RESPONDENT

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

PER CURIAM

The issue in this case is whether an agreement to acquire real property for the benefit of a partnership was barred by the statute of frauds. The court of appeals held that it was. We disagree. We reverse the court of appeals' judgment and remand to that court for further proceedings.

John Ganim and Farouk "Frank" Alattar were friends who began looking for properties to invest in together. On March 17, 2004 they visited a 3,800 acre tract in Washington County that was for sale (the Property). Two days later Alattar, while accompanied by Ganim, executed an agreement as "Frank Alattar, Trustee" to purchase the Property.

In the days following Alattar's execution of the purchase agreement, Alattar, Ganim and their lawyers exchanged documents culminating in Alattar and Ganim executing an Agreement of Limited

Partnership of Gates Bluebonnet Hills, LTD. (Gates Bluebonnet), which was to take effect March 29, 2004. But despite Ganim and Alattar each signing the Gates Bluebonnet agreement, they later disputed whether it correctly reflected the terms of their agreement. Because of the disagreement, Alattar notified Ganim that he would not enter into a partnership and denied that Ganim had, or would have, any interest in the Property. Ganim subsequently sued Alattar. While suit was pending the sellers conveyed the Property by special warranty deed to "Farouk Alattar, Trustee." Neither the purchase agreement nor the deed identified a trust or named any trust beneficiaries.

The case was tried to a jury. Ganim's position at trial was that he and Alattar agreed to purchase the Property as partners and six documents, taken collectively, established that Alattar acquired the Property on behalf of Gates Bluebonnet. The six documents were introduced into evidence. Among the documents was an unsigned letter dated March 25, 2004 to Alattar from his attorney referencing the agreement to purchase the Property and referring to discussions Alattar and his attorney had "on proposed entity structure for this transaction." Another of the documents was a letter to Alattar from his attorney dated March 26, 2004, which included the proposed partnership agreement for Alattar and Ganim's review and execution.

Alattar contended he had no agreement with Ganim to acquire the Property as partners. He insisted that he had purchased the property for himself and his family.

As relevant to the issue before us, the jury found (1) Ganim and Alattar did not mutually rescind the Gates Bluebonnet Hills Agreement of Limited Partnership, (2) six specified documents

constituted an agreement that Alattar purchased the Property for the benefit of Gates Bluebonnet,[1] (3) Alattar failed to comply with the agreement, and (4) Ganim was damaged in the amount of $2,446,800.

The trial court rendered judgment for Ganim on the jury verdict.[2] The court of appeals reversed and rendered judgment for Alattar. ___ S.W.3d ___, ___. It reasoned that under the agreement found by the jury the Property was sold either to Gates Bluebonnet acting through Alattar, or was sold to Alattar as trustee of an unidentified trust unrelated to the partnership. *Id*. The appeals court concluded that either way, "the agreement is one for the sale of real estate and subject to the statute of frauds." *Id*. It then determined that the agreement did not comply with the statute of frauds because no single document contained both the contract's essential terms and the signature of the party to be charged, nor could the documents be construed together to satisfy the statute of frauds because the later documents did not refer to the earlier ones. *Id.* Because it rendered judgment on the statute of frauds issue, the appeals court did not address the other issues raised by Alattar.

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[1] Jury question two read as follows:

> Do you find that the following writings as shown in the Plaintiff's Exhibits listed below constituted an agreement whereby the 3,800 acres purchased by Frank Alattar, trustee, was for the benefit of the Gates Bluebonnet Hills Limited Partnership?
>
> [list of six Plaintiff's exhibits]

The jury answered "Yes."

[2] The judgment was for damages of $2,445,300. Ganim has not complained of the amount of damages awarded.

In this Court Ganim argues that, in finding Alattar purchased the Property for Gates Bluebonnet, the jury determined Alattar purchased the Property for their mutual benefit. Thus, Ganim contends, this was an agreement for the joint acquisition of real property, not a land-purchase agreement, and it is not subject to the statute of frauds. Alattar argues that Ganim has shifted positions on appeal: in the trial court he argued Alattar agreed to convey the Property to the partnership, but he now contends Alattar agreed to purchase the Property for the partnership and a second conveyance was not required. Alattar further contends that both of Ganim's positions fail because each requires Alattar to have purchased the Property as trustee for benefit of the partnership and such an agreement would be an express parol trust in land, which the Texas Trust Code makes unenforceable. We conclude that neither the statute of frauds nor the Texas Trust Code bar the enforcement of the agreement.

Chapter 26 of the Business and Commerce Code is entitled "Statute of Frauds." It provides that "a contract for the sale of real estate" must be in writing. TEX. BUS. & COMM. CODE § 26.01 (a), (b)(4). This Court long ago held that "an agreement between two or more persons for the joint acquisition of land is not a contract for the sale of land and is not required by our statute of frauds to be in writing." *Gardner v. Randell*, 7 S.W. 781, 782 (Tex. 1888); *Reid v. Howard*, 9 S.W. 109, 110 (Tex. 1888); *James v. Fulcrod*, 5 Tex. 512, 1851 WL 3915, at *3 (1851).

In *Gardner* the parties agreed to purchase land, with each to pay one-half of the purchase price and each to hold an equal interest in the property. *Gardner*, 7 S.W. at 781. Gardner purchased the property for $3,250, paying $500 of his own money and taking a bond for title in his own name.

Id. The parties then orally agreed that if Randell paid his half by the end of a 90-day period, Randell would own half of the property. *Id*. at 781-82. Gardner subsequently raised the money, completed the purchase, and obtained a deed to the property in his name. *Id*. at 782. When Randell tendered his share of the money, Gardner refused to convey, prompting Randell to file suit to recover his interest in the property. *Id*. This Court characterized the transaction at issue as "an agreement between two parties to buy land jointly," which did not fall within the statute of frauds. *Id*. The Court noted that the case did not involve a parol trust or a resulting trust, but a "parol contract by which two or more persons agree to purchase land for their joint benefit" with the "title to be taken in the name of one." *Id*.

Alattar concedes that *Gardner* and its progeny would support enforcement of the agreement Ganim alleges. But he argues that the Trust Code abrogated *Gardner* by providing that an express trust must be in writing and signed by the settlor. *See* Texas Trust Act, ch. 148, § 7, 1943 Tex. Gen. Laws 232, 234 (former Tex. Rev. Civ. Stat. Ann. art. 7452b-7), *repealed by* Act of May 25, 1983, ch. 567, § 1, 1983 Tex. Gen. Laws 3658, 3658 (current version at TEX. PROP. CODE § 112.004).

Section 112.004 of the Trust Code provides that a trust in real property "is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent." TEX. PROP. CODE § 112.004; *see also Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977). The Trust Code's provision applies only to express trusts. TEX. PROP. CODE § 111.003 ("For the purposes of this subtitle, a 'trust' is an express trust only . . . ."); *see also Omohundro v. Matthews*, 341 S.W.2d 401, 404 (Tex. 1960); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 259 (Tex. 1951).

An "express trust" is "a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person." TEX. PROP. CODE § 111.004(4).

Ganim does not contend, and the jury did not find, that an express trust was created.[3] Nor does Alattar contend there is evidence that he or someone else acting as settlor created an express trust in favor of Ganim or Gates Bluebonnet by a manifestation of "an intention to create the relationship" of trustee in Alattar. *See id*. § 111.004. The dispute was over whether Alattar agreed to purchase the Property for Gates Bluebonnet, not over whether an express trust was created. Further, the only possible evidence supporting the creation of a trust agreement was the Purchase Agreement Alattar signed as "Frank Alattar, Trustee" and the deed conveying the Property to "Farouk Alattar, Trustee." But "the mere designation of a party as 'trustee' does not create a trust." *Nolana Dev. Ass'n v. Corsi*, 682 S.W.2d 246, 249 (Tex. 1984).

We conclude that no express trust was created as to the Property. Because no express trust was created, the Texas Trust Code does not apply.

Moreover, after the Trust Code was adopted our courts have continued to enforce agreements for the joint acquisition of land, even though legal title is held in the name of one of the partners. *See, e.g.*, *King v. Evans*, 791 S.W.2d 531 (Tex. App.—San Antonio 1990, writ denied). In *King*,

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[3] Even if there had been evidence of an express trust, a question concerning its existence was not requested or submitted to the jury. Under such circumstances the existence of an express trust as a ground of defense or recovery was waived unless the evidence was conclusive on the question. TEX. R. CIV. P. 279.

Evans sued King claiming that a 725-acre tract acquired by King was a partnership asset based on an oral partnership agreement. *Id*. at 532. The jury found that the land was purchased by King for the benefit of the partnership. *Id*. On appeal, King argued that the jury's finding was based on either an express trust or a constructive trust cause of action and was required to be in writing. *Id*. at 533. The court of appeals disagreed, stating that when "land is acquired for partnership purposes but is held in one partner's name, the partnership's claim to the land is not barred by absence of a written document of conveyance." *Id*. The court of appeals held that because there was no evidence a trust was formed, the statute of frauds did not apply to agreements between parties to jointly acquire land. *Id.*; *see also Davis v. Sheerin*, 754 S.W.2d 375, 386 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (holding that the statute of frauds did not bar Sheerin's claim to an interest in the real property held solely in Davis's name because Sheerin was "not relying on an oral conveyance of land, but [was] contending that the six tracts were all purchased by and for the benefit of the partnership"); *Bradley v. Bradley*, 540 S.W.2d 504, 510 (Tex. Civ. App.—Fort Worth 1976, no writ) (holding that the statute of frauds "does not apply to a contract between two or more parties, such as the one involved here, to acquire jointly realty from a third person"); *McDonald v. Sanders*, 207 S.W.2d 155, 157 (Tex. Civ. App.—Texarkana 1947, writ ref'd n.r.e.) (holding that an oral agreement between two parties for one of them to purchase a mineral interest for the benefit of the other did not violate the statute of frauds).

In reaching its conclusion the court of appeals relied on *White v. McNeil*, 294 S.W. 928 (Tex. Civ. App.—1927, no writ). But *White* involved a different relationship between the parties to the

land conveyance. There the partner was conveying land that he already owned to a partnership as a capital contribution. *Id*. at 929. *White* held that the transaction was a standard land conveyance, which was required to be in writing. *Id*. In contrast, the jury in this case found that Alattar agreed to initially purchase the Property for Gates Bluebonnet, not that he agreed to contribute property he already owned to the partnership.

The agreement found by the jury was that Alattar purchased the Property for Gates Bluebonnet. It was not an agreement for the sale of real estate nor did it create an express trust. Thus, it was not required to comply with the provisions of either Business and Commerce Code section 26.01 or Property Code section 112.004.

We grant Ganim's petition for review. Without hearing oral argument we reverse the court of appeals' judgment. *See* TEX. R. APP. P. 59.1. We remand the case to the court of appeals for further proceedings.

OPINION DELIVERED: June 24, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0659

JERRY L. BARTH, PETITIONER,

v.

BANK OF AMERICA, N.A., RESPONDENT

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

PER CURIAM

Jerry L. Barth sued "Bank of America Corporation". Bank of America, N.A. answered, asserting that it had been, in its words, "incorrectly named". At trial, the witnesses referred simply to "Bank of America", with one exception: Bank of America, N.A.'s corporate representative testified, in response to a question by Bank of America, N.A.'s counsel regarding the "actual entity [involved in the dispute] that we're here over today", that it was "Bank of America National Association". Bank of America Corporation was not mentioned in the evidence. During the jury charge conference after the close of the evidence, the trial court granted Barth a trial amendment to correct the misnomer, but the liability questions submitted to the jury and answered in Barth's favor all referred to Bank of America Corporation. The trial court rendered judgment against Bank of America, N.A. on the verdict. The court of appeals reversed and rendered, holding that the verdict does not support the judgment. ___ S.W.3d ___ (Tex. App.–Corpus Christi 2010). We disagree.

Bank of America, N.A. argues that this is a case of misidentification, not misnomer. The argument, contrary to Bank of America, N.A.'s own answer in the trial court, is clearly wrong. We have explained:

> A misnomer differs from a misidentification. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 4 (Tex. 1990). Misidentification — the consequences of which are generally harsh — arises when two separate legal entities exist and a plaintiff mistakenly sues an entity with a name similar to that of the correct entity. *Chilkewitz v. Hyson*, 22 S.W.3d 825, 828 (Tex. 1999). A misnomer occurs when a party misnames itself or another party, but the correct parties are involved. *Id.* (noting that "[m]isnomer arises when a plaintiff sues the correct entity but misnames it"). Courts generally allow parties to correct a misnomer so long as it is not misleading.

In re Greater Houston Orthopaedic Specialists, Inc., 295 S.W.3d 323, 325 (Tex. 2009) (per curiam) (footnote and citations omitted). Bank of America, N.A. agrees that it has not been misled. This is a clear case of misnomer.

Bank of America, N.A. also argues that the jury findings of Bank of America Corporation's liability support a judgment only against Bank of America Corporation. But there was no evidence at trial that Bank of America, Bank of America, N.A., and Bank of America Corporation were different entities, and Bank of America, N.A.'s representative testified that Bank of America, N.A. was the entity involved in the dispute. Nothing in the record suggests that the jury could possibly have been confused, and its answers must be taken to be applicable to Bank of America, N.A.

Accordingly, we grant Barth's petition for review, and without oral argument, TEX. R. APP. P. 59.1, reverse the court of appeals' judgment and remand the case to that court for consideration of other issues raised by Bank of America, N.A.

Opinion delivered: August 26, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0674

AUSTIN STATE HOSPITAL, DR. VIKAR NUZHATH,
AND DR. ERIK LINDFORS, PETITIONERS,

v.

JOEL GRAHAM, RESPONDENT

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

PER CURIAM

The issue presented is whether an employee of a governmental unit may take an interlocutory appeal from an order denying his motion to dismiss based on section 101.106(e) of the Texas Civil Practice and Remedies Code. We hold that he can and reverse the judgment of the court of appeals. 319 S.W.3d 905 (Tex. App.–Dallas 2010).

Joel Graham sued Austin State Hospital, a governmental unit, and two of its employees, Dr. Vikar Nuzhath and Dr. Erik Lindfors ("the Doctors"), on health care liability claims. The Hospital moved to dismiss the claims against the Doctors under section 101.106(e) of the Texas Tort Claims Act, which states: "If a suit is filed under [the Act] against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." TEX. CIV. PRAC. & REM. CODE § 101.106(e). The Doctors also moved to

dismiss under section 101.106(a) and (e). Graham then nonsuited the Hospital, asserting that its motion to dismiss was thereby mooted. The Hospital and the Doctors objected, arguing that the nonsuit could not be used to defeat its statutory right to the immediate dismissal of its employees, and, in support of their objections and motions, later filed an affidavit in which a Hospital assistant superintendent asserted that the Doctors were Hospital employees. The trial court denied the Doctors' motions and did not rule on the Hospital's.

The Hospital and Doctors appealed. The court of appeals concluded that the Hospital was no longer a party to the action, 319 S.W.3d at 907 n.2, and that it lacked jurisdiction over the Doctors' appeal under Section 51.014(a) of the Civil Practice and Remedies Code, *id*. at 907-908. Section 51.014(a) allows an appeal

> from an interlocutory order . . . that:
>
> * * *
>
> (5) 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; [or]
>
> * * *
>
> (8) grants or denies a plea to the jurisdiction by a government unit . . . .

The court held that a government employee's motion to dismiss based on section 101.106(e) is neither a motion for summary judgment, as required by section 51.014(a)(5), nor a plea to the jurisdiction, as required by section 51.014(a)(8).

The Hospital and Doctors petitioned for review. We have jurisdiction to determine the court of appeals' jurisdiction. *E.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Margulis*, 11 S.W.3d 186, 187 (Tex.

2000) (per curiam); *Long v. Humble Oil & Ref. Co.*, 380 S.W.2d 554, 555 (Tex.1964); *see also* TEX. GOV'T CODE § 22.225.

In holding that section 51.014(a)(5) allows an appeal only from the denial of a motion for summary judgment asserting immunity, not a motion to dismiss making the same assertion, the court of appeals relied on its prior decision in *Hudak v. Campbell*, 232 S.W.3d 930, 931 (Tex. App.–Dallas 2007, no pet.). The court reasoned that "[a] motion for summary judgment implicates very specific procedural safeguards, levels and burdens of proof, and standards of review [that] are strictly enforced" and do not apply to motions to dismiss. *Id.* (citations omitted). But we have held, under section 51.014(8), that "an interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle, such as a motion for summary judgment." *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004) (citing *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004) ("If the trial court denies the governmental entity's claim of no jurisdiction, whether it has been asserted by a plea to the jurisdiction, a motion for summary judgment, or otherwise, the Legislature has provided that an interlocutory appeal may be brought.")). "The reference to 'plea to the jurisdiction' is not to a particular vehicle but to the substance of the issue raised." *Simons*, 140 S.W.3d at 349. The court of appeals did not mention *Simons* in *Hudak* or in the present case.

We see no reason for limiting section 51.014(a)(5) appeals to one specific procedural vehicle when section 51.014(a)(8) appeals are not so limited. Every other court to address the issue has agreed. *Reedy v. Pompa*, 310 S.W.3d 112, 114 n.1 (Tex. App.–Corpus Christi-Edinburg 2010), *rev'd on other grounds*, 332 S.W.3d 402 (Tex. 2011) (per curiam); *City of Arlington v. Randall*, 301

S.W.3d 896, 902 n.2 (Tex. App.–Fort Worth 2009, pet. denied); *Leonard v. Glenn*, 293 S.W.3d 669, 681 n.11 (Tex. App.–San Antonio 2009), *rev'd on other grounds*, 332 S.W.3d 403 (Tex. 2011) (per curiam); *Lamphier v. Avis*, 244 S.W.3d 596, 598-599 (Tex. App.–Texarkana 2008, pet. dism'd as moot), *disapproved on other grounds, Franka v. Velasquez,* 332 S.W.3d 367, 382 n. 67 (Tex. 2011); *Kanlic v. Meyer*, 230 S.W.3d 889, 892 (Tex. App.–El Paso 2007, pet. denied) (also disapproved on other grounds in *Franka*); *Walkup v. Borchardt*, No. 07-06-0040-CV, 2006 WL 3455254, at *1 n.1 (Tex. App.–Amarillo Nov. 30, 2006, no pet.) (mem. op.) (disapproved on other grounds in *Franka*); *Phillips v. Dafonte*, 187 S.W.3d 669, 673-675 (Tex. App.–Houston [14th Dist.] 2006, no pet.) (disapproved on other grounds in *Franka*); *cf. Brown v. Xie*, 260 S.W.3d 118, 120-121 (Tex. App.–Houston [1st Dist.] 2008, no pet.) (appeal from denial of motion to dismiss) . In some instances, one procedural vehicle may be more appropriate or may be necessary for a proper presentation of the issue. For example, if Graham disputed that the Doctors were employed by the Hospital, a summary resolution, if possible, might require a motion for summary judgment. But Graham does not dispute that the Doctors were Hospital employees, that they were acting in course of their employment with the Hospital, or raise any other factual issue regarding the application of section 101.106(e). The point of section 51.014(a)(5), like section 51.014(8), is to allow an interlocutory appeal from rulings on certain issues, not merely rulings in certain forms. Therefore, we hold that an appeal may be taken from orders denying an assertion of immunity, as provided in section 51.014(a)(5), regardless of the procedural vehicle used. We need not consider whether the Doctors' appeal is permitted by section 51.014(a)(8).

Graham argues that his nonsuit of the Hospital precluded a ruling on its motion to dismiss. The Doctors, however, had their own motions for dismissal asking for affirmative relief. Section 101.106 (e) provides that "[i]f a suit is filed under [the Tort Claims Act] against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." The Doctors were therefore entitled to "immediate" dismissal once the Hospital filed its motion. A nonsuit cannot "prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." TEX. R. CIV. P. 162. Graham's remaining arguments, that his suit was not filed under the Tort Claims Act for purposes of section 101.106, fail under our decision in *Franka v. Velasquez*, 333 S.W.3d 367 (Tex. 2011).

Accordingly, we grant the petition for review, and without oral argument, TEX. R. APP. P. 59.1, reverse the judgment of the court of appeals and remand the case to that court for further proceedings.

Opinion delivered: August 26, 2011

IN THE SUPREME COURT OF TEXAS

444444444444
NO. 10-0688
444444444444

CMH HOMES, ET AL., PETITIONERS,

v.

ADAM PEREZ, RESPONDENT

4444444444444444444444444444444444444444444444444444
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS
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Argued February 3, 2011

JUSTICE WAINWRIGHT delivered the opinion of the Court.

Once more, this Court is presented with a question of the availability of judicial review of an interlocutory arbitration order. In this consumer dispute, CMH Homes, Inc. and Adam Perez agreed to submit their claims to arbitration but could not agree on an arbitrator. Because of this disagreement, the trial judge intervened and appointed an arbitrator to preside over their dispute. CMH Homes filed an interlocutory appeal challenging this appointment, requesting in the alternative that its appeal be treated as a mandamus petition. The court of appeals determined it was without jurisdiction and dismissed the appeal. We agree with the court of appeals' determination that Texas Civil Practice and Remedies Code section 51.016 does not allow an interlocutory appeal of an order appointing an arbitrator. However, under these circumstances, CMH Homes's appeal may properly

be considered as a petition for writ of mandamus. We remand for the court of appeals to consider this appeal as a petition for writ of mandamus.

I. Background

A. Facts and Procedure

On October 2, 2002, Adam Perez purchased a manufactured home from CMH Homes, with the help of salesman Bruce Robinson Moore, Jr. Vanderbilt Mortgage and Finance provided financing for the purchase. The retail installment contract between CMH Homes and Perez contained an arbitration clause which provides:

> All disputes, claims or controversies arising from or relating to this contract . . . shall be resolved by mandatory binding arbitration by one arbitrator selected by Seller with Buyer's consent.

On November 2, 2009, Perez sued CMH Homes, Inc., Vanderbilt Mortgage and Finance, Inc., and Bruce Robinson Moore, Jr. (hereinafter "CMH Homes") for fraud and violations of the Texas Debt Collection Act in the financing of his manufactured home. Perez filed a motion to compel arbitration on January 13, 2010. Although the parties agreed that the contract was governed by the Federal Arbitration Act and agreed to submit to arbitration, they could not agree to an arbitrator. After two months of disagreement, with both parties suggesting arbitrators in various correspondence, Perez's attorney declared an impasse.[1] On March 8, 2010, after a hearing, the trial

[1] After receiving Perez's motion to compel arbitration, CMH Homes presented three names for consideration as potential arbitrators. Perez rejected the suggested arbitrators and presented CMH Homes with a proposed agreed order that compelled the parties to arbitration and left a blank for the court to appoint an arbitrator. CMH Homes did not agree to the proposed order and offered to submit two more arbitrator names for Perez's consideration. Instead, Perez sent a copy of the proposed order to the court and suggested three possible arbitrators for the court to appoint. In response, CMH Homes sent a letter to the court explaining that under the arbitration provision, CMH Homes, not Perez, has the right to designate the arbitrator and suggested two more arbitrators. The letter also indicates that the parties were considering one of the two arbitrators, Donato Ramos, but Perez was concerned about conflicts of interests because his

court issued an order appointing Gilberto Hinojosa as arbitrator. Although the order was titled "Order on Plaintiff's Motion to Compel Arbitration," the only directive in the order was to name an arbitrator to preside over the dispute.

CMH Homes filed an interlocutory appeal pursuant to Texas Civil Practice and Remedies Code section 51.016, challenging the court's appointment of Gilberto Hinojosa as arbitrator. CMH Homes did not file a separate mandamus petition, but asked the court of appeals in the alternative to consider its appeal as a mandamus proceeding. *See CMH Homes, Inc. v. Perez*, 328 S.W.3d 592, 594 (Tex. App.—San Antonio 2010, pet. granted). The court of appeals determined that interlocutory appeal was unavailable under Civil Practice and Remedies Code section 51.016 and dismissed the appeal for want of jurisdiction. *Id.* at 593.

B. Jurisdiction and Standard of Review

This court has jurisdiction to determine whether the court of appeals correctly decided its jurisdiction. *See Badiga v. Lopez*, 274 S.W.3d 681, 682 n.1 (Tex. 2009) (citing *Tex. Dep't of Crim. Justice v. Simons*, 140 S.W.3d 338, 343 n.13 (Tex. 2004)). We review the court of appeals' determination of its jurisdiction de novo. *Villafani v. Trejo*, 251 S.W.3d 466, 467 (Tex. 2008).

Unless a statute authorizes an interlocutory appeal, appellate courts generally only have jurisdiction over final judgments. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *see also Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) ("Interlocutory orders

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attorneys had financial connections to Ramos. The court held a hearing on February 9, 2010 where the parties appeared to agree to the appointment of Ramos. However, when the parties could not agree to a waiver of conflicts for Ramos, the agreement fell apart. Perez notified the court that they could not reach an agreed waiver and again asked the court to appoint an arbitrator and re-submitted the three names previously suggested, including Gilberto Hinojosa.

may be appealed only if permitted by statute." (citations omitted)). We strictly apply statutes granting interlocutory appeals because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable. *See, e.g.*, *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007); *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001) (citation omitted).

II. Discussion

First, we must determine whether the court of appeals lacked jurisdiction under Texas Civil Practice and Remedies Code section 51.016 of an interlocutory appeal of an order appointing an arbitrator. If section 51.016 does not provide jurisdiction, we then decide whether the court of appeals should have considered CMH Homes's interlocutory appeal as a petition for writ of mandamus.

A. Texas Civil Practice and Remedies Code Section 51.016

Prior to the Legislature's 2009 amendment to the Texas Arbitration Act (TAA), parties seeking to appeal an order refusing to compel arbitration would commonly file two separate appellate proceedings. Under the TAA, a party could bring an interlocutory appeal of an order denying arbitration. *See* TEX. CIV. PRAC. & REM. CODE § 171.098. Under the Federal Arbitration Act (FAA), a party could only challenge an order denying arbitration by mandamus. *Jack B. Anglin*, 842 S.W.2d at 271–72. As a result, parallel proceedings were the norm in Texas arbitration disputes where parties were unsure which arbitration act applied. Although "unnecessarily expensive and cumbersome," such parallel proceedings were required. *Id.* at 272. Twice, this Court requested that the Legislature "consider amending the Texas Act to permit interlocutory appeals of orders issued

pursuant to the Federal Act." *Id.*; *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 n.4 (Tex. 2006) (quoting *Jack B. Anglin*, 842 S.W.2d at 272). In response, the Legislature added section 51.016 to the Civil Practice and Remedies Code in 2009. Act of May 27, 2009, 81st Leg., R.S., ch. 820, §§ 1, 3, 2009 Tex. Gen. Laws 2061 (codified at TEX. CIV. PRAC. & REM. CODE § 51.016). This is our first opportunity to construe the scope of the Legislature's remedial action.

Section 51.016 provides that a party may appeal a judgment or interlocutory order "under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16." TEX. CIV. PRAC. & REM. CODE § 51.016. Section 16 of the FAA provides:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
>
> (C) denying an application under section 206 of this title to compel arbitration,
>
> (D) confirming or denying confirmation of an award or partial award, or
>
> (E) modifying, correcting, or vacating an award;
>
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
>
> (3) a final decision with respect to an arbitration that is subject to this title.
>
> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16. Civil Practice and Remedies Code section 51.016 expressly incorporates federal law. Thus, an interlocutory appeal in this case is permitted only if it would be permitted under the same

circumstances in federal court under section 16. *See Little v. Tex. Dep't of Crim. Justice*, 148 S.W.3d 374, 381–82 (Tex. 2004) (examining federal law when interpreting state statute that incorporated federal statute).

In considering the scope of section 16's jurisdictional grant, we first determine the nature of the order being appealed. The order at issue is entitled "Order on Plaintiff's Motion to Compel Arbitration" and appoints Gilberto Hinojosa as arbitrator. Although Perez's motion to compel arbitration did not request that the trial court appoint an arbitrator, Perez submitted letters to the court administrator declaring an impasse and requesting the trial judge appoint an arbitrator.

At first glance, this order may appear to fit within section 16(b)(2) as an order "directing arbitration to proceed." 9 U.S.C. § 16(b)(2). The "Order on Plaintiff's Motion to Compel Arbitration" was issued in response to Perez's motion requesting that the trial court compel arbitration. But the substance of the order is the appointment of Gilberto Hinojosa as arbitrator. *See Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992) ("[I]t is the character and function of an order that determine its classification."). While it may be argued that by appointing an arbitrator the order implicitly compels the parties to arbitration, the order does not explicitly grant Perez's motion to compel and does not explicitly compel the parties to arbitrate their dispute. There is no question that both parties agreed to arbitrate their dispute; the open question remaining was who would serve as the arbitrator. The purpose of the order was to answer that question.

Section 5 of the FAA explicitly permits a trial court to appoint an arbitrator under certain circumstances. 9 U.S.C. § 5. Where the parties have previously agreed to a method for selecting an arbitrator, the parties must follow that method. *Id.* However, if the agreed upon method breaks

down and there is a lapse in appointing an arbitrator, the parties may petition the trial court to appoint an arbitrator. *Id.*

An order appointing an arbitrator under section 5 is neither listed in section 16(a) (where appeals may be taken) nor in section 16(b) (where appeals may not be taken). 9 U.S.C. § 16(a), (b). Even though section 16 is silent on the matter, CMH Homes argues that an appeal of an order appointing an arbitrator is "permitted by Section 16" because some federal circuit cases may have entertained interlocutory appeals regarding appointment of arbitrators pursuant to section 5.[2] However, none of the cited cases mentions whether the appeal is interlocutory and all but one of the cited cases fails to specifically discuss its jurisdictional basis or cite section 16.[3] *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003) (affirming the district court's selection of an arbitrator pursuant to section 5); *ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151 (2d Cir. 2003) (same); *see also The Stop & Shop Supermarket Co. LLC v. United Food & Commercial Workers Union Local 342*, No. 06-2639-cv, 2007 WL 1725476 (2d Cir. June 13, 2007) (same). The one exception, *Universal Reinsurance*, specifically establishes its jurisdiction "pursuant to 9 U.S.C. § 16(a)(3), which authorizes review of 'a final decision with respect to an arbitration . . . .'" *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125, 126 (7th Cir. 1994). Neither CMH Homes nor Perez has suggested that this appeal was anything other than interlocutory. Because the

[2] CMH Homes relies upon the following cases: *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003); *ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151 (2d Cir. 2003); *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1994); *ATSA of Cal., Inc. v. Cont'l Ins. Co.*, 754 F.2d 1394 (9th Cir. 1985).

[3] CMH Homes also cites the Ninth Circuit case *ATSA of California, Inc. v. Continental Insurance Co.*, 754 F.2d 1394 (9th Cir. 1985). But because this case was decided before section 16 was enacted, it does not interpret section 16.

trial court did not enter a dismissal or otherwise dispose of all parties and claims, the order remains interlocutory and cannot be appealed under section 16(a)(3).[4] *See In re Gulf Exploration, LLC*, 289 S.W.3d 836, 839 (Tex. 2009) ("[T]here can be an appeal if the underlying case is dismissed." (citing *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 86–87 (2000))). Although we presume a court always evaluates its jurisdiction before deciding a matter, these cases do not indicate whether their jurisdictional basis was section 16, and if so, whether the basis was section 16(a)(3) for final orders.[5] The only federal circuit case that speaks directly to the jurisdictional issue is *O.P.C. Farms Inc. v. Conopco Inc.*, which held that under section 16, the trial court's order appointing an arbitrator

[4] In state court, cases are typically stayed pending arbitration rather than dismissed, as frequently is the case in federal court. In *In re Gulf Exploration, LLC*, we explained:

> Arbitrability is often the only issue in federal court because nondiverse parties may prevent removal of the underlying case from state court; in such cases, even a stay order will be considered final if the federal action is effectively over. But in the state courts, disputes about arbitrability and the merits must usually proceed in a single court under rules of dominant jurisdiction.
>
> Accordingly, a stay is generally the only appropriate order for a state court with jurisdiction of all issues. Indeed, the Texas Arbitration Act states that "[a]n order compelling arbitration must include a stay" of the underlying litigation. During arbitration, a court order may be needed to replace an arbitrator, compel attendance of witnesses, or direct arbitrators to proceed promptly; after arbitration, a court order is needed to confirm, modify, or vacate the arbitration award. Consequently, dismissal would usually be inappropriate because the trial court cannot dispose of all claims and all parties until arbitration is completed.

289 S.W.3d 836, 840–41 (Tex. 2009) (citations omitted).

[5] The appellants in *National American* and *ACEquip* represented to the circuit courts that the order being appealed was final. *See* Appellant's Brief at 3, *ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151 (2d Cir. 2003) (No. 01-9166); Appellant's Brief at 1, *Nat'l Am. Life Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003) (02-1992). The appellees did not challenge this assertion in *ACEquip*, *see* Brief of Plaintiff-Appellee, *ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151 (2d Cir. 2003) (No. 01-9166), and appear not to have challenged the assertion in *National American*, *see* Reply Brief of Appellant, *Nat'l Am. Life Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003) (02-1992). In both cases, the parties treated the order appointing an arbitrator as final, and the courts of appeals appear to have taken the parties at their word.

was not a final decision and was thus unappealable.[6] 154 F.3d 1047, 1048–49 (9th Cir. 1998). The court explained: "[T]he only basis for an appeal . . . that could even be plausibly argued is § 16(a)(3). It is, however, clear that the appointment of the third arbitrator is not the final decision in this case. . . . Consequently § 16 effectively deprives us of jurisdiction." *Id.*

The appellate jurisdiction of Texas courts in this case is based on federal law. The court of appeals had jurisdiction to consider the trial court's order if "appeal . . . would be permitted by 9 U.S.C. Section 16" in federal court. TEX. CIV. PRAC. & REM. CODE § 51.016. Because there is no apparent federal approach to judicial review under section 16 of orders appointing arbitrators, we will not extrapolate jurisdiction from a dearth of federal authority to allow an interlocutory appeal where the law is unclear and section 16 suggests otherwise.

Before the enactment of section 51.016, we specifically invited the Legislature "'[i]n the interests of promoting the policy considerations of rigorous and expedited enforcement of arbitration agreements, . . . to consider amending the Texas Act to permit interlocutory appeals of orders issued pursuant to the Federal Act.'" *See In re D. Wilson*, 196 S.W.3d at 780 n.4 (quoting *Jack B. Anglin*, 842 S.W.2d at 272). While we agree the Legislature added section 51.016 to prevent unnecessary parallel proceedings, this inconsistency generally arose when parties were unsure whether the TAA or the FAA applied to their agreement. *See Jack B. Anglin*, 842 S.W.2d at 272 ("[L]itigants who allege entitlement to arbitration under the Federal Act, and in the alternative, under the Texas Act,

[6] In its analysis, the court in *O.P.C. Farms* concluded that an order appointing an arbitrator is "embedded" in the case. *O.P.C. Farms Inc. v. Conopco Inc.*, 154 F.3d 1047, 1049 (9th Cir. 1998) (citation omitted). However, the United States Supreme Court eliminated the distinction between embedded and independent proceedings in *Green Tree*, which may raise questions about the precedential value of this case. *See Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 87–89 (2000).

are burdened with the need to pursue parallel proceedings—an interlocutory appeal of the trial court's denial under the Texas Act, and a writ of mandamus from the denial under the Federal Act."). The Legislature in enacting section 51.016 has remedied this particular situation and enacted a policy change that promotes efficiency and common sense. *See Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 862 (Tex. App.—Dallas 2010, no pet.); *Ranchers & Farmers Mut. Ins. Co. v. Stahlecker*, No. 09-10-00286-CV, 2010 WL 4354020, at *1 (Tex. App.—Beaumont Nov. 4, 2010, no pet.) (mem. op.); *In re Rio Grande Xarin II, Ltd.*, Nos. 13-10-00115-CV, 13-10-00116-CV, 2010 WL 2697145, at *3–4 (Tex. App.—Corpus Christi-Edinburg July 6, 2010, pet. dism'd) (mem. op.); *950 Corbindale, L.P. v. Knotts Capital Holdings Ltd. P'ship*, 316 S.W.3d 191, 195 n.1 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Here, however, the issue is not which Act applies, but whether this particular type of order is appealable. Just as all interlocutory arbitration orders are not subject to appeal under the TAA, the Legislature in enacting section 51.016 did not intend to make all interlocutory orders under the FAA appealable, only those permitted by section 16 of the FAA.[7] Our interpretation does not promote parallel proceedings of arbitration orders under the TAA and FAA and does not frustrate the Legislature's intent in enacting section 51.016.

[7] The language of section 51.016, and therefore FAA section 16, also indicates the Legislature did not intend to create a comprehensive appellate scheme making all FAA orders appealable through interlocutory appeal, but instead focused on denials of arbitration. *See* TEX. CIV. PRAC. & REM. CODE § 51.016; 9 U.S.C. § 16; *In re Gulf Exploration*, 289 S.W.3d at 839 ("[T]he FAA 'generally permits immediate appeal of orders hostile to arbitration . . . but bars appeal of interlocutory orders favorable to arbitration.'" (quoting *Green Tree*, 531 U.S. at 86)); *see also May v. Higbee Co.*, 372 F.3d 757, 762 (5th Cir. 2004) (noting the "general, congressionally mandated rule that anti-arbitration decisions are immediately appealable under § 16(a)(1)").

The court of appeals below correctly determined it was without jurisdiction to hear an interlocutory appeal pursuant to section 51.016. The only remaining appellate option for the parties at this juncture is mandamus relief.

B. Mandamus

Because Civil Practice and Remedies Code section 51.016 does not allow an interlocutory appeal of this type of order, CMH Homes requests in the alternative that we instruct the court of appeals to treat CMH Homes's appeal as a petition for writ of mandamus to prevent form from overriding substance.

Before the adoption of section 51.016, this Court held in *In re Louisiana Pacific Corp.* that a trial court's order appointing an arbitrator could be reviewed by mandamus. 972 S.W.2d 63, 64 (Tex. 1998) (per curiam). The arbitration agreement in *Louisiana Pacific* allowed each party to select an arbitrator. *Id.* at 63. After Louisiana Pacific withdrew its arbitrator due to the objection of the other party, the trial court improperly appointed an arbitrator pursuant to section 5 of the FAA. *Id.* at 64. We conditionally issued the writ "[b]ecause the terms of the contract and the FAA allow[ed] Louisiana Pacific to choose an arbitrator" before the trial court intervened to name a replacement. *Id.* We explained the importance of contractual arbitrator selection: "Since its inception, one of the central purposes of the FAA has been to allow the parties to select their own arbitration panel if they choose to do so. 'Toward this end, it is desirable that the arbitration panel consist of arbitrators chosen by each of the parties.'" *Id.* at 65 (quoting *Lobo & Co. v. Plymouth Navigation Co.*, 187 F. Supp. 859, 860 (S.D.N.Y. 1960)).

Although this court decided *Louisiana Pacific* when FAA interlocutory orders could only be reviewed by mandamus, the Legislature's addition of section 51.016 is of no effect here. As explained above, section 51.016 does not provide for interlocutory appeal of an order appointing an arbitrator. There is still no remedy by appeal because the FAA does not provide for the review of this type of order in state court. *See id.* at 65 ("Louisiana Pacific has no adequate remedy by appeal because the FAA does not provide for review of the trial court's actions in state court."). Moreover, "[m]andamus is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal, as when a party is erroneously denied its contracted-for arbitration rights under the FAA." *In re D. Wilson*, 196 S.W.3d at 780 (internal citation omitted); *see also Jack B. Anglin*, 842 S.W.2d at 272–73 (awarding mandamus relief where a party "would be deprived of the benefits of the arbitration clause it contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated").

Perez argues mandamus review is inappropriate because CMH Homes failed to file a separate mandamus petition and, citing *Jack B. Anglin*, contends that the court "may not enlarge [its] appellate jurisdiction absent legislative mandate." 842 S.W.2d at 272. However, CMH Homes invoked the court of appeals' original jurisdiction by specifically requesting that its appeal be treated as a mandamus petition. *See Warwick Towers Council of Co-owners v. Park Warwick, L.P.*, 244 S.W.3d 838, 839 (Tex. 2008) ("[T]he factor which determines whether jurisdiction has been conferred on the appellate court is not the form or substance of the bond, certificate or affidavit, but whether the instrument was filed in a bona fide attempt to invoke appellate court jurisdiction." (internal quotations and citations omitted)); *see also Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103

(Tex. 1994) ("The court of appeals . . . has jurisdiction over the appeal if a party files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction."); *Grand Prairie Indep. Sch. Dist. v. S. Parts Imps.*, 813 S.W.2d 499, 500 (Tex. 1991) ("If the appellant timely files a document in a bona fide attempt to invoke the appellate court's jurisdiction, the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument required by law or our Rules to perfect the appeal.").

Texas policy as "'embodied in our appellate rules . . . disfavors disposing of appeals based upon harmless procedural defects.'" *Higgins v. Randall Cnty. Sheriff's Office*, 257 S.W.3d 684, 688 (Tex. 2008) (quoting *Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997)); *see also* TEX. R. APP. P. 44.3 ("A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities."). This Court has previously treated a petition for review as a petition for writ of mandamus where the appellant/relator specifically sought mandamus relief. *Powell v. Stover*, 165 S.W.3d 322, 324 n.1 (Tex. 2005). And it is our practice when confronted with parallel mandamus and appeal proceedings "to consolidate the two proceedings and render a decision disposing of both simultaneously." *In re Valero Energy Corp.*, 968 S.W.2d 916, 917 (Tex. 1998).

Moreover, nothing in the procedures for interlocutory appeals and mandamus actions prevents us from treating this appeal as a petition for writ of mandamus. Appeals from interlocutory orders are accelerated, and an accelerated appeal is perfected by filing a notice of appeal within twenty days of the order. *See* TEX. R. APP. P. 26.1(b). Because mandamus is "controlled largely by equitable principles," there is no fixed deadline for filing original proceedings in the Texas Rules

of Appellate Procedure. *In re Int'l Profits Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (citations omitted). An appeal complying with the rules governing an accelerated appeal would generally be timely for mandamus purposes. Additionally, briefs in mandamus actions and interlocutory appeals have the same content and page length requirements. *Compare* TEX. R. APP. P. 38.1, .4 (stating contents of brief and page length requirement for appeal to the courts of appeals), *with* TEX. R. APP. P. 52.3, .6 (stating contents of brief and page length requirement for original proceedings at the supreme court and courts of appeals). "[T]he interests of promoting the policy considerations of rigorous and expedited enforcement of arbitration agreements" would not be served by letting a technicality rule the day.[8] *Jack B. Anglin*, 842 S.W.2d at 272.

We will not unnecessarily waste the parties' time and further judicial resources by requiring CMH Homes to file a separate document with the title "petition for writ of mandamus" listed on the cover where the party has expressly requested mandamus treatment of its appeal in an uncertain legal environment. *See Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 351 (Tex. 2001) (rejecting an "approach [that] catapults form over substance to deny appellate review on the merits"). Because CMH Homes specifically requested mandamus relief in the court of appeals and preserved that issue in this Court, and because judicial efficiency militates against requiring CMH Homes to file a separate original proceeding, we instruct the court of appeals to consider this appeal as a petition for writ of mandamus. Today, we speak only to the propriety of mandamus *review* and not to the

[8] Although we note that CMH Homes's petition was not certified at this Court as required by Texas Rule of Appellate Procedure 52.3(j), we are confident that CMH Homes will fully comply with Rule 52 on remand to the court of appeals.

propriety of mandamus *relief* in this particular case. Because the merits were not briefed to this Court, we do not decide whether the trial judge improperly appointed an arbitrator.

III. Conclusion

We hold that Texas Civil Practice and Remedies Code section 51.016 does not permit interlocutory appeal from an order appointing an arbitrator. However, this appeal may properly be considered as a petition for writ of mandamus, as CMH Homes requested. The court of appeals erred in dismissing CMH Homes's appeal for lack of jurisdiction. Accordingly, we reverse and remand to the court of appeals for further proceedings consistent with this opinion.

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Dale Wainwright
Justice

OPINION DELIVERED: May 27, 2011

IN THE SUPREME COURT OF TEXAS

NO. 10-0748

KACHIKWU ILLOH, M.D., PETITIONER,

v.

DAMITA CARROLL AND KAREN BUTLER, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF JAMES CARROLL, RESPONDENTS

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

PER CURIAM

James Carroll suffered a stroke and received treatment from Dr. Kachikwu Illoh, an employee of The University of Texas Health Science Center – Houston (UTHSCH). After James Carroll died, allegedly because of septicemia caused by bed sores developed while under Illoh's care, Damita Carroll and Karen Butler sued Illoh and another doctor. Illoh moved to dismiss the suit under section 101.106(f) of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE §101.106(f), claiming that the suit was based on conduct within the general scope of his employment and could have been brought against UTHSCH.

The trial court denied Illoh's motion, and Illoh brought an interlocutory appeal under section 51.014(a)(5) and (8) of the Civil Practice and Remedies Code. The court of appeals held that Illoh did not show that Carroll and Butler's claims could have been brought against UTHSCH, a

requirement of section 101.106(f), and therefore affirmed the trial court's denial of Illoh's motion to dismiss. 321 S.W.3d 711, 717 (Tex. App.—Houston [14th Dist.] 2010).

While this case has been pending on appeal, we decided *Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011), which held, among other things, that a tort action "could have been brought under" the Tort Claims Act even if that tort action does not fall within the Act's limited waiver of immunity. *Id.* at 375. In light of *Franka*, we grant Illoh's petition for review, and without hearing oral argument, reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings. TEX. R. APP. P. 59.1.

Opinion Delivered: June 24, 2011